

8. Vagrancy Laws and Touts

In 2006 the Malawi Government decided to prohibit the practice of being a minibus tout. This chapter notes that touts continue to be arrested by police. The authors argue that funnelling touts through the criminal justice system is not a sustainable solution to the problems associated with touting including theft or pick-pocketing. Additional research is required to determine the rationale behind and impact of this prohibition.

Introduction

Minibuses are a familiar sight in many African cities, where they are cheaper and more accessible than traditional public transport systems. Much can be written about the minibus industry, the need for tighter regulation and the challenges faced by employees and users of minibus services.

Minibus-calling is an informal income-generating activity in urban areas in Malawi. “Touts” (or minibus “callboys”) earn money by attracting passengers to board minibuses. Touts typically work for an informal employer or individual who retains a portion of the money they earn.

Despite the prevalence of this activity, however, little information exists about the extent to which touts currently operate in Malawi, though there is some general evidence regarding the ways in which touts have historically functioned. Touts, for example, are traditionally paid by a minibus conductor the amount equivalent to the minibus fare of one passenger per trip.³⁸⁵ The minibus industry has traditionally been highly competitive, with minibus owners benefitting from the use of touts to secure passengers. There have been reports that minibus touts initially organised themselves into informal associations charged with disciplining members who stole from passengers or engaged in illegal activity.³⁸⁶

In January 2006, the Malawian government declared minibus-calling illegal, asserting that it violated various municipal by-laws.³⁸⁷ The offence of touting has its origins in English law,

385 R Tambulasi & H Kayuni “Can the State Perpetuate the Marginalisation of the Poor? The Socio-Economic Effects of the State’s Ban on Minibus ‘Callboys’ in Malawi” (2008) 25(2) *Development Southern Africa* 220. See also S Chirombo, “Passengers should stand firm for minibus fares – PAWA, Malawi News Agency, 16 November 2012 <http://www.manoonline.gov.mw/index.php/business/item/1213-passengers-should-stand-firm-to-fight-for-minibus-fares-pawa> (last accessed: 2 June 2013).

386 Tambulasi & Kayuni *supra* note 385, 221.

387 *Id* 215.

where it dealt with soliciting of customers for unlicensed taxis – in contrast, the offence in Malawi is aimed at the act of soliciting or pestering potential clients, without an inquiry into the validity of the licence of the minibus itself.³⁸⁸ In Malawi, the offence of touting is now contained in section 8B of the Road Traffic Act, Road Traffic (Construction, Equipment and Use) Regulations.³⁸⁹ Section 8B provides that “no owner, member of the crew or any passenger acting on behalf of the owner, member of the crew or on his own behalf on a public service vehicle shall make any noise or sound any instrument in order to attract the attention of the public or of a possible manager, or by troublesome or frequent demands, or by persistent following, hold out the vehicle for hire to the public, or attempt to induce any person to become a passenger therein.” The Act similarly prohibits the “harass[ment of] a passenger or a member of the crew of a public service vehicle.”³⁹⁰ The terminology used in sections 8B and 8C seem to target the persistent, noisy or harassing behaviour involved in touting. The use of the word “induce” in section 8B similarly suggests behaviour which seeks to tempt or persuade a person to get into one minibus as opposed to another. The manner in which the sections are framed clearly indicates that it was targeted against competitive behaviour which sought to engage customers in a direct and persistent manner. However, there might be forms of touting that are less confrontational and encourage customers to use a minibus, which might not be categorised as persistent, annoying, noisy or harassing. Because the heading of section 8B states that “touting is prohibited” it appears that such behaviour would also fall foul of section 8B.

Procedurally, police appear to also act on the touting ban by charging suspected touts under sections 180 and 184 of the Malawi Penal Code, which respectively address the offence of being an idle and disorderly person and the offence of being a rogue and vagabond.³⁹¹

The prohibition of touting in Malawi was welcomed by some members of the community associating touts with disorder and theft, and by minibus owners feeling that their profits were drained by touts.³⁹² Passengers have also complained that the presence of touts tends to escalate the cost of minibus fares.³⁹³

Research conducted on the subject of touting in Zomba and Blantyre in 2007 revealed that touts were often marginalised young men struggling to obtain employment due to low levels of education.³⁹⁴ Touts interviewed by Tambulasi and Kayuni indicated that they had previously received income as thieves, beggars, small-scale vendors, subsistence village farmers or houseboys, but had not been able to earn a sustainable living from these activities.³⁹⁵ Touts described their work as providing a stable income, assisting them in their attempts to feed and support the education of their dependants.³⁹⁶ The touting ban reportedly had a negative impact on their economic viability of the young men who practiced

388 Promoting Pre-trial Justice in Africa “Glossary of Criminal Offence Terms” <http://ppja.org/ppja-publications/glossary-unusual-criminal-offence-terms> (last accessed: 2 June 2013).

389 Section 8B of the Malawi Road Traffic Act, Road Traffic (Construction, Equipment and Use) Regulations G.N. 18/2000, 40/2004.

390 *Id* section 8C.

391 Section 180 and 184 of the Malawi Penal Code.

392 Tambulasi & Kayuni *supra* note 385, 222.

393 Chirombo *supra* note 385.

394 Tambulasi & Kayuni *supra* note 385, 218.

395 *Id* 219.

396 *Id* 221.

touting, exacerbating their social vulnerability.³⁹⁷ After the ban, some touts reported that they continue the trade illegally, accepting that they would be arrested or required to bribe police officers. Some former touts reported that they now resorted to other illegal activities like theft, begging, loitering or charcoal-making.³⁹⁸

Police Arrest Practices Relating to Touts in Blantyre

Notes on Methodology

Paralegals for the Centre for Education, Advice and Assistance (CHREAA) in Blantyre conducted quantitative research at several police stations in order to determine the extent to which police arrest individuals for nuisance-related offences. In particular, CHREAA researchers sought to understand the frequency and effect of police efforts to utilise sections 180 and 184 of the Penal Code. The research was conducted from 1 May to 5 September 2012 using datasheets to collect information from police registers and conversations with suspects in police cells. During the collection of information on section 180 and 184 arrests, the researchers also documented a number of arrests for “touting” in terms of section 8B of the Road Traffic (Construction, Equipment and Use) Regulations. Such arrests were not the main focus of the study and the results described below are accordingly of a preliminary nature.

Research Findings

Researchers identified a total of 24 cases of touting arrests in Blantyre police station records during the research period. Researchers further identified a total of seven recorded cases of arrests for touting in Limbe police station records from May to June 2012. For one of the June arrests in Limbe, the suspect had been arrested for touting but was charged under section 184. This suggests an inconsistency in the operationalisation of the touting ban, with the police using section 184 as a default when uncertain about an offence.

All of those arrested in Limbe for touting were male, and all but one of those touting suspects arrested in Blantyre were male. This suggests that touting as a predominantly male occupation.

As indicated in the chart below, the ages of individuals arrested in Blantyre and Limbe for touting ranged from seventeen to 35 years.

It is concerning that those arrested for touting sometimes spent at least one night in custody before their release. Of the eleven individuals still in custody when researchers visited the police station, indeed, five had spent at least one night in custody:

- At Limbe police station, a person arrested on 13 June 2012 for touting was still in custody on 14 June 2012;
- At Blantyre police station –
 - Two persons who were arrested in the afternoon on 15 May 2012 for calling passengers, were still in custody the next day;
 - One person arrested at 8am on 16 May 2012 for touting was still in custody on 17 May 2012; and
 - One person arrested at 11am on 4 July 2012 for touting was still in custody on 5 July 2012.

397 *Id* 223.

398 *Id* 223-5.

Chart 7: Ages of Persons Arrested for Touting:



The police’s use of detention in the context of rather typical, low-level, non-violent offences, suggests that the use of arrest as a last resort is not respected.

Researchers also observed detainees’ socio-economic circumstances, which further suggested the vulnerable situation of touts, whose profession has now been rendered illegal in Malawi. Of ten suspects in custody at Blantyre police station when visited during the research, eight were married, and seven had children; detention obviously had a negative impact on dependants of touts in custody. Furthermore, six suspects admitted to having been previously arrested on a similar charge, indicating that criminalisation of touting may not have a deterrent impact, but rather consume valuable police time and resources. Finally, eight detainees noted that they did not have access to a lawyer, though most of those detained had had a statement recorded by police, and were able to identify someone able to act as a surety for them. As such, the law appears to disproportionately impact low-income individuals without access to legal resources or the ability to post bail, indicating that the law in its application may threaten the availability of due process without regard to wealth or status.

Conclusion

Six years after the banning of minibus touting, it is clear that the activity persists despite its recently proclaimed illegality. Funnelling touts through the criminal justice system is not a sustainable solution to the problems associated with touting. Whilst it might seem a tempting solution, it is not an efficient or effective response to the problems of theft or pick-pocketing. By contrast, existing laws merely target an already-marginalised group of persons for arrest, deprive them of their only source of income and fail to address the concerns motivating the legislation in the first place.

Critics of the touting ban further note the government's failure to facilitate access to viable income-generating alternatives for those who were engaged in this work.³⁹⁹ Observers recommend that the government should instead have tried to find way to better regulate the activity of touting, which would likely have been a more effective way of dealing with the problems associated with the industry.⁴⁰⁰

Promoting Pre-trial Justice in Africa (PPJA) has noted that, given the harsh conditions in detention, touting might be better dealt with through other interventions than criminalisation and imprisonment.⁴⁰¹

This research report focuses primarily on the police and courts' use of sections 180 and 184 of the Penal Code. Arrests based on formal charges of touting under the Road Traffic Regulations were noted by paralegals, but the rationale for these arrests was not interrogated in interviews with police or magistrates.

Additional research is required to assess the extent to which the Road Traffic Regulations pertaining to touting are implemented and the effect this has had on the practice of touting and those involved in this sector.

399 *Id* 225.

400 Interview with Kayira *supra* note 193; see also Tambulasi & Kayuni *supra* note 385, 225.

401 Promoting Pre-trial Justice in Africa *supra* note 388.

