9. Arrest and Detention

From the research findings outlined in Chapters 5 to 8, it is clear that the manner in which persons are arrested for minor nuisance-related offences in practice is often not in line with the legal requirements for a lawful arrest. In this chapter we outline some of the legal requirements which should be present for an arrest to be lawful and discuss the specific concerns relating to persons who are arrested for nuisance-related offences but never charged.

Introduction

The preceding chapters have identified a number of areas of concern relating to the arrest of persons for nuisance-related offences:

- Persons continue to be arrested for conduct which does not comply with the offence with which they are charged. For example, the arrest of touts under section 184 or the arrest of intoxicated persons under section 180 instead of section 183.
- The fact that persons arrested for nuisance-related offences are often released immediately after their arrest, suggests that there was often no probable cause for the arrest and no intention to pursue the case judicially at the time when the arrest was made. This appears to be an abuse of arrest procedures.
- Arrest and detention is often not proportionate to the conduct of the person arrested. For example, arresting someone for public urination.
- Persons continue to be detained for longer than a day for what is a very minor offence.
- Arrests at night tend to disproportionately target the poor.
- Sweeping exercises risk arrests without proper procedures or probable cause for arrest.
- Alternatives to arrest such as cautioning, public awareness, communication and counselling would often be a more appropriate response to minor nuisance-related offences.
- In the case of children who have been arrested and detained a range of provisions in the Child Care, Protection and Justice Act are sometimes ignored. For example, providing children with nutritious food and counselling; separating them from adults and not using handcuffs; treating them with dignity and taking account their age.
- Section 184 is often used to arrest sex workers when their conduct did not fall within the terms of section 184. This practice continues despite the High Court in Malawi having cautioned against this.

- Sex workers report that during arrest police would rape or assault them, steal from them and solicit bribes.
- Conditions in detention often do not comply with international standards, including being unhygienic, lack of food, risk of transmission of diseases due to overcrowding and lack of hygiene, and cold.

These concerns highlight the myriad of problems that arise when police use their powers of arrest in practice.

Summary of the Laws Relating to Arrest and Detention

The law relating to arrests and detention can be found in the Malawi Constitution, 1995, the Criminal Procedure and Evidence Code as amended in 2010, the Penal Code, as amended in 2010 and the Police Act, 12 of 2010.

Constitution
The Malawi Constitution entrenches a range of rights relating to arrests:

- The right to respect for human dignity;[402]
- The right not to be subjected to cruel, inhuman or degrading treatment or punishment;[403]
- The right to freedom and security of person, which shall include the right not to be detained without trial;[404]
- The right to be recognised as a person before the law;[405] and
- The various rights pertaining to arrested and detained persons.[406]

Rights of Arrested Persons in terms of the Malawi Constitution

Section 42(1) provides that every person who is detained shall have the right:

a.) "to be informed of the reason for his or her detention promptly, and in a language which he or she understands;

b.) to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;

c.) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;

d.) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religion counsellor and a medical practitioner of his or her choice;

---

402 Section 19(1) of the Malawi Constitution.

403 Section 19(3) of the Malawi Constitution.

404 Section 19(6) of the Malawi Constitution.

405 Section 41(1) of the Malawi Constitution.

406 Section 42 of the Malawi Constitution.

e.) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and

f.) to be released if such detention is unlawful."

Section 42(2) provides that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right:

a.) "promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
b.) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
c.) not to be compelled to make a confession or admission which could be used in evidence against him or her;
d.) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;
e.) to be released from detention, with or without bail unless the interests of justice require otherwise;
f.) as an accused person, to a fair trial, which shall include the right –
    i. to public trial before an independent and impartial court of law within a reasonable time after having been charged;
    ii. to be informed with sufficient particularity of the charge;
    iii. to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
    iv. to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
    v. to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
    vi. not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
    vii. not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;
    viii. to have recourse by way of appeal or review to a higher court than the court of first instance;
    ix. to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and
    x. to be sentenced within a reasonable time after conviction.

Criminal Procedure and Evidence Code

The Criminal Procedure and Evidence Code has been amended by Act 14 of 2010 to provide for increased protection of persons who have been arrested.

Section 20 of the Criminal Procedure and Evidence Code prohibits the use of greater force than was reasonable to apprehend a suspect.

Section 20A provides that an arrest is unlawful where the person arrested was not informed of the reason for the arrest at the time of, or as soon as practicable after, the arrest.[407] In addition, section 20A(6) provides that, once a person is arrested, "the police officer shall promptly inform him that he has the right to remain silent, and shall warn him of the consequences of making any statement".

Section 26, which was amended by Act 14 of 2010, requires that, where necessary to search a woman, a search must be made by another woman and with strict regard to decency and the powers to search do not authorise police to require a person to remove clothes in public.

Section 28 provides for those circumstances under which a police officer may arrest a person without a warrant, including any person whom he suspects upon reasonable grounds of having committed an arrestable offence, a person who commits breach of peace in his presence, and any person whom he finds lying or loitering in any highway, yard or place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony; and any person who is about to commit an arrestable offence or whom he has reasonable grounds of suspecting to be about to commit an arrestable offence. It is important that police are appropriately trained to assess what would amount to "reasonable grounds" in this section. It is unfortunate that police arrest persons even if they have not committed a felony or arrestable offence as required by the section.

In terms of section 29(a), a police officer may arrest "any person within the limits of such station who cannot give a satisfactory account of himself." It is encouraging that this section was amended by Act 14 of 2010 which removed reference to "no ostensible means of subsistence". This suggests that the legislature is increasingly aware of the problems relating to such a provision, and it is hoped that this will eventually lead to the repeal of section 184(b) of the Penal Code.

Section 31 has been amended to deal with non-arrestable offences. The section now allows a police officer to arrest someone for a non-arrestable offence if the person refuses to give his or her name or residence or if the officer has reason to believe that the person would not be found.

Section 32 was amended by Act 14 of 2010 and provides that a police officer making an arrest without a warrant shall, without reasonable delay and in any event within 48 hours, take or send the person arrested before a magistrate or traditional or local court having jurisdiction in the case. Section 32A has been inserted to provide that the police may caution and release an arrested person. Section 32A(4) provides that a police officer must, when exercising his or her discretion to caution and release an arrested person, bear in mind the following: the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity. Section 32A(5) provides that the Chief Justice may issue guidelines to police on the exercise of the power to caution and release.

407 This section was inserted by Act 14 of 2010.

Section 35 provides that where a person has been arrested without a warrant, he must either be brought to a court within 48 hours, or released on police bail, or released by the police officer in charge of the station when after due police inquiry, insufficient evidence is disclosed on which to proceed with the charge.

Bail (Guidelines) Act

The Bail (Guidelines) Act, 8 of 2000 deals with the circumstances in which bail is granted. It provides that a senior police officer must release someone unconditionally where it appears that there is insufficient evidence.

Child Care, Protection and Justice Act

Part III of the Child Care, Protection and Justice Act, 22 of 2010 deals with the arrest and detention of children suspected of having committed offences. These provisions are dealt with in more detail in Chapter 6.

Are Persons Arrested for Nuisance-Related Offences Falling Through the Cracks?

International law permits detention before a trial for limited circumstances only. A key principle is that pre-trial detention may be ordered only if there are reasonable grounds to believe that a person was involved in the commission of the offence and that there is a danger of the person absconding or committing further serious offences and that the course of justice will be jeopardised if the person is released.[408] Based on the UN Standard Minimum Rules for Non-Custodial Measures, pre-trial detention should be used as last resort only, for the shortest time period necessary and should be administered with respect for the inherent dignity of the person detained.

The fairness and equity of the criminal justice system has often been brought into question because pre-trial detainees are more likely to be poor and unable to afford a legal representative or bail.[409] Many pre-trial detainees will eventually be released or convicted of a minor sentence which does not carry a prison sentence, a clear indication that their detention was without cause. The negative impact of pre-trial detention on public resources, detainees, and their families has also been well documented.[410] There is increasing recognition at a regional and international level that the decriminalisation of minor offences such as loitering or vagrancy would assist in reducing the number of pre-trial detainees.[411] In some instances, the costs incurred in employing reactive penalisation measures outweigh the costs that would be incurred in developing measures to prevent nuisance-related behaviour.[412]

Malawi has made significant progress in dealing with the problems relating to pre-trial detention - e.g. the Criminal Procedure and Evidence Code has been amended by Act 14 of

---

408 Principle established at the 8th UN Congress on Prevention of Crime and Treatment of Offenders, Havana, 1990 and included in the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), adopted by the General Assembly 14 December 1990.

409 M Shaw "Reducing the Excessive Use of Pre-Trial Detention" *Justice Initiatives*, Open Society Justice Initiative, (2008), 1-10, 2. *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 19-20.

410 M Schönteich "The scale and consequences of pre-trial detention around the world" Justice Initiatives, *Open Society Justice Initiative* (2008), 11-43.

411 Open Society Foundations *Pre-trial Detention and Torture: Why Pre-Trial Detainees Face the Greatest Risk*, A Global Campaign for Pre-trial Justice Report (2011), 13.

412 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 8.

2010 to include a range of pre-trial custody time limits, which will greatly assist in caseflow management and a reduction in prison overcrowding.[413]

Significantly, arrested persons who have not yet appeared in front of a judicial officer for determination on whether to be released or detained awaiting trial are generally not included in the definition of pre-trial detainees.[414] Thus, all those persons who have been arrested for nuisance-related offences, detained at a police station and subsequently released, often fall outside the ambit of discussion on the challenges relating to pre-trial detention. The period between arrest and when a person is brought before the court for the first time should be less than two days, but is sometimes much longer. There is little information about the number of days spent in detention by this group of persons before they were released or charged. Similarly, for this report researchers found the data on when persons arrested for nuisance-related offences were released to be incomplete. It is hoped that section 32A of the Criminal Procedure and Evidence Code which allows for the caution and release of arrested persons will reduce the time spent in custody for minor nuisance-related offences.

However, even if detention was only for a short period, the harm done to the individual and his or her family is unacceptable. An Open Society Initiative for Southern Africa (OSISA) survey of five police stations in 2010 noted that police stations provided little or no food to persons in custody, and conditions are often unhygienic and hazardous.[415] The burden that such arrests place on families who have to spend scarce resources to visit the police station, bring food and pay bail is not acknowledged.[416] Such families and detainees often have no information on when the person will be brought before court or released. In essence, persons arrested for nuisance-related offences are treated as if they are guilty and their detention serves as punishment, even though they have not been formally charged or brought before a court. The conditions in custody also sometimes lead to a person pleading guilty so that they can be released even if they did not commit an offence.

In such circumstances, the use of paralegals who visit persons who are in police custody are invaluable.[417] Such paralegals are often the only ones who can insist on the person's release if they have been detained for more than 48 hours or who can facilitate contact between them and their families.[418] The presence of paralegals at a police station could also act as a deterrent for the abuse perpetrated against persons in custody by police.[419] Due to the high rate of pre-trial detention in Malawi, the needs of persons arrested for minor offences who are likely to be released the same or following day are not prioritised. It is accordingly important to also focus on changing the police practice of arresting persons for minor nuisance-related offences and considering alternatives to arrest. This is discussed in more detail in the following chapter.

---

413 Sections 161A-J of the Criminal Procedure and Evidence Code.

414 Schönteich *supra* note 410, 12.

415 L Muntingh "Survey of conditions in detention in police cells" in Open Society Initiative of Southern Africa (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, 52-65.

416 African Policing Civilian Oversight Forum *supra* note 308, *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1.

417 Plan of Action of Ouagadougou Declaration on Acceleration of Prison and Penal Reforms in Africa (2002).

418 C Msiska (2008) "On the Front Lines: Insights from Malawi's Paralegal Advisory Service" *Justice Initiatives*, Open Society Justice Initiative (2008) 70-85.

419 *Id* 80.

The use of Court User Committees (CUC) in districts in Malawi to discuss challenges experienced by different stakeholders with the criminal justice system, provides an important opportunity for paralegals and organisations to raise concerns about unnecessary police arrests for minor nuisance-related offences. [420]

Conclusion

It is of concern that persons who are arrested unlawfully are not aware of their rights and continue to "suffer in silence".[421] One of the roles of the Community Policing Section of the Malawi Police Service is to inform community members about their rights. The police however have limited resources to do so on a sustained basis. In addition to the need for donor support to conduct civic education, it would make sense for civil society organisations and the police to join forces when conducting civic education on the rights of arrested persons.[422]

It has been argued that most police officers are aware of the procedures for arrest outlined in the Criminal Procedure and Evidence Code and the Police Act, but might choose not to follow them due to various factors including "overzealousness" or the possibility of gaining some benefit from those arrested.[423] The findings of the research do not support this view, and it is unlikely that many police officers would be familiar with recent amendments to the Criminal Procedure and Evidence Code and the Penal Code.

Over the past two decades, there have been increasing calls for the repeal of outdated offences. The main argument for this has been that many persons in pre-trial detention in Africa are detained for being poor, homeless or a "nuisance". This was the argument made in the Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa.[424] The OSISA report points out the dire effect of pre-trial detention on society – it estimates that the actual yearly exposure of the population in Malawi to prison on remand may be as high as 1 in 100.[425] The OSISA report notes that some behaviour which leads to detention in Malawi, such a touting and rogue and vagabond offences, are not even considered crimes in other countries. The OSISA report emphasises the urgency of reviewing the Penal Code in the context of Malawi's human rights obligations and the burden of remand detention on the poor.[426]

There have also been recommendations that the police training curriculum should be reviewed to ensure that human rights standards are upheld throughout a person's contact with the police, including during arrest, interrogation and custody. [427]

---

420 *Id* 75-76. The Malawi Police Service's *Strategic Development Plan July 2012 to June 2017* recognises the need to strengthen Court Users Committees, 27.

421 Interview with Kayira and Kainja *supra* note 264.

422 *Id*.

423 *Id.*

424 Second Pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18-20 September 2002.

425 OSISA (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, 4.

426 *Id.*

427 Muntingh *supra* note 415, 63.

The Malawi High Court has also expressed support for an interpretation of vagrancy laws which does not unfairly discriminate against the poor.[428]

Various jurisdictions have further emphasised that the purpose of arrest must be to bring a suspect before court to face prosecution not to frighten or harass a person.[429]

The problem of unlawful arrest does not only lie with the police and the courts must also bear responsibility for the overuse of vagrancy-related offences.

Arrests for vagrancy-related offences are a reflection of the State and society's failure to devise community-based alternatives to arrest and detention for nuisance-related offences. This chapter highlighted that, although arrest should be used as last resort only, it is still often utilised in cases of minor nuisance-related offences. This next chapter looks at the question whether arrest should even be an option for such offences.

428 *Mwanza supra* note 69; *R v Balala* 1997 2 MLR 67.

429 *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC); *Tsose v Minister of Justice* 1951 (3) SA 10 (A); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) (An arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court.)