IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.22/2018

In the matter between:

'MAABELE RAMAKATSA	**1ST APPLICANT**
NTSOAKI SENTJE	**2ND APPLICANT**
ABELE RAMAKATSA	**3RD APPLICANT**
LEEMISA SENTJE	**4TH APPLICANT**

And

COMMISSIONER OF POLICE	**1ST RESPONDENT**
OFFICER COMMANDING VTD/CRU	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

CORAM: **E.F.M. MAKARA, S.P. SAKOANE JJ and M. MOKHESI AJ.**

HEARD: **13 FEBRUARY, 2019**

DELIVERED: **16 APRIL, 2019**

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SUMMARY

Application for habeas corpus and release from unlawful detention – Applicants' relatives applying to court – Whether relatives have locus-standi – Constitution 1993, section 22(1)

Liberty – Detention – Lawfulness – Prescribed purpose – Applicants arrested and detained in police custody on charge of robbery – Period of detention extending beyond the constitutional and statutory period of 48 hours – No charge laid throughout period of detention and applicants not brought before court for remand – Warrants for further detention granted without notice to applicants or their lawyer – Whether restriction of liberty imposed for purposes other than those prescribed in the Constitution and the Criminal Procedure and Evidence Act – Constitution 1993, sections 4(1)(b), 6; Criminal Procedure and Evidence Act, 1981 sections 32, 33 and 34

Individual application – Hindrance – Access to lawyer while in detention – Legal representation when application for further detention made – Applicants' lawyer denied access by the police – Interrogation used as reason for denying access to lawyer and family members – Whether infringement of the right to legal advice and legal representation – Constitution 1993; Judges' Rules.

Interrogation by police – Denial of access to lawyer – Evidence collected in the process - Whether evidence to be declared inadmissible in subsequent trial – Whether right to presumption of innocence violated – Constitution 1993, section 12(2) (a).

ANNOTATIONS:

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Letsae v. Commissioner of Police And Another 1982-1984 LLR 49 (HC)

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Maseko v. Attorney-General LAC (1990-94) 13

Metsing v. Director General, Directorate on Corruption and Economic Offences And Others, Constitutional Case No.11 of 2014 (25 February 2015)

Mohatla v. Commissioner of Police LAC (1985-89) 52

Moloi v. Commissioner of Police (1982-1984) LLR 58 (HC)

Nkholise v. Commissioner of Police And Another (1982-1984) LLR 49 (HC)

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JUDGMENT

SAKOANE J:

I. INTRODUCTION

> "The police must obey the law while enforcing the law… in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves".: **Spano v. New York** 360 US 315 (1959) @ 320-321

[1] The above dictum aptly captures the dispute presented by this case. It is a matter in which the police arrested criminal suspects and detained them in their custody for upwards of 14 days. During all these days, the suspects were not taken to court either for extension of the constitutional and statutory 48 hour period of detention or for remand on any charge. The result is that there was no judicial oversight over their detention and no access by their families and lawyers.

[2] The first two applicants are the family members of the suspects. The last two applicants are the suspects. The 1st applicant is the mother of 3rd applicant. The 2nd applicant is the mother of the 4th applicant. The 1st and

2nd applicants got wind of the fact that their sons were arrested and detained in police custody on 3 August, 2018. They approached a firm of attorneys which briefed their Counsel, Mr. *Mafaesa*, to see the suspects in detention. Counsel was denied access. On 14 August, 2018 the police told him, in the company of his colleague, Mr. R. *Thoahlane,* that the reason for denying them access was that this would compromise their investigations. Mr. *Thoahlane* has filed a supporting affidavit in this regard.

[3] True to the Sesotho adage that "The mother grabs the sharp edge of the knife" (*'Mangoana o tšoara thipa ka bohaleng*), the 1st and 2nd applicants took it upon themselves to contact the officer commanding the place of detention on the 15 or 16 August, 2018. The police told them that their sons were taken to Bloemfontein, South Africa. This took them aback because the sons' passports were still in the possession of the 1st and 2nd applicants. This generated a suspicion that the police did not want them to see their sons because they had been tortured.

[4] On 16 August, 2018 the 1st applicant approached the Magistrate's Court to find out whether any remand of their sons had been made. She searched the criminal register book but did not find any record of such remands.

Urgency

[5] The 1st and 2nd applicants then launched this constitutional motion on 20 August, 2018 for *habeas corpus*, seeking release of their sons from police custody and from detention in prison as well as stay of any proceedings emanating from their arrest pending finalization of the matter.

Reliefs

[6] When the matter first came for hearing on 21 August 2018, we were informed by Counsel that the suspects had since appeared in court and remanded in custody at the Maseru Central Correctional facility on a charge of robbery. Counsel adopted the attitude that the interim reliefs for *habeas corpus* and release from police custody including release from prison had become otiose. I will in due course express my different opinion about their attitude.

[7] The relief being sought is the following:

> "1. Dispensation of the Rules of Court relating to service and process on account of urgency hereof.
>
> 2. That the rule nisi be issued returnable on such date and times to be determined by the Honourable Court, calling upon the Respondents to show cause, if any, why:

2.1 That 1st and 2nd Respondents shall not be ordered to produce **ABELE RAMAKATSA** and **LEEMISA SENTJE** before the Court forthwith.

2.2 The 1st and 2nd Respondents shall not be ordered to release **ABELE RAMAKATSA** and **LEEMISA SENTJE** from custody forthwith.

2.3 That **ABELE RAMAKATSA** and **LEEMISA SENTJE** be joined as 3rd and 4th Applicants in these proceedings upon their release and they file further affidavits.

2.4 That any proceedings, if any, pending against **ABELE RAMAKATSA** and **LEEMISA SENTJE** emanating from their arrest be stayed pending determination hereof.

2.5 That **ABELE RAMAKATSA** and **LEEMISA SENTJE** be released from Lesotho Correctional Service detention facility if already remanded until finalization hereof and or until any pending case against them is completed.

3. That prayers 1, 2, 2.1, 2.2, 2.3, 2.4 and 2.5 to operate with immediate effect as interim orders of the Honourable Court.

4. That sections 32 (1), 33 (4), 35 (1) and (2) of the Criminal Procedure and Evidence Act, 1981 be declared to be inconsistent with section 4 (1) (b) read with provisions of section 6 of the Constitution of Lesotho insofar as it (sic) permits (sic) further detention of detained (sic) beyond forty-eight hours and to the extent of that inconsistency void.

5. That sections 32 (1), 33 (4) 35 (1) and (2) of the Criminal Procedure and Evidence Act, 1981 be declared to be inconsistent with section 12 (2)(a) (sic) Constitution of Lesotho insofar as the said sections permits (sic) further detention of detainee on account that further investigations are conducted.

6. Alternative to prayer 4, it be declared that (sic) detained person is entitled to legal representation when further detention is made, and the Court in which such application for further detention is made shall keep the record of reasons for such application and objections made.

7. Any evidence acquired pursuant to arrest and detention of **ABELE RAMAKATSA** and **LEEMISA SENTJE** be declared null and void and inadmissible to (sic) any resultant proceedings.

8. Arrest and detention of **ABELE RAMAKATSA** and **LEEMISA SENTJE** be declared unlawful.

9. Costs of suit in the event opposition hereof.

10. Further and alternative relief the Honourable Court may grant."

Points in limine

[8] The respondents take three preliminary points: lack of urgency, non-joinder and *locus standi*.

Lack of urgency

8.1 The first point is that the matter is not urgent as no imminent harm is suffered by the applicants if the matter is dealt with in the ordinary course. This point, I consider, does not have merit in a situation where the liberty of an individual is at stake and there is a risk to life if a detainee is sickly and denied access to medication as alleged in the grounds for urgency. Urgency does not dissipate by the happenstance of the detainees having since been taken to court, charged and remanded as awaiting trial prisoners. Whatever happened after the launch of this matter in this court does not detract from it cry for urgent attention as the time the court was seized with it the 3rd and 4th applicants were still in police custody and had not been remanded on any charge.

Non-joinder

8.2 The second point is non-joinder. It is contended that the applicants have not joined their detained sons even though they have a direct and substantial interest in their release from detention. Further, it is said the Clerk of Court and the Magistrate seized with their case "should have been joined in as far as the issue relating to the court records and the decision to grant further detention is concerned."

8.3 It must be remembered that as at 17 August, 2018 when the application was launched in this Court, the 1st and 2nd applicants and their lawyers were continuously being denied access the 3rd and 4th applicants. It is inconceivable how they would then have been able to take instructions from them to bring the suit in their own capacity. Part of the interim relief was for *habeas corpus* which is never made by a body whose production to court an applicant would not know of its whereabouts – let alone whether it is still alive. In any case, the part of the interim relief that the detainees be joined as applicants upon their being released from police custody and to file affidavits was granted at the first hearing. Hence their application to intervene as applicants was just a formality. The reliefs for *habeas corpus* and release from police custody were necessitated by the behaviour of the police. Costs will be awarded despite the subsequent appearance and remand in

custody on a charge of robbery: **Mohatla v. Commissioner of Police** LAC (1985-89) 52; **Nkholise v. Commissioner of Police & Another** 1981(1) LLR 27 (HC); **Letsae v. Commissioner of Police And Another** 1982-1984 LLR 49 (HC)

8.4 It is not clear to me what the basis is for the respondents' contention that the Clerk of Court and the Magistrate who issued arrest warrants and granted an application for further detention should also be joined. All that the applicants are saying about them is that they are not aware of any record of the application for warrants for detention and further detention or remand of their sons and that their search for same such drew a blank. If such warrants exist, then applications for their issuance must be a matter of record. The answer thereto can competently be provided by the police who applied for the warrants and the Attorney General who represents the Clerk and the Magistrate as part of the Crown. I would, therefore, dismiss this point as well.

Locus standi

[9] This point was raised from the Bar by Mr. *Tšeuoa* for the Crown. It was contended that the mothers are not victims of the allegedly unlawful

detentions of their sons. They, therefore, cannot claim any right in law to sue in their own capacity or even a representative capacity.

[10] The answer to this contention are found in the common law and section 22 (1) of the Constitution.

10.1 Common law – The position is articulated on in **Lesotho Human Rights Alert Group v. Minister of Justice and Human Rights and Others** LAC (1990-94) 652 as follows:

p. 657H-J "In application *de libero homine exhibendo*, however, which is part of the Roman-Dutch law, the South African courts have held that where the liberty is at stake, *locus standi* of a person who brings an application or action on behalf of a detained person should not be narrowly construed but, on the contrary, should be widely construed, because the illegal deprivation of liberty is a threat to the very foundation of a society based on law and order … Persons other than the detainee could thus bring an action for his release on the detainee's behalf."

p.658A-B "The applicant would be allowed to act on behalf of the detained person where he could satisfy the court that the detained person was not in a position to make the application himself. The court would also have to be satisfied that the detained person would have made the application himself if it had been in his power to do so."

10.2 The Constitution – Section 22(1) provides that:

"If any person alleges that any of the provisions of sections 4-21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (**or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person**) then, without

> prejudice to any other action with respect to the same matter which is lawfully available, that person (**or that other person**) may apply to the High Court for redress." [Emphasis added]

[11] Both the common law and the Constitution negate the proposition advanced by Mr. *Tšeuoa*. The mothers of the detainees are entitled to bring this constitutional motion not because they are direct victims of human rights violations, but because it is their sons' rights to liberty that are allegedly violated. Theirs is, as it were, a representative suit on behalf of the detainees whose access to court to bring the suit is prevented by the fact of their inaccessibility in detention. It follows that the point of **locus standi** falls to be dismissed as I hereby do.

[12] *En passant*, I refer to the following *dictum* of the African Commission on Human and Peoples Rights which rings true in regard to the propriety of the *locus standi* of the mothers:

> "holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.": **Amnesty International and Others v. Sudan** (2000) AHRLR 297 para 54

II. MERITS

A. The Legal Enquiry

[13] The legal enquiry is whether the impugned sections 32 (1), 33 (4) and 35 (1) and (2) of the **Criminal Procedure and Evidence Act No.7, 1981** permit further detention beyond forty-eight hours for purposes of further investigations and if so, whether they are to that extent inconsistent with section 4(1)(b) read with section 6 and 12 (2)(a) of the Constitution.

Constitutional approach

[14] When a law is impugned for violating constitutionally guaranteed rights and freedoms, this Court is called upon to embark on a five-stage enquiry. Firstly, there needs to be determined the content and scope of the relevant constitutional rights and freedoms. Secondly, to interpret the impugned law. Thirdly, to determine whether the impugned law limits the constitutional right or freedom. Fourthly, if the impugned law does limit the constitutional right or freedom, to undertake a justification analysis guided by the principle that it is for the party (usually the respondent) relying on the impugned law to provide a justification and not for the party (usually an applicant) to show that the law or conduct is justified. Fifthly, to fashion an order that is appropriate to effectively protect the right or freedom if the impugned law or order is unjustified: **Attorney-**

General v. 'Mopa LAC (2000-2004) 427; **Maseko v. Attorney-General** LAC (1990-94) 13 at 17H

Interpretation of constitutional provisions

The right to personal liberty

Section 4(1) (b)

[15] This section is part of the catalogue of rights and freedoms enumerated in Chapter II of the Constitution usually known as the Bill of Rights. It reads thus:

> "(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following –
>
> (a) ………
>
> (b) the right to personal liberty;
>
> ………….
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

[16] The constitutional message conveyed is that the listed right to personal liberty is subject to limitations stated in the subsequent section of the Constitution that elaborates on it. This means that the Constitution does not have a general limitation clause. Each right and freedom has its own *sui generis* limitation clause. Thus, the right to personal liberty has to be given a meaning that rhymes and reasons with the contours of the limitation clause that relates to it.

[17] Liberty is a concept which connotes absence of impediments or obstacles in making choices of lifestyle and behaviour. The dynamic of liberty and coercion is explained by Hayek as follows:

> "By "coercion" we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Except in the sense of choosing the lesser evil in a situation forced on him by another, he is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs. Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another. Free action, in which a person pursues his own aims by the means indicated by his own knowledge, must be based on data which cannot be shaped at will by another. It presupposes the existence of a known sphere in which the circumstances cannot be so shaped by another person as to leave one only that choice prescribed by the other.
>
> Coercion, however, cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons. This is possible only by the state's protecting known private spheres of the individuals against interference by others and delimiting these private spheres, not by specific assignation, but by creating conditions under which the

individual can determine his own sphere by relying on rules which tell him what the government will do in different types of situations.

The coercion which a government must still use for this end is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced. Even where coercion is not avoidable, it is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person. Being made impersonal and dependent upon general, abstract rules, whose effect on particular individuals cannot be foreseen at the time they are laid down, even the coercive acts of government become data on which the individual can base his own plans. Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others." : **The Constitution of Liberty** (Routledge) pp.19-20

[18] In the context of the Bill of Rights, personal liberty must be construed as referring to freedom from physical constraint and protection of physical integrity. This Court is enjoined to protect persons against any governmental action or conduct which cannot be justified by reference to any law that is constitutionally compliant.

[19] In assessing whether there has been deprivation of liberty, regard may be had to the specific context and circumstances surrounding the type of restriction other than the paradigm of confinement in a cell. An element of compulsion or coercion is indicative of a loss of liberty irrespective of the length of the period or purpose of confinement.

[20] Apart from physical restraint, psychological compulsion is included in the concept of restriction of liberty. This is so where, for example, there is a reasonable perception of suspension of freedom of choice arising from involuntary police control over the movement of a person by a demand, direction or order whose disobedience might be visited with penal liability or legal consequences: Steytler **Constitutional Criminal Procedure** (Butterworths) pp.48-49; Harris, O' Boyle & Warbrick **The Law of the European Convention on Human Rights** 3rd ed. (Oxford) pp.292-293.

Section 6

[21] Section 6 of the Constitution elaborates, in relevant parts, on the procedural and substantive guarantees of liberty and permissible restrictions in the criminal process by providing as follows:

> "(1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law in any of the following cases, that is to say –
> (a) …………….
> (b) …………….
> (c) …………….
> (d) ……………..
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Lesotho;
> ……………..
>
> (2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.
>
> (3) Any person who is arrested or detained –

(a) ……………….

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal office,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within forty-eight hours of his arrest or from the commencement of his detention, the burden of proving that he has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court."

[22] Subsections (1)(e), (2), (3)(b) and (4) read together lay down the constitutional command that the power of the police to arrest or detain a person must be authorized by law and triggered by the existence of a jurisdictional fact of reasonable suspicion of commission or imminent commission of an offence; the reason(s) for deprivation of liberty must be given to the person upon arrest or detention; the reason(s) must be intelligible and understandable to the level of understanding of the arrestee or detainee; the period of detention must not exceed 48 hours; if not released before the expiry of 48 hours, the arrestee or detainee must be charged and brought to court; any further detention in custody beyond 48 hours must be by an order of court.

[23] The logic of the requirement for authorization by law and for existence of jurisdictional fact of reasonable suspicion for the exercise of the power to arrest or detain serves the purpose of protecting a person against arbitrary, rumour-driven, and factually baseless deprivations of liberty. The police dare not arrest or detain because of personal vendetta or be actuated by malice, revenge act on a hunch or precipitously and irrationally. Shortly stated, the police must serve the law and the law alone and not listen to the tune of a political trumpet.

The binding principles

[24] The following are the golden rules:

24.1 "A suspicion is of course not to be equated with *prima facie* proof; but the suspicion must be reasonable, that is to say, it must be such that a reasonable man in possession of the facts would agree that there was reasonable ground to suspect that the person involved was concerned in subversive active …. It is this requirement of reasonableness which is the safeguard given against capricious arrests. : **Solicitor General v. Mapetla** LAC (1985-89) 125 at 127 B-C.

24.2 "when a policeman arrests without a warrant, he must in ordinary circumstances, inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized, but that when the circumstances under which he is arrested are such that he must know the general nature of the alleged offence for which he is detained, the person arresting him need not inform him thereof.": **Maseko v. Attorney General** LAC (1990-94) 13 at 27D-F

[25] The requirement of reasonable suspicion as a *sine qua non* for arrest and detention does not require the police to obtain all the evidence before laying charges. *Prima facie* evidence of commission of an offence suffices. As held by the European Court of Human Rights:

> "115 In order for an arrest on reasonable suspicion to be justified under art 5(1) (c) [our section 6(3) (b)], it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody…; nor is it necessary that the person detained should ultimately have been charged or taken before a court. The object of detention for questioning is to further a criminal investigation, by confirming or discontinuing suspicions which provide the grounds for detention. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the criminal investigation…" : **Jafarov v. Azerbaijan** (2017) 42 BHRC 355.

[26] Since a reasonable suspicion must exist at the time of the intended arrest, a vague suspicion which can only be properly investigated after arrest does not qualify as a requisite suspicion for purposes of the law. An arrest made in such a situation is no arrest and is unlawful because the suspect is deprived of liberty for purposes of interrogation and proper investigation afterwards run primarily to confirm a vague suspicion. Section 6 of the Constitution does not provide in its list of grounds for deprivation of the right to liberty any that is for the purpose of interrogation or investigation to confirm or dispel a vague suspicion that an offence has been committed: **Wiesner v. Molomo** 1983 (3) SA 151 (A); **African National Congress (Border Branch) and Another v.**

Chairman, Council of State, Ciskei and Another 1994 (1) BCLR 145 (Ck) at 163 B-F.

[27] Thus, the notorious practice of the police, (which I take judicial notice of), of calling people under the pretext of being assisted with investigations or calling them for questioning and subsequently causing them to die in police custody because of so-called interrogation fatigue (*Ho khathalla lipotsong*) is unlawful, antithetical to policing a democratic society and is reminiscent of police behaviour in the bygone era of dictatorial government when they enforced the notorious Internal Security legislation. In that era the police arrested and detained persons and held them in custody for weeks, months and even years for purposes of investigation and extraction of admissions and confessions for commission of offences by methods of violence and solitary confinement without access by family members, their lawyers and doctors: **Sello v. Commissioner of Police & Another** 1980 (1) LLR 158 (HC); **Moloi v. Commissioner of Police** 1982-1984 LLR 58 (HC). The new democratic dispensation has adhered in a new policing culture of respect for human rights and freedoms and corresponding accountability for their violation. It is for this reason that section 8 of the Constitution outlaws in absolute terms torture and inhuman or depraving punishment or treatment.

[28] The remarks by *Mofokeng* J in **Sello** (supra) have left an indelible print of judicial vigilance and not slumber on the seat of justice jealously protecting citizens against unlawful deprivation of liberty. The learned Judge said:

> "When a person is apprehended in a criminal case he is informed of the nature of the offence he is suspected to have committed so that he could know why his liberty is being curtailed. He is to know so that he can prepare for his pending trial. It is no use informing a detainee, who has committed no crime, that he is being detained because a prescribed officer believes on reasonable grounds that the detainee has committed or intends to commit any offence under that Act (without naming such offence (s) or fully informing him of the circumstances). To an ordinary citizen that does not mean anything, and this is particularly serious because this detained ordinary citizen has to answer questions to the satisfaction of the Commissioner. The affidavit of the said Thaha is not helpful either in this particular aspect. That is why it is so important that the activities of the police in this respect should be reviewed by an independent authority so as to check and see if their actions are in accordance with the law. **They should not think that they are above the law or a law unto themselves. This is what an ordinary citizen fears most. The citizen must never feel that he is being intimidated by the use of this law**. It is the main function of the Courts in our Kingdom to protect the rights of an individual. It is equally the function of parliament. If those rights are infringed or curtailed, however slightly, and the situation is brought to the notice of the Courts, our Courts will jealously guard against such an erosion of the individual's rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, the Courts will scrutinize such legal right very closely indeed. If it is an Act of parliament, the Courts will give it the usual strict interpretation in order to see whether the provisions of the said Act have been strictly observed. If the Courts come to the conclusion that the provisions of such an Act are not being strictly observed then the detention of the detainee would be illegal and the Courts will not hesitate to say so.": Op.cit. pp. 168-169 [Emphasis added]

[29] Upon detention of a suspect in custody, the clock starts ticking. The police have forty-eight hours to confirm their reasonable suspicions and

bring the suspect to court on a holding charge. If the suspicion is not confirmed, the suspect must be released immediately. If confirmed, the suspect must be brought to court within forty-eight hours on a charge and then apply for a court order for extension in the presence of the accused as decreed under section 6(4) of the Constitution. A delay in bringing the detainee before court within forty-eight hours should be justified by exceptional circumstances: Harris et al (supra) p. 340.

[30] In regard to what circumstances should be regarded as exceptional, the authorities provide the following guidelines:

> (a) What is ordinarily contemplated by words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different.
>
> (b) To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
>
> (c) Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
>
> (d) The word 'exceptional' has two shades of meaning, depending upon the context in which it is used: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
>
> (e) Where it is directed in a statute that a fixed rule will be departed from only under exceptional circumstances, generally speaking effect will best be given to the Legislature's intention by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied upon as allegedly being exceptional.": **Seatrans Maritime v. Owners, MV Ais Mamas and Another: MV Ais Mamas** 2002 (6) SA 150(C); **Liesching and Others v. S** 2018 (11) BCLR 1349 (CC) para [39]-[40], [131]-[139]

[31] Physical appearance in court within the forty-eight hour period is a mandatory procedural requirement whose purpose is fourfold:

31.1 **Promptness** – as a measure for expedited judicial detection of any ill-treatment, incommunicado detention and arbitrary or unjustified deprivation of liberty.

31.2 **Automatic review** – necessary to enable the court to scrutinize the legality of the detention without the necessity of any application to do so by the arrestee or detainee. The court has the discretion to order release after hearing the individual and reviewing the lawfulness and justification for the arrest and detention.

31.3 **Authorization for extension** – if the police require to do further investigations and need to keep the individual in custody. The police must justify their request and the detainee is entitled to legal assistance and to have access to documents in the docket which are essential in order to effectively resist the police request: **Schiesser v. Switzerland** (1979)2 EHHR 27 para 31; **Khodorkovskiy and Lebedev v. Russia** (2013) ECHR 747 para 516; **Medvedyev And Others v. France** (2010) 51 EHRR 899 paras 117-125; **UN**

Human Rights Committee, General Comment No.35 (2014); **African Commission, Principles and Guidelines on the Right to a Fair Trial And Legal Assistance in Africa** (2003).

31.4 **Justification for detention** – Further detention should not be granted for the purpose of prolonging interrogation whose object is to wear down the resolve of the detainee not to cooperate with the police or to induce him to make admissions or confess to the commission of the offence. The Magistrate should be alert to enquire and ask for reasons that justify further detention so as to assess their relevance and sufficiency. Such reasons and their assessment must appear in the record of proceedings so that the detainee can, if unhappy, apply for review: Harris et al (supra) p.344

[32] The forty-eight hour period is the maximum. It is not a target or acceptable deadline for detention. It may still be breached before it expires if there are no exceptional circumstances. If it is not reasonably possible to bring a detainee to court before the period expires and no charge is laid, any further detention becomes unconstitutional: Steytler (supra) p.126; Harries et al (supra) pp.339-340.

[33] In construing an article in the Constitution of Namibia that is identical to our section 6(3), the High Court, remarked as follows:

> "[5] … One must not lose sight of the fact that the object of Article 11 (3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her – treatment that is outlawed by Article 9 (2) of the Namibian Constitution. The forty-eight-hour rule is therefore one of the most important reassuring avenues for the practical realization of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.
>
> …………….
>
> [7] What Article 11 (3) says – in material part – is that 'no such persons shall be detained in custody *beyond such period (i.e. 48 hours) without the authority of a Magistrate or other judicial officer*.' (Italicized for emphasis)": **Sheehama v. Minister of Safety and Security** 2011 (1) NR 294 (HC)

[34] From the aforegoing survey of case law from other constitutional democracies, comments of international human rights bodies, and scholarly writings, there is a consensus that deprivation of the liberty of persons suspected of commission or involvement in criminal conduct is subjected to tight constitutional controls. Such controls are managed and operationalized through judicial oversight. They provide for accountability and responsiveness by the investigating agencies.

Presumption of innocence

[35] <u>Section 12 (2) (a)</u> provides that:

> "(2) Every person who is charged with a criminal offence –
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty:"

[36] Presumption of innocence ceases upon a plea of guilty or on proof of the charge. Otherwise it is not affected by arrest and detention. Its normative value is explained by Zahar & Sluiter as follows:

> "The presumption of innocence has two aspects. First, it concerns the outcome of the proceedings, in the sense that judges are prohibited from doing or saying anything, before the judgment has been delivered, that would imply that the defendant has already been convicted. In this way, there is a direct connection to the right to an impartial tribunal. Secondly, there is the 'reputation-related' aspect, which aims to protect the image of the suspect as 'innocent' in the eyes of the public, which bears some relation to the right to protection against unlawful attacks on honour and reputation, as provided for in Article 17 of the ICCPR.
>
> …………
>
> As to its more concrete effects, the presumption of innocence plays an important role, but rarely in its own right. For example, it is pivotal in respect of habeas corpus rights for persons who have not been convicted. Furthermore, in connection with the privilege against self-incrimination, the presumption of innocence is the basis for the imposition of the burden of proof on the prosecutor." : Zahar A. & Sluiter G. **International Criminal Law** (Oxford) pp.302 and 303

[37] A similar articulation is found in the dictum of the European Court of Human Rights which is that:

> "The court reiterates that Article 6§ 2 is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements

> of a fair criminal trial that is required by paragraph 1 (see **Allenet de Ribemont v. France,** 10 February 1995, § 35, Series A no.308, and **Ilgar Mammadov v. Azerbaijan**, no.15172/13, § 125, 22 May 2014). It not only prohibits the premature expression by the tribunal itself of the opinion that the person charged with a criminal offence is guilty before he has been so proved according to the law (see **Minelli v. Switzerland**, 25 March 1983, § 38, Series A no. 62), but also covers statements or actions made by other public officials about pending criminal investigations, which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see **Allenet de Ribemont**, cited above, § 41; **Daktaras v. Lithuania**, no.42095/98, §§ 41-43, ECHR 2000-X; and **Ürfi Çetinkaya v. Turkey**, no.19866/04, § 139, 23 July 2013).
>
> The court stresses that Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see **Allenet de Ribemont**, cited above § 38, and **Maksim Petrov v. Russia**, no.23185/03, § 103, 6 November 2012).": **Huseynov v. Azerbaijan** [2018] ECHR 81 paras 39-40

[38] Professor *Schwikkard* cautions, rightly so in my respectful opinion, that the right to be presumed not guilty until proved otherwise must not be conflated with the cluster of rights enumerated in the Bill of Rights. He reasons that:

> "Obviously there would be no need to enumerate these rights separately if they were merely components of the presumption of innocence. If we take the view that the right to a fair trial exists from the inception of the criminal process it may be convenient to substitute references to the presumption of innocence as a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process with the term right to a fair trial, which acknowledges that there are many separate rights which must be upheld at different stages of the criminal process.
>
> Another reason for viewing the presumption of innocence as having an exclusive identity is to allow greater coherence in establishing its normative value. The separate rights necessary to uphold the right to a fair trial have different rationales (albeit there is some degree of

> overlap). Consequently, different policy considerations apply in determining when a limitation of any right is justifiable. The normative value of a rule is undermined by the frequency of its breach. Consequently, we also need to distinguish between the presumption of innocence as a rule regulating the burden of proof and as a policy directive as to how persons should be treated prior to conviction. For example, whilst the breach of the presumption of innocence as the foundation of a policy directive might be frequently justified in denying bail applications this should not be allowed to undermine the normative value of the presumption of innocence as a rule of regulating the burden of proof.”: Schwikkard P.J. **Presumption Of Innocence** (Juta) pp. 38-39

[39] The forensic test at the pre-trial stage for legality of arrest and detention is proof of the existence of a jurisdictional fact of reasonable suspicion as a justification for limiting the liberty of a suspect. The pre-trial stage is not the moment to enquire into guilt by calling for a court to have moral certainty about the guilt of the accused through proper application of rules of evidence interpreted within the precepts of the Bill or Rights: **S v. Mavinini** [2009]2 All SA 277 (SCA) para [26]. It is, therefore, not correct to place the right to be presumed innocent at the pre-trial investigation stage, as Mr. *Mafaesa* seeks to do, when no charge is up for trial. I would then hold that a detainee who is under investigation has no basis in law to complain about violation of presumption of innocence when a warrant for further detention is applied except if he is detained beyond forty-eight hours without being charged and brought to court. Questions of innocence or guilt do not feature during consideration of such applications. The question that features is whether there is a

continuing reasonable suspicion of commission of an offence as a prerequisite for extension of the restraint of liberty. Section 6 (4) is specific that there must be a stated offence as a basis for further detention.

Interpretation of impugned laws

Texts

Section 32

[40] This section provides in relevant parts that:

> "(1) No person arrested without a warrant shall be detained in custody for a longer period than in all circumstances of the case is reasonable and such period shall, subject to sub-section (2), **unless a warrant has been obtained for further detention upon a charge of an offence, not exceed 48 hours**, exclusive of the time necessary for the journey from the place of the arrest to the subordinate court having jurisdiction in the matter.
>
> (2) Unless a person arrested without a warrant is released by reason that no charge is to be brought against him, he shall, as soon as possible, be brought before a subordinate court having jurisdiction **upon a charge of an offence** but if the magistrate of the court is temporarily absent, and there is no other magistrate available who has jurisdiction in the matter, that person may be detained in custody until the return of the first-mentioned magistrate or such other magistrate becoming available, whichever is earlier.
>
> (3) ……………..
>
> (4) Whenever a person effects an arrest without warrant he shall forthwith inform the arrested person of the cause of the arrest."
> [Emphasis supplied)

[41] Section 33(4) reads:

> "When a warrant has been issued for the arrest of a person who is being detained by virtue of an arrest without a warrant the warrant of arrest shall have the effect of a warrant for his further detention."

[42] Section 35(1) and (2) decree as follows:

> "(1) A telegram from any officer of any court or from any peace officer, stating that a warrant has been issued for the apprehension or arrest of any person accused of any offence, shall be a sufficient authority to any peace officer for the arrest and detention of such person until a sufficient time, not exceeding 14 days, has elapsed to allow the transmission of the warrant or writ to the place where such person has been arrested or detained unless a judicial officer orders that he be discharged.
>
> (2) Any judicial officer may, upon cause show (sic), order the further detention of any person arrested and detained under sub-section (1) for a period, to be stated in the order, not exceeding 28 days from the arrest of such person."

Analyses

[43] Section 32(1)

The plain meaning of this subsection is, I consider, that detention in custody of a person arrested without a warrant must not exceed 48 hours – discounting the extra time necessary for the journey taken to physically bring the arrested person to court: **Nkholise v. Commissioner of Police & Another** (supra). But if circumstances render it reasonable to have the 48 hour period extended, then a warrant for further detention upon a charge must be sought before the expiry of the said period. An application for further detention beyond the 48 hour period which is not

based upon a charge is legally impermissible. There cannot be any lawful basis for seeking and being granted a warrant further detention if the police have not laid a charge within the 48 hour period. Any further detention other than the purpose of eventual trial on a charge is improper: **Minister of Law and Order v. Kader** 1991(1) SA 41 (AD) at 49I.

Section 32(2)

[44] This subsection casts a duty on the police to release a detainee if they have no reason in law to prefer a charge. If, however, a charge is laid, the charged detainee must be brought to a court of competent jurisdiction for remand as soon as possible. If there is no magistrate of that court to conduct the remand, the detention may continue until the magistrate is available. Thus, the detention on a charge is extended by dint of the fact of unavailability of a magistrate of competent jurisdiction. No warrant is necessary.

[45] Whether a detained person has not been brought to court "as soon as possible" is a question of fact to be determined, inter alia, on the consideration of whether a circuitous route instead of a direct road was taken by the police; whether the police acted on their own convenience or inefficiently or in deliberate non-compliance. The police should not wait to take the person to court in order to bolster their assurance or strength of

the case by seeking further evidence or taking him somewhere first to find further evidence: **John Lewis & Co. Ltd v. Tims** 1952 (1) All ER 1203 (HL) at 1211 D-F

Section 32(4)

[46] Sub-section (4) directs, in mandatory terms, that the police must tell an arrestee of the cause/reason for the deprivation of liberty. The cause or reason must be given forthwith and not after the arrest and during interrogation. The law does not countenance arrests without cause or reason being made know to the arrested person. The law-giver must have so worded the provision in order to prevent arrests made to harass citizens or arrests founded on flimsy excuses, rumour or gossip.

[47] Subsections (1) and (2) serve two different purposes. Subsection (1) stipulates the timeframe for detention of a suspect whom a charge is yet to be preferred. The maximum period of detention is 48 hours. It may be extended before its expiry by applying for a warrant, otherwise the suspect must be released. Subsection (2) regulates the detention of a charged suspect. He must appear in court for remand once a charge is laid before the expiry of forty eight hours. The charge need not be complete. It suffices that the charge informs the accused in general terms of what is held against him: **Exparte Prokureur-General, Transvaal**

1980(3) SA 516 (T). Non-compliance with the 48 hour period and the ensuing detention become unlawful: **Rex v. Mtungwa** 1931 TPD 466

Section 33(4)

[48] Sub-section (4) is part of a section that regulates issuance of warrants of apprehension. It must be read with subsection (1) which provides:

> "Any judicial officer may issue a warrant for the arrest of any person or **for the further detention of a person arrested with or without a warrant on a written application** subscribed by the Director of Public Prosecutions or by the public prosecutor or **any commissioned officer of the police setting forth the offence alleged to have been committed** and that, from information taken upon oath, there are reasonable grounds of suspicion against the person, or upon the information to the like effect of any person made on oath before the judicial officer issuing the warrant."
> [Emphasis added]

[49] Subsection (1) conveys the meaning that a warrant for the further detention an arrested person must be by way of a written application by, among others, a commissioned officer of the police. The application must set forth the alleged offence and be based on information on oath that there are reasonable grounds of suspicion. The police officer must look at the information and be able to form a reasonable suspicion. On his part, the magistrate is not called upon to consider the correctness of the officer's conclusion with regard to existence of reasonable suspicion, but to exercise a discretion if satisfied that the alleged offence is an offence in law and its gravity justifies the issuance of warrant. : **May v.**

Union Government 1954 (3) SA 120 (N) at 125B-E; **Prinsloo and Another v. Newman** 1975 (1) SA 481 (AD) at 499G-H and 500C-D

[50] Subsection (4) must then be interpreted in the light of subsection (1). Its effect is that a warrant for the arrest for a person who is already in custody by virtue of a warrantless arrest serves as a warrant for his further detention. To my mind, the subsection applies to a detention in custody upon arrest without a warrant and not an arrest with a warrant. I do not think that the purpose here is to retrospectively legalize and extend a prior arrest and detention whose lawfulness ceased on the expiry of the forty-eight hour period.

[51] I do not discern any good reason for a person who is already in detention and whose detention is sought to be extended, not to be served with such an application or the court to be approached *ex parte*. Such a person has a direct, personal interest in the application. Justice and fairness demand that he must be put on notice and served with the papers so as to decide whether or not to resist the application. In this regard, access to legal advice and the right to legal representation loom large. The court cannot abdicate its responsibility by granting warrants for further detention on the nod, or simply because no objection is forthcoming from the arrested person. The court must always be fully and adequately informed of

matters that affect its decision: Cf. **Regina v. Manchester Crown Court**, **Ex p. McDonald** [1999]1 W.L.R. 841 (D.C.)

[52] The question that arises is whether a detention based on prior unlawful arrest can be extended. To my judgment, the answer is that a prior lawful arrest and detention are prerequisites for granting a warrant for further detention. Therefore, a person whose prior arrest is unlawful cannot be detained and such detention extended. This must be so because the detention contemplated by sections 32 and 33(4) and its extension must be founded on prior lawful deprivations of liberty and fall within the statutory duration. Thus, a further detention in custody made on the foot of an expired statutory 48 hour period or absent a charge is not valid. As earlier said, in judgment a section 33(1) application for further detention cannot be granted if the detention is itself based on an unlawful arrest or its period has expired because of failure to seek its extension timeously. The law-giver could not have intended a warrant for further detention to clothe a prior illegal conduct in a legal garb. A detention which is not achievable by a prior unlawful act cannot indirectly be achieved by a warrant for further detention: **Minister of Law and Order Kwandebele and others v. Mathebe and another** 1990(1) SA (AD) 114 at 122B-D

Section 35

[53] This section deals with the procedure for issuance of a warrant of arrest and detention in custody and extension of such detention by telegraphic message from an officer of the court or from a peace officer (which latter term includes reference to a police officer). The conveyance of a telegraphic message to arrest is sufficient authority for deprivation of liberty. The arrested person may be arrested and detained in custody for a maximum period of 14 days to allow the transmission of either the warrant or writ to the place of arrest or detention unless the magistrate orders discharge. An order for further detention for a maximum of 28 days from the date of arrest may be granted upon 'cause shown'.

[54] It is my considered opinion that, the application of this section must be restricted to circumstances where the logistics and time for reaching the place of arrest are made difficult by the terrain or topography in the mountainous parts of the Kingdom. It must be confined to exigencies of such unique, difficult and exceptional circumstances. It cannot be invoked to circumvent the constitutional imperatives to bring the arrested person before court on a charge as soon as is reasonably practicable and for extension of detention for any purpose other than for eventual trial.

[55] The conclusion I arrive at through this interpretative exercise is that except for section 35, the impugned sections authorize further detention beyond the constitutionally ordained period of forty-eight hours or an account of further investigations. The golden thread that runs through all of them is that the detained person must be charged within forty-eight hours or be released. If charged, it is compulsory that he be brought to court before the expiry of the forty-eight hour period and cannot thereafter be detained by the police in connection with the charge.

[56] Section 35 is not implicated on the facts of this case. For this reason, I do not find it necessary or feel compelled to reach the question of its consistency with the Constitution. The expression of any views on its meaning are, therefore, tentative and not conclusive.

Rights of suspects in police custody

The Judges' Rules

[57] The questioning of suspects by the police has never been unbounded in law. The operative common law principles were reiterated when the Judges' Rules were made and adopted by English courts at the beginning of the 20th century: **Practice Note (Judges' Rules) [1964] 1 WLR. 152**. The opening statement in the Judges' Rules identifies these principles:

> "These rules do not affect the principles
>
> (a) That citizens have a duty to help a police-officer to discover and apprehend offenders;
>
> (b) That police-officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;
>
> (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;
>
> (d) That when a police-officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;
>
> (e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

[58] The Judges' Rules were conceived as administrative guides to the police when conducting investigations. The golden thread that runs through them is that before putting questions, the police must caution the suspect not to speak unless he chooses so and not to get anything from his mouth by force or threats, fear or promise. If the suspect chooses to speak, whatever he says must be recorded and may subsequently be tendered in evidence against him at trial. The record of the caution and what was

said is important and must be kept irrespective of lack of its evidential value to the police as it may later be of the benefit to the accused at trial.

[59] The part of the Judges' Rules relevant to the issues raised *in casu* direct that:

> "6. *Supply to accused persons of written statement of charges*
>
> (a) The following procedure should be adopted whenever a charge is preferred against a person arrested without warrant for any offence:
>
> As soon as a charge has been accepted by the appropriate police-officer the accused person should be given a written notice containing a copy of the entry in the charge sheet or book giving particulars of the offence with which he is charged. So far as possible the particulars of the charge should be stated in simple language so that the accused person may understand it, but they should also show clearly the precise offence in law with which he is charged. Where the offence charged is a statutory one, it should be sufficient for the latter purpose to quote the section of the statute which created the offence.
>
> The written notice should include some statement on the lines of the caution given orally to the accused person in accordance with the Judges' Rules after a charge has been preferred. It is suggested that the form of notice should begin with the following words:
> 'You are charged with the offence(s) shown below. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.'
>
> (b) Once the accused person has appeared before the court it is not necessary to serve him with a written notice of any further charges which may be preferred. If, however, the police decide, before he has appeared before a court, to modify the charge or to prefer further charges, it is desirable that the person concerned should be formally charged with the further offence and given a written copy of the charge as soon as it is possible to do so having regard to the particular circumstances of the case. If the accused person has then been released on bail, it may not always be practicable or reasonable to prefer the new charge at once, and in cases where he is due to surrender to his bail within forty-eight hours or in other cases of difficulty it will be sufficient for him to be formally charged with the further offence and served with a written notice of the charge after he has surrendered to his bail and before he appears before the court.

> 7. *Facilities of defence*
> (a) A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.
>
> He should be supplied on request with writing materials and his letters should be sent by post or otherwise with the least possible delay. Additionally, telegrams should be sent at once, at his own expense.
>
> (b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices."

Access to legal advice and the privilege against self-incrimination

[60] The Judges' Rules have, with time, evolved and solidified into a binding police code of conduct for the protection of the right of access to legal advice and the privilege against self-incrimination: **Commander of The Lesotho Defence Force And Others v. Rantuba And Others** LAC (1995-1999) 687; **Attorney-General of Trinidad and Tobago and another v. Whiteman** [1992] 2 All ER 924 (PC); 1991 (2) AC 240**;** **Metsing v. Director General, Directorate on Corruption and Economic Offences And Others** Constitutional Case No.11 of 2014 (25 February 2015). **Shabadine Peart v. The Queen [2006] UK PC 5**

[61] Other rights that the Judges' Rules oblige the police to respect are the right to remain silent during questioning and the prohibition of the use of force, torture, inhuman and degrading treatment to get admissions or

confessions. Where the police have warned a suspect in terms of the Judges' Rules and not ill-treated a suspect or practised any subterfuge, respect is given to relevant provisions of the Constitution and the **Criminal Procedure and Evidence Act, 1981** governing admissibility of extra-curial statements and confessions. But if the Judges' rules are honoured in breach instead of observance and the stream of justice is thereby fouled, consequences may follow. Evidence collected is rejectable at trial, the Crown is exposed to the risk of claims for damages for unlawful arrest and torture and associated police brutality. This entails providing a budget to meet such claims. In other words the tax payer pays for police brutality. Reputational damage is done to the police service as an institution with the attendant loss of trust by the community. : **Rex v. Sekhobe Letsie & Another** (4) 1991-1996 (2) LLR 1006 (HC); **Mabope And Others v. R LAC** (1990-94) 150; **Timothy v. The State** [2000]1 W.L.R. 485 (PC) **Hunte v. State** (2016)40 BHRC 633 (PC); **Mhlongo v. S**; **Nkosi v. S** (2015) 8 BCLR 887 (CC) **Simmons And Another v. R. Rev 1 (Bahamas)** [2006] UK PC 19 (3 April 2006); United Nations Human Rights Committee**, General Comment No. 20** (1992)

[62] It is a matter of grave concern that despite the settled principles of law that evidence procured in violation of an accused's rights is rejectable at

trial, the police have escalated violation of arrested persons' rights and even have official encouragement if regard is had to media reports and news from the radio. Such conduct, if not nipped in the bud, is fast turning the police service into an institution of official torture. The police are best advised that torture is a crime under customary international and the UN Convention Against Torture. Persons who practice it are individually accountable under customary international law and the **Rome Statute of the International Criminal Court**: Zahar & Sluiter (supra) pp.124-127.

[63] The common law rights of access to a lawyer and the privilege against self-incrimination are generally recognized international human rights standards to be respected by the police. Access to a lawyer during police interrogation can only be restricted if securing the presence of a lawyer is impracticable or if the particular circumstances of the case make it impracticable to adhere to it. This may, for example, be so if waiting for the presence of a lawyer from the moment of detention would render interrogation with expedition practically impossible given the constitutional and statutory 48 hour period within which the police are expected to confirm their suspicion and decide whether to lay a charge and bring the suspect to court. The public interest in the detection and suppression of crime will not be well served if access to a lawyer means

that, irrespective of the circumstances of a case, or the availability of a lawyer within a reasonable time, the police must always delay interrogation until the suspect has had access to a lawyer. It surely must be dependent on the ready availability of a lawyer: **Cadder v. Her Majesty's Advocate** (Scotland) [2010] UKSC 43

[64] The assumption behind access to legal advice is that the detainee knows the lawyer from whom advice is to be sought. But for many people knowing which lawyer to approach is a major obstacle. There is, therefore, a need for the Law Society to consider placing at all police-stations a roll of legal practitioners with their contact details. This may give practical realization to the right of access to legal advice.

[65] What must not be tolerated is a situation where a lawyer arrives at the police station before or during interrogations to access his client and the police deny access on the reasoning that they are still busy with interrogations or other things. This nullifies the right of access whose very purpose is to enable giving advice to the client not to answer or continue responding to questions which may lead to incriminating statements and the obtaining of incriminating evidence as a result of the lines of enquiry.

Legal propositions

[66] From the analysis of the impugned provisions, the following legal propositions are made:

66.1 A peace officer is entitled to arrest without warrant any person reasonably suspected to have committed a Schedule 1 Part II offence. Robbery being in the listed offence, the police would have been entitled to arrest the 3rd and 4th applicants without a warrant: Section 24 (b).

66.2 It was mandatory for the police to inform the 3r and 4th applicants forthwith about the cause of the arrest and not to detain them beyond 48 hours without laying any charge. It is wrong not to promptly inform an arrested person of the reasons for arrest and to leave it to him to gather the reasons from the drift of the interrogation, which may involve the putting of various alternative assertions and even exaggerated accusations: **S v. Matlawe** 1989 (2) SA 883 (BGD); **Harris** et al p.337

66.3 The purpose of arrest is to bring the suspect to trial and the police's role is limited. It is not the business of the police to decide whether the suspect has to be detained further pending trial. That is the role

of the court: **Minister of Safety and Security v. Sekhoto and another** [2011]2 A11 SA 157 (SCA) para [44].

66.4 A request for further detention must be made by way of an application based on sworn information that there are reasonable grounds for suspicion. Further detention may be ordered only if the court is satisfied that there are exceptional circumstances which warrant it and its purpose is to bring the arrested person to trial upon the charge of a stated offence. A detention for any purpose other than eventual trial is improper: **Minister of Law And Order v. Kader** (supra) 491.

66.5 An arrested person in police custody is entitled to be given notice of the application for further detention and to appear in court in person or through a lawyer to oppose it: **Khodorkovskiy and Lebedev** (supra).

66.6 No further detention can be made if the prior detention had already expired or was based on a prior unlawful arrest: **Minister of Law and Order Kwandebele** (supra).

66.7 A detained person retains the common law right of access to a lawyer and the privilege against self-incrimination. The right of access for purposes of obtaining legal advice exists even where the right to legal representation has been lawfully excluded. The onus of justifying a statutory derogation from the right of access to legal advice or privilege against self-incrimination is on the party who asserts an entitlement to their attenuation: **Rantuba** (supra); **Timothy** (supra).

66.8 Generally, the right to be presumed innocent until proven or pleaded guilty does not feature at the pre-trial stage of arrest and investigation provided that no premature expressions of guilt are made by public authorities and the police. Any evidence collected after denial of access to legal advice, or in violation of the right to silence and the privilege against self-incrimination, may be excluded at trial: **Metsing** (supra); **Timothy** (supra)

B. The Factual Enquiry

[67] The following facts are not contested:

67.1 The 3rd and 4th applicants were arrested and detained in police custody on 3 August, 2018.

67.2 A warrant for the further detention of the 4th applicant was issued on 13 August, 2018.

67.3 The police have also annexed another warrant for the 3rd applicant but the date stamp is not clear. This warrant purports to be for further detention as well. I believe that it was issued on the same day of 13 August, 2018.

67.4 There is no record of any written application for the issuance of the warrants or any charge despite respondents' contention that it exists.

67.5 Throughout the period under review, the 3rd and 4th applicants were not made aware of applications for their further detention or given any charges for which they were being held.

67.6 The 3rd and 4th respondents neither appeared in court for remand nor were informed of any charges during their detention.

67.7 Their mothers (1st and 2nd applicants) engaged lawyers to see them in police custody but were denied access throughout the period of 3-20 August, 2018 when they were eventually remanded in prison on a charge of robbery.

67.8 The police denied them access to lawyers for the entire period on the basis that it was premature to do so as they were busy with their investigations. Access by the 1st and 2nd applicants was also rendered impossible by the police as they had taken the 3rd and 4th applicants outside the Kingdom.

Justification

[68] The police seek to justify their conduct on the basis of what appear to be pro-forma warrants of arrest and further detention. These forms are on themselves not written applications for warrants for further detention as contemplated under section 33(1) of the **Criminal Procedure and Evidence Act, 1981**. They have the inscription of being "Warrant of Apprehension, or for the further detention of a person arrested without a warrant." They also state "Whereas from information taken upon oath before me, there are reasonable grounds for suspicion". Further, it is inscribed, therein with reference to an arrested person, that he be arrested or detained "and brought before Maseru Magistrate Court to be examined

and answer to the said information, and to be further dealt with according to law."

[69] Both these pro-forma warrants have written on them by a pen the words "Application for further detention is granted as prayed". There is a signature of the magistrate but no full names.

[70] I have a distinct impression that absent a record of any section 33(1) application, the police must have approached the Magistrate and orally asked for the further detention of the 3rd and 4th applicants on production of pro-forma warrants that have no date as to when they were issued, if at all. The Magistrate just stamped the forms, signed them and wrote "Application for further detention is granted". The result is that the pro-forma warrants double-up as warrants for arrest and further detention. Furthermore the duration for further detention is not specified, thus leaving it to the sweet call of the police. This is highly irregular and illegal. In establishing lawfulness of the issuance and validity of the warrants, there is no room for reliance on the presumption of legality. Positive evidence is needed: **R v. Henkins** 1954 (3) SA 560 (C.P.D.).

[71] The police aver (and fatally so to their case), that at the time the detained applicants' lawyers sought to see them, these applicants did not know

about any charges and had not even been taken to court for remand. The police considered the request of the lawyers to be an interference with investigations. It must be recalled that the denial of access happened throughout the entire period of detention between 3rd and 20th of August, 2018. The 48 hour period had by then long come and gone without any charge being laid or the applicants being brought to court. The only reasonable inference to draw is that the 3rd and 4th applicants remained in detention for interrogation purposes. This was a clear abuse of police powers and deprivation of their rights to liberty which the Magistrates court had no authority in law to sanction. By so doing, the Magistrate dismally failed in his duty to protect the applicants from unconstitutional and unlawful police conduct.

[72] The concession made that throughout their detention, the 3rd and 4th applicants had not been remanded and did not even know on what charges they were arrested and detained makes good the 1st and 2nd applicants' version that they searched for but did not find any record of their sons' remand or appearance in court. Holding the 3rd and 4th applicants in custody for such a long period and getting it to be extended in the manner it was is a brazen breach of section 4(1) (b) read with section 6(2), (3) and (4) of the Constitution. It was also a non-

compliance with sections 34(2) of the **Criminal Procedure and Evidence Act, 1981** on execution of warrants.

[73] Another troubling feature about the pro-forma warrants is that it is stated therein that the 3rd and 4th applicants were to be arrested or detained and brought before the Maseru Magistrate Court. There are two hypotheses to work by here. The first is that the forms are for warrants of arrest for production before court for remand on a stated charge of robbery. The second is that they are warrants for both section 33(1) and (4) further detentions, that is to say, warrants for further detention of persons arrested without warrants. On the facts, the first hypothesis leads to the result that having arrested and detained these applicants, the police failed to bring them before court as directed "to be examined and answer and to be dealt with according to law". The police failed to bring the arrestees to court as they were ordered but kept them in custody to interrogate them. The warrants were then used for a purpose other than the one they were issued for. The police then acted *mala fide* and thus in *fraudem legis*: **Minister van die Suid-Afrikaanse Polisie en Andere v. Kraatz en 'n Andere** 1973(3) SA 490 (A)

[74] The second hypothesis leads to the result that applying for warrants for further detention eleven days later (on 13 August) when the legality of the

prior detention had long ceased to exist, the police used the procedure for issuance of a warrant for further detention for a purpose which is not authorized. The authorized purpose for a warrant for further detention is to detain beyond forty-eight hours where an arrest was made without a warrant. Here warrants of arrest were issued for production of suspects in court on a charge of robbery and not for confirmation of a reasonable suspicion for its commission by interrogation in custody. Thus, the detention in custody was unlawful and could not be extended.

[75] But even assuming that the warrants were for arrest and detention of the 3rd and 4th applicants for investigating robbery, the police did not inform them and thus failed to execute the warrants in terms of section 34(2) of the Criminal Code and section 6(2) of the Constitution. This rendered their detention illegal and unconstitutional.

[76] It cannot have been the intention of the legislature that where the police arrest with a warrant, they should be allowed to keep a suspect in detention for a period of their choosing in order to interrogate him or investigate further a stated offence and for a magistrate to endorse such conduct by granting an open-ended further detention. This would run counter to the strictures of section 38 of the **Criminal Procedure and**

Evidence Act, 1981 to bring the arrested person as soon as possible before the Magistrate Court upon the charge mentioned in the warrant.

[77] Section 6(3) of the Constitution does not distinguish between arrests with or without warrants in decreeing in mandatory terms that an arrested person "who is not released, shall be brought before a court as soon as is reasonably possible, and where he is not brought before a court within forty-eight hours of his arrest or from commencement of his detention". The onus of justification for non-compliance with this constitutional command is on the police. This means that an arrested person, irrespective of the mode of arrest, cannot not be kept in police custody beyond forty-eight hours without being brought before a magistrate. It is at the stage of appearance in court that a warrant for further detention may be sought and not thereafter. This comes clear in section 6(4) when it provides that "he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court". A warrant of arrest cannot be a licence to detain a suspect in police custody for a period to the liking of the investigators. Ordering further detention without fixing any limit is a breach of section 6(3) (b): **Kharchenko v. Ukraine** [2011] ECHR 258 para 75 (10 February 2011)

[78] So the question asked by this case whether the impugned sections permit further detention for purposes of investigation must be in the negative. Further detention for investigation purposes is only permissible if warranted by clearly proven exceptional circumstances and not for the purpose for compelling the detainee to cooperate with the police or to make admissions or confess to participation in the commission of the offence. Neither should its purpose be to gather all the evidence. A limit must be placed on the period for further detention.

III. DISPOSITION

[79] In my judgment the impugned provisions of the **Criminal Procedure and Evidence Act**, **1981** do not present any constitutional inconsistency, which would warrant their being struck down. Reliance on them as a justification for by the police for their unconstitutional, unjustifiable conduct is specious and falls to be rejected. A misuse of the law to commit an illegal act does not render the law constitutionally non-compliant. It is the misuse that is constitutionally objectionable.

[80] On the facts, it appears that section 12(2) (a) of the Constitution and section 35 (1) and (2) of the **Criminal Procedure and Evidence Act, 1981** are not implicated. There is, therefore, no basis to reach the

question of constitutional inconsistency. The relief sought in regards thereto falls to be dismissed.

Guidelines

[81] In view of the disturbing public outcry about increasing deaths of suspects in police custody, the time has come for a judicial response by laying down the following guidelines for the Lesotho Mounted Police Service, Prosecutors and the Magistrates Court:

> 1. Whenever a police officer arrests a person, he shall immediately inform the person of the reasons for arrest.
>
> 2. The police officer shall disclose his identity, if demanded; show his identity card to the person arrested and to persons present at the time of the arrest.
>
> 3. The police officer shall record the reasons for the arrest and other particulars in a police diary and transfer same to the investigation diary in the docket.
>
> 4. The police officer shall furnish the reasons for the arrest to the person within three hours of bringing him to the police station.
>
> 5. If the police officer, upon arrest, finds any marks or injuries on the person he shall record the reasons for their infliction and take the person to the nearest hospital or government doctor for treatment and obtain a certificate from the attending doctor and furnish a copy of same to the arrested person.
>
> 6. Where the arrested person has suffered injuries during arrest and/or detention in police custody, the Magistrate shall order the prosecutor to refer the matter to the Director of Public Prosecutions to consider preferment of charges of aggravated assault and risking injury or death under Sections 32(g) and 33 of the **Penal Code** against the responsible police officer(s) who arrested and/or interrogated the arrested person.
>
> 7. If the person is not arrested at his residence or place of business, the police officer shall inform the nearest relative or chief by phone or messenger within twelve hours of bringing him to the police station.

8. The police officer shall advise the arrested person of his rights to call and consult a lawyer of his choice if he so desires and allow access by any of his nearest relatives. Such access and consultation shall be allowed before the person is brought before the nearest Magistrates Court under Sections 32 and 34(3) of the **Criminal Procedure and Evidence Act**, 1981.

9. When the arrested person is brought before the nearest Magistrates Court, the police officer shall, in applying for further detention, state reasons why the investigation could not be completed within 48 hours and why he considers that the accusation or information against the person is well-founded. He shall also transmit copies of the relevant entries in the case diary to the same Magistrate and the arrested person.

10. If the Magistrate is satisfied, having considered the stated reasons and materials and representations by the arrested person, he may pass an order for further detention; otherwise, he shall release the person forthwith.

11. If the Magistrate authorizes further detention in police custody, he may allow a stated period not exceeding 48 hours, and if there is no specific case about the involvement of the accused in a cognizable offence within that period, the accused shall be released.

12. The police officer who arrests a person, or the investigating officer, or the jailer as the case may be, shall inform the nearest Magistrate or relative at once about the death of any person who dies in custody.

13. The Magistrate shall inquire into the death of a person in police custody or in jail immediately after receiving the information pursuant to the **Inquests Proclamation No. 37 of 1954**.

Conclusion

[82] In summation I hold that:

82.1 The detention of the 3rd and 4th applicants from the moment of expiry of the forty-eight hours after 3 August and throughout the subsequent period until their remand in custody on a charge of robbery on the 20 August constitutes a violation of their constitutional right to liberty.

82.2 The purported further detention of the 3rd and 4th applicants is unlawful as it was not done in accordance with the behests of the statutory provisions.

82.3 The failure to bring the 3rd and 4th applicants to court as directed in the warrants for arrest and keeping them in police custody for interrogation is unlawful.

82.4 The denial of access by counsel to see the 3rd and 4th applicants while in detention and failure to notify them or their lawyer about the application for warrants for their further detention constitutes a violation of the right of access to legal advice and legal representation.

82.5 Because the 3rd and 4th applicants have since been charged and remanded in custody on a charge of robbery, no declarator need be issued regarding use-immunity of any evidence acquired on the basis of their unlawful detention. This is a matter best left to the trial court to decide on the criterion of whether or not it may negatively impact on the general right to a fair trial: **Metsing** (supra)

Order

[83] In the result, the following order is issued:

1. It is declared that the 3rd and 4th applicants' detention beyond the forty-eight hour period without being charged or taken to court constitutes a violation of their right to personal liberty guaranteed by section 4(1) (b) read with section 6(1)(e) and (3) of the Constitution.

2. It is declared that the warrants for the arrest of the 3rd and 4th applicants were not executed in compliance with section 33(4) and therefore the arrests were unlawful.

3. It is declared that a detained person is entitled to legal representation when further detention is sought and the court hearing such an application must keep a record of proceedings, any objections and reasons for decision.

4. It is declared the 3rd and 4th applicants were denied their right of access to their lawyer while in police custody as well as their right to legal representation when an application for their further detention was made.

4. Costs of suit are awarded to the Applicants. Such costs to include the costs of two Counsel.

5. The Registrar is directed to ensure that this judgment is brought to the attention of the Chief Magistrates, the Director of Public Prosecutions and the Law Society.

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S.P. SAKOANE
JUDGE

I agree:

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E.F.M. MAKARA
JUDGE

I agree:

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M. MOKHESI
ACTING JUDGE

For the applicants: N.J. Mafaesa and R. Mothobi instructed by K.D. Mabulu & Co., Maseru

For the Crown: R.J. Tšeuoa