A REPORT BY JUSTICE

Pre-Trial Criminal Procedure

Police Powers and the Prosecution Process

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Evidence to
the Royal Commission on Criminal Procedure
(Part 1)

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PREAMBLE

Constitutional Principles and International Obligations

1 The United Kingdom is unlike most other democratic societies in not having any legally enforceable Bill of Rights guaranteeing the fundamental rights and freedoms of the individual against the misuse of power by public authorities. We also differ from many member countries of the Council of Europe in not having incorporated the rights and freedoms guaranteed by the European Convention on Human Rights into our legal system. The right to liberty and security of person is not defined in positive terms in United Kingdom law. Such a right exists in the sense that the individual has a right to personal liberty and security save in so far as that right is restricted by the common law or by express statutory enactment, but in many important respects these restrictions are not defined with sufficient clarity. The law is vague and uncertain. Indeed, in some key areas the liberty of the individual is not protected by the law but is, as Sir Henry Fisher has observed, "governed by rules made by the Judges and by administrative directions which may be varied by the Executive at any time"[1].

2 We agree with Sir Henry Fisher that "the balance between the effectiveness of police investigations and protection for the individual is important enough to be governed by law and that the consequences of a breach of the (Judges') Rules should be clear and certain"[2]. In our view, the right to liberty and security of the person should be codified by statute in clear and positive terms. The process of codification should effectively secure the rights and freedoms guaranteed by Article 5 of the European Convention and the right, guaranteed by Article 13, to an effective remedy before a national authority within the United Kingdom for a violation of Article 5. The Convention contains only minimum guarantees, but even so we are not satisfied that they are sufficiently secured within our legal system in all respects and we hope that the Royal Commission will consider this important point.

3 We also draw the attention of the Royal Commission to the specific provisions of Article 9 of the International Covenant on Civil and Political Rights, which came into force in March 1976 and by which the United Kingdom is bound. This Article provides that:

> 1 Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2 Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

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1 Report of the Confait Inquiry, 13 December 1977, para. 15.5
2 ibid. para. 15.6

3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

INTRODUCTION

1 In a free society the police cannot perform their duties effectively unless they are given adequate powers and enjoy the full confidence and co-operation of the public. The public has a moral duty to help the police by providing information and active support when called upon to do so. The police for their part have a duty to use the power at their disposal responsibly and in such a way as to deter and catch criminals without trespassing unduly on the rights and freedoms of law-abiding citizens. If therefore we appear to be reluctant to grant the police some of the additional powers they are demanding and want to circumscribe some of the unregulated power which they enjoy in practice, it is not because we want to help criminals escape detection and conviction, but because of the high value which we place on liberty and on effective safeguards against abuse of power.

2 JUSTICE has always stood for the rule of law and shares the objectives of those whose task it is to combat disregard of the law. We cannot accept, however, that these objectives should inevitably override considerations of freedom. We all accept a degree of limitation. Much of the work of the police proceeds satisfactorily without the invocation of sanctions. Questions are answered and searches submitted to voluntarily. For these reasons we do not think it necessary or right to tip the balance in such a way as to undermine the essential characteristics of our free society and in doing so to run a greater risk of bringing about injustice. The question of police powers is therefore of paramount importance.

3 The right exercise of power in any field, and nowhere more than in the police, requires ethical training and self-discipline reinforced by internal and external checks. Without such checks it is not difficult for two or three dishonest officers to secure the conviction of a man for a crime he has not committed and thus contribute to a lowering of police standards. It is equally necessary that the powers conferred on the police shall be clearly defined and adequate for the duties required of them. We believe that, whether or not the powers of the police are to be extended, the time has come when they should be fully defined by statute, in order that it should be clear to everyone what is within their statutory powers and what is not. It is as much in the interest of the police as of the public that their powers should be defined and known. Moreover, the most effective power which the police may command is the respect and co-operation of the public. This they may lose if they claim excessively wide and easily abused powers.

4 It has been widely accepted for a very long time that the powers enjoyed by the police in England and Wales are deficient in both the above respects. The powers of detention, search, seizure, arrest and questioning are vague. The internal checks are often inadequate and the majority of the external checks have no statutory force. On the other hand, some of the restraints imposed, and the various obstacles the police encounter in

their efforts to bring criminals to justice, are clearly frustrating. These restraints have become increasingly frustrating and harmful to society, and successive governments have failed to give the police adequate manpower and the financial resources needed to combat organised crime and the general growth of lawlessness and violence.

Misleading Assumptions

5 The Commissioner of Police for the Metropolis and the Superintendents' Association for England and Wales both concede in their Written Evidence to your Commission that this frustration leads to undesirable bending of the rules. In respect of powers of arrest and search, the Commissioner says with commendable frankness, "The effect of this is that many police officers have, early in their careers, learned to use methods bordering on trickery or stealth in their investigations because they were deprived of proper powers by the legislature. ... One fears that sometimes so-called pious perjury of this nature from junior officers can lead to even more serious perjury on other matters later in their careers."

6 In our experience the Commissioner's assessment of the situation and its dangers is well founded, but we seriously question the assumption implicit in both Memoranda that the consequences of breaking of the rules will normally be brought to light and corrected by the courts. We cannot accept this as a true picture of the situation. The files of hundreds of cases brought to our notice over the years and the experience of our members who practise in the criminal courts indicate that police malpractice is far more widespread in some forces and crime squads than police spokesmen would have us believe. Furthermore, only a small proportion of the resulting miscarriages of justice is remedied on appeal or as the result of subsequent investigation. In support of this view, we would cite that fact that, during his tenure of office as Commissioner, Sir Robert Mark brought about the prosecution, dismissal or enforced resignation of over four hundred members of his force. These were ostensibly based on evidence of financial corruption, but it is reasonable to infer that the officers who were dishonest enough to accept bribes not to press charges against a known criminal may well have been capable of fabricating evidence against another man. Indeed we know that the conduct of some of these officers had been the subject of unsuccessful appeals and petitions on this score.

7 Another false assumption is that there are ample safeguards against malpractice and abuses of police powers. In support of this assumption the Commissioner for the Metropolis prays in aid

(1) The Judges' Rules

(2) Civil proceedings against police officers

(3) Criminal proceedings against police officers

(4) Disciplinary proceedings against police officers

(5) Applications for writs of habeas corpus

Additionally, the Superintendents' Association calls attentionto the Police Complaints Board, the right of access to solicitors at all stages,

and the safeguards afforded by the court of trial.

8 For a number of reasons we think that this assumption is somewhat naive.

(1) The Judges' Rules have no statutory force and it is only rarely that evidence is excluded so that a prosecution fails because they have been broken, either in respect of improper questioning or refusal of access to a solicitor until an incriminating statement has been obtained.

(2) An application for a writ of habeas corpus does not provide a simple remedy. It presupposes prompt access to a solicitor. It requires finance for counsel which may not be available. It may take three or four days to get it to court, by which time a damaging admission may have been obtained. It may further have the effect of forcing the police to prefer charges in cases where they still have doubts as to whether they should.

(3) As the Superintendents' Association points out in its Memorandum of Evidence (para. 38), the number of civil actions in any one year alleging unlawful arrest or wrongful imprisonment is very small. This is intended to show that very few suspects have a sustainable cause of complaint. It has to be borne in mind however that the mounting of successful civil proceedings is extremely difficult. Usually, legal aid has to be obtained and, if an Area Committee is presented with the statement of a complainant which is not supported by independent witnesses and fully documented evidence, it is unlikely to grant a certificate. It will usually take the view that the evidence of police officers is more likely to prevail.

(4) The earliest part of the same paragraph also minimizes the extent and effect of police irregularities, viz.

"At the risk of being accused of chauvinism the few celebrated cases which are introduced to show misuse of police power invariably refer to persons released from H.M. Prisons following either out-of-time appeals or pardons by the Home Secretary. These are often due to irregularity of procedures during the investigation or during the trial. Whilst it may be a moot point, depending upon one's point of view, the question of guilt or innocence is rarely reviewed in such cases, the decision resting on procedural or evidential niceties."

The view expressed here is based on inadequate knowledge of Home Office principles and procedures relating to petitions. These are never based on irregularity of procedures or on legal or evidential niceties. The experience of JUSTICE, which has submitted scores of factually documented petitions over the years with only occasional success, is that the Home Office consistently refuses to take into account any matters which have or could have been considered at trial or on appeal, or any subsequently discovered improprieties. It almost invariably insists on

factual proof of innocence and the refutation of all the evidence on which a conviction was based, including hotly disputed verbal admissions. JUSTICE has recently been concerned with two cases in which, after a post-trial investigation, the Home Office has refused to take any action on the report of a Chief Superintendent expressing his belief in the complainant's innocence.

(5) It is true that the Court of Appeal from time to time quashes convictions because of some technical irregularity in the prosecution process or during the trial. When the appellant is clearly guilty, this must be a cause of frustration to the officers who have secured the conviction. But it has to be borne in mind that the Court of Appeal can and does apply the proviso in appropriate cases and, when allowing a factually meritorious appeal, prefers to base its judgment on a point of law rather than to voice any public criticism of the police officers involved in the case.

(6) It is equally difficult, if not virtually impossible, for a complainant to bring criminal proceedings against a police officer. Legal aid is not available. A magistrate has to be sufficiently impressed with the evidence to grant a summons. If the complainant is in custody, he will have to obtain the consent of the Home Office, and the Director of Public Prosecutions has power at any time to take over the proceedings and offer no evidence.

(7) Criminal and disciplinary proceedings against police officers following the investigation of complaints likewise provide no real remedy for the complainant, in that the investigations are normally undertaken only after the termination of trial and appeal proceedings and are designed to discover whether the officer has been guilty of any malpractice. Consideration is rarely given to the possibility that the malpractice complained of may have brought about a miscarriage of justice. This point was developed at some length in our submission to the Home Office Joint Working Party on Complaints against the Police.

(8) The courts do not provide adequate safeguards because, as practitioners know, it rarely helps a defendant to ventilate or press complaints against the police either in a magistrates' court, or in the Crown Court, or in the Court of Appeal, however valid and well-supported the complaint may be. In criminal matters it is widely felt by the general public that the Bench is prone to support the police.

9 We further believe it to be wrongly assumed that the scales are too heavily weighted in favour of the accused. The successful prosecution of some known criminals may well be hampered by difficulties in obtaining admissible evidence. There are cases in which falsely contrived defences may succeed and where the right of silence and the jury's ignorance of previous convictions are difficult to overcome. But in many trials the scales are weighted against the accused. Apart from non-disclosure of important evidence, it needs to be understood that:

(1) The prosecution has far greater resources for obtaining and testing forensic evidence and for bringing witnesses to court than has the defence under its limitations of manpower and legal aid.

(2) Whereas the police freely take upon themselves the right to interview defence witnesses, and can bring pressure to bear on them, the defence lays itself open to charges of attempting to pervert the course of justice if it attempts to interview prosecution witnesses.

(3) Trial judges will rarely interrupt or cut short cross-examinations by prosecution counsel but will frequently do so with defence counsel and insist on knowing where the question is leading.

(4) It is very much easier for the prosecution than the defence to obtain a short adjournment or postponement of a trial because of the absence of witnesses.

(5) The prosecution has far greater facilities than the defence for obtaining evidence of rebuttal in the course of a trial.

The Need for Dialogue

10 JUSTICE has accepted for many years that the police require additional legal powers if they are to do their work effectively and honestly, but we have at the same time insisted on appropriate safeguards. We think that we are justified in maintaining this stand. In support of it we would cite what has happened over the requirement to give notice of alibi.* JUSTICE asked for a clause to be added to the Criminal Justice Bill 1967 requiring the police to give notice to the defence solicitors of their intention to interview alibi witnesses, so that they could be present. The government declined to do this but gave an undertaking that appropriate instructions would be given to the police. They were duly given, but have been widely disregarded, and many judges and practitioners are unaware of them.

11 In 1964 representatives of JUSTICE had an all-day meeting with representatives of the Association of Chief Police Officers in the course of which the problems confronting the police were discussed in a friendly and constructive way. At the end of the day we invited them to specify in writing the further powers they required, offering in return to indicate the corresponding safeguards which responsible members of the legal profession would be likely to require. Their response was that they were allowed to make recommendations to the Home Office and not to any outside body. The appointment of your Commission has thus provided the police with an opportunity long denied them to put forward their detailed demands openly and thus to pave the way for constructive criticism and dialogue. We welcome this, but we think that the bodies representing the police are mistaken in thinking and alleging that their only critics are to be found in the ranks of the 'do-gooders' and intellectuals. Our experience is that many responsible lawyers practising in the criminal courts are worried by some aspects of police practice in the

* This requirement was originally proposed by the JUSTICE Committee on Evidence.

gathering and presentation of evidence and by the harm they can do both to the public image of the police and to the integrity of criminal trials.

POWER TO STOP, SEARCH AND ARREST

12 It is beyond the resources of JUSTICE to analyse and list the wide variety of powers at present enjoyed by the police or denied to them. This work has been done so thoroughly and the results set out so clearly by the Commissioner for the Metropolis and by the Superintendents' Association in their Written Evidence that we think it sensible to comment only on some of the specific requests made by them for further powers.

13 The evidence submitted by the Superintendents' Association calls for a general power to stop and search any individual or vehicle on reasonable suspicion. Our view on this is that in relation to individuals such a power is too wide and too vaguely defined to be generally applied, and would be likely to create ill-will, suspicion and fear of the police among the public outweighing any supposed gain in the detection of crime. It is a particularly dangerous power when exercised by officers in plain clothes and we have had a number of cases brought to our notice in which wholly innocent men have mistaken police officers for potential muggers, have run away or resisted arrest, and have ended up being charged with obstruction or assault. We are aware that special powers to stop and search on suspicion of unlawful possession have already been conferred on the police in the Metropolitan area and in certain large provincial cities. This has created anomalies that are obviously undesirable and the question is whether they should be removed by abolishing the special powers or by making them uniform throughout the country.

13A Our view is that such rights as are to be conferred should be uniform throughout the country, and should be restricted to cases where there is a specific suspicion. The physical power to stop and search already exists and is frequently exercised by police officers without resistance or protest. Persons carrying bags are often asked to show their contents. It is only when they refuse that a right to enforce the request comes into question. We do not believe that such a right of enforcement should be conferred except where the officer is in uniform and has a specific suspicion of an offence based on reasonable grounds, analogous to the present law in respect of persons suspected of being in possession of dangerous drugs. Life style or mode of dress does not and should not in itself justify such a suspicion.

14 We do however recognise that some particular areas are so sensitive that special provisions are necessary. They include docks, airports, customs houses, nuclear installations and military bases. Existing statutes covering these institutions and others in the same category vary as to the circumstances in which authorised persons have the right to stop, question and search. Members of the public visiting such areas would normally recognise the need for special security, but notices could make this doubly clear. The right to stop and search should extend to an appropriate radius from the boundaries of the installation but only if the officer reasonably

suspects some unlawful possession or intent. We do not recommend a corresponding amendment to S.54 of the British Transport Commission Act 1949 as it applies to railways, as we do not think that they fall so clearly into the category described above.

15 We believe it to be in the public interest that the police should be empowered to stop and search for offensive weapons, including cans and bottles, any person seeking to enter a football ground or other sports area, or taking part in a public procession or gathering, if they have reasonable grounds for believing that there is a danger of disorder or violence. We further think that such a power should be extended to cover the searching of special coaches and railway trains carrying supporters to such events.

Additional Powers Requested by the Police

16 In relation to the other powers asked for by the Commissioner, our views are as follows:

(1) "To stop search and detain persons and vehicles in public places for articles which may cause injuries or damage to persons or property."

Apart from the specific purpose mentioned in para.15 above, we would not approve of this general power. We take the view that it amounts to a general right to search without warrant in any public place, as widely construed by the courts, and at any time. The Commissioner envisages a limited use of the power, but this would not prevent an officer exercising it arbitrarily.

(2) "To seize property found in a public place believed to be of evidential value."

We would accept this subject to the belief being based on reasonable grounds, and with the reservation that the retention should be for no more than a reasonable period, the owner to have a right of access to the court. (See Ghani v Jones)

(3) "To search persons and possessions in a public place if by reason of a person's presence at a particular location an officer believes that such search may assist in the prevention of a serious crime or danger to the public."

This is too wide: our recommendations in paras.14 and 15 above should suffice.

(4) "To set up road blocks authorised by a senior officer for specific purposes."

We would not accept this as the existing powers and practices appear to be adequate. As the Commissioner observes, the law-abiding members of the public always allow search.

(5) "To obtain a search warrant to search for evidence of an offence."

If this means a warrant to search for articles connected with a known offence which the police have reason to believe is to be found at a

particular place, we would have no objection. But if it goes further than this, we would oppose such a wide extension of present powers.

(6) "To obtain a Bankers' Books Evidence Act 1879 order at any stage in an investigation and the definition of 'bank' and 'books' in the Act to be widened."

We would not accept the first of these requests because we feel that a person's bank account and correspondence with his banker may contain matters of a private nature which he is entitled to keep confidential. We therefore think that an order should be obtainable only after investigation has brought to light tangible evidence that the suspected person is engaged in criminal activities. If your Commission should decide that existing powers should be widened, we would take the view that an order should be granted only by a High Court judge and that application should be based on affidavits. As for the second request, we agree that the definition of 'bank' and 'books' should be widened and think that the Department of Trade would be an appropriate authority to designate the banks to be brought within the purview of the Act.

(7) "To obtain names and addresses of witnesses."

We are likewise reluctant to support this proposal, although we appreciate and have considerable sympathy with its purpose. A witness to a crime or accident may have very strong personal reasons for not wanting his presence at the scene to be disclosed. He may be genuinely nervous and unsure of the evidence he may be asked to give and a reluctant witness is rarely a good witness. The difficulty of distinguishing genuine witnesses from persons who merely happen to be present at a scene is very great and the proposed power would on many occasions simply enable the police to compile a dossier on everyone present at a particular time and place. Furthermore, it has come to be generally known that witnesses may be kept waiting for days on end without being called and, if called, may be subjected to hostile cross-examination and the disclosure of any criminal convictions. We think that the reluctance of witnesses to get involved would be considerably lessened if they were treated with greater consideration.

(8) "To extend to places outside England and Wales over which any court in England and Wales has jurisdiction (i.e. British ships and territorial waters) the powers and privileges of a constable."

We agree that the powers and privilages of a constable should be so extended.

(9) "To obtain in certain circumstances from a High Court judge a fingerprinting order for persons in a particular area."

We do not agree with this proposal, as we believe it to be too great an infringement on the liberty of the subject. We have no means of knowing how many refusals are met with in the course of such an exercise but we would imagine that those who refuse automatically become prime suspects and, unless thay can prove sound alibis, are likely to be subjected to prolonged and repeated questioning. We also have in mind the require-

ments of the Magistrates' Courts Act to the effect that when a fingerprint order is made it has to be carried out in the precincts of the court or at a place where the subject of the order has been committed in custody. This provision was specifically designed to prevent the fingerprinting being carried out with undue force by the arresting officers.

(10) "Search on arrest."

We accept the need for the police to be able to search with the minimum of delay not only the person but the personal property (including vehicles) of anyone they have arrested. They should also have the power to seize and retain for a reasonable period any property which might provide evidence of or be the proceeds of an offence and take from him any article which might be used to cause injury or to effect an escape. We do not however think that they should have the power to search any premises where he lives or carries on business without obtaining a warrant. In cases of urgency a police officer can obtain a warrant from a magistrate at any hour of the day or night. We also think that premises where he carries on business should be strictly interpreted and not extended to include premises where he works as an employee without managerial responsibility. A right of access to the court should exist in all cases where property is seized.

We are also worried by the number of cases reported to JUSTICE in which the finding of articles in clothes, cars, homes and business premises has been disputed and the evidence has sometimes been shown to have been planted. We therefore recommend that such searches should be carried out where practicable in the presence of the occupier of the premises, and in any event by at least two officers acting together.

(11) "Use of necessary force when a power of search exists."

We agree that the use of necessary force should be allowed in all cases when a search warrant has been issued. We think however that this power should be used with more care and consideration than it sometimes is at present. It is a terrifying experience for a wife or mother of a suspect to have her house suddenly invaded and overrun by a squad of police officers.