



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

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February 14, 2017

MEDIA RELEASE

Re: “Preventative Detention”: What is it?

I have noted the robust discussion on the above captioned phrase in the public domain. As a public service I now make available a comprehensive dissertation to the public discourse in an effort to provide context and to explain aspects of the legal terms involved in an informed discussion of the issues arising.

THE POWERS OF ARREST

HISTORY

In relation to the United Kingdom and by extension the Commonwealth historians are divided as to the origin of the office of **Constable**. Some (and it seems to be the conventional wisdom) date the office to the Norman conquest-1066-when William the duke of Normandy became William I King of England.

Other historians perhaps not wishing to ascribe the origin of such an important office to a roguish French interloper, have pushed the boundaries back to Alfred the Great circa 871 CE.

The term was also used at the local level within the feudal system however, describing an officer appointed to keep order.

With the establishment of an empire, the office was planted around the world wherever a British flag was planted and people were conquered and subjugated to British rule.

If **WIKIPEDIA** is to be believed then the history of law enforcement in Jamaica began in 1716 when night watchmen were appointed to serve the cities of Port Royal, Kingston, and the parishes of Saint Catherine and Saint Andrew. In 1832 the first attempt to establish a permanent

police force began, and William Ramsay was appointed Inspector General of the police force in 1835.

In the aftermath of the **Morant Bay Rebellion** in 1865 the decision was taken to establish a para-military organisation which is known today as the Jamaica Constabulary Force. This institution was established in 1867.

DUTIES OF THE FORCE

Section 13 of the **Constabulary Force Act** sets out the duties of the members of the Jamaica Constabulary Force. These duties are as follows:

[1] to keep watch by day and by night,

[2] to preserve the Peace,

[3] to detect crime,

[4] to apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence,

[5] to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter ; and

[6] to do and perform all the duties appertaining to the office of a Constable.

Please note that although the right of the Constable to arrest a citizen on reasonable suspicion that he is about to commit an offence is not expressly provided for in the Constabulary Force Act (which codifies all other duties of the Constable at Common law), this arrest which could be called a “preventative arrest” would still obtain at common law and is also recognized in the Constitution as a circumstance which could cause the deprivation of one’s liberty.

It is generally accepted that the most coercive power in possession of the **Constable** is the power of arrest. This of course would attach to ALL police officers.

WHAT IS AN ARREST?

The law defines an arrest as the beginning of imprisonment. It occurs when a law enforcement officer states in terms that a person is arrested, when he either:-

[i] uses force to restrain the individual concerned or

- [ii] when by word or conduct he makes it clear that he will if necessary use force to prevent the individual from going where he wants to go¹. The constable who is using the method of word or conduct must use clear and unambiguous language. The subject being arrested must not be able to draw an inference that he has a choice whether or not to accompany the police. In the words of Lord Parker a former Lord Chief Justice of England and Wales:-

A police officer should use very clear words to bring home to a person that he is under compulsion, and the simplest words to use are "I arrest you"²

There is no such thing as either a symbolic arrest or custodial arrest. There is either a complete arrest or there is no arrest at all. An arrest is complete only when the person /suspect is in fact prevented from leaving the custody of the officer. As stated before this may be accomplished either by physical restraint or by words alone provided that he submits to the restraint³.

An arrest has three purposes either individually or collectively. These are:

- [i] **Preventive** (in order to terminate a breach of the peace actual or prospective or in the case of the statute terminate the commission of an offence against its provisions).
- [ii] **Punitive** (e.g. to take a person before a court of law to answer for an offence); or
- [iii] **Protective** (e.g. where drunk or mentally disordered persons are arrested for their own protection).⁴

It would seem that the use of the phrase “preventative detention” is really interchangeable with the phrase “preventative arrest”. Both phrases, given the context previously outlined would embrace the concept of the **Constable** being able to arrest someone on reasonable suspicion that they are about to commit an offence.

WHO CAN ARREST?

District Constables or as they are known members of the Rural Police shall have all the powers of constables, and they shall exercise their office at all times when required to do so by any Justice, or any officer of the Constabulary to whom such district constable is by this Act made

¹ **Blackstone's Criminal Practice 2006**. Peter Murphy (Ed). Oxford University Press. Paras.D1.3 & D1.4

² **Alderson v. Booth** [1969] 2 Q.B. 216

³ **Blackstone's Criminal Practice 2006**. Para D1.4. See also *Murray v Ministry of Defence* [1988] 1 WLR 692

⁴ **Blackstone's Criminal Practice 2006**. Para D1.3

subordinate, and also, whenever in his judgment the public safety or welfare, or the ends of justice demand it⁵.

In addition to District Constables the power of arrest has been conferred upon other entities such as Fisheries Inspectors, Game Wardens⁶ where they may arrest (without warrant) any person committing or reasonably suspected of having committed an offence for which the fishery inspector has jurisdiction⁷.

Forest Officers also possess this power to arrest (without a warrant).⁸

The Agents of the Independent Commission of Investigations (INDECOM) are also conferred with the powers of a **Constable**, pursuant to Section 20 of their enabling legislation – **The Independent Commission of Investigations Act**. These powers, authorities and privileges as are given to a **Constable** are conferred upon them solely for the specific purpose of giving effect to particular Sections of their legislation.

However, they are not in fact **Constables** and they cannot exercise such powers outside of the jurisdiction of their Act⁹.

A power of arrest without a warrant is also conferred on the ordinary citizen but she may **ONLY** arrest in circumstances where she has witnessed the felony being committed or the felony has already been committed.

THE CONSTITUTIONAL CONTEXT

⁵ S. 4 **District Constables Act**.

⁶ Section 17 of the **Wild Life Protection Act** (re fisheries inspectors and game wardens) Where any person is found committing, or is reasonably suspected of being engaged in committing an offence against this Act or any regulations made thereunder, any Game Warden, Fishery Inspector or Constable may without warrant stop and detain him, and if his name and address are not known and he fails to give them to the satisfaction of the Game Warden, Fishery Inspector or Constable such Game Warden, Fishery Inspector, or Constable, may without warrant apprehend him and, where such arrest is effected by a Game Warden or Fishery Inspector, shall forthwith deliver him into custody at the nearest police station to be dealt with according to law.

⁷ Section 17 **Wild Life Protection Act**. Fishery Inspector must deliver such person arrested to the nearest police station. Section 13(2)(b)(ii) of the Exclusive Economic Zone Act (as a marine officer). Section 24(2)(b)(c)(e)(g)(h) of the **Maritime Area Act**. Section 8 of the **Morant and Pedro Cays Act** (arrest without warrant) and detain that person until he can be delivered to the police in Kingston.

⁸ Section 32 **Forest Act** :- Any forest officer or any constable may arrest without a warrant **any** person who has committed, or attempted to commit, or is reasonably suspected by that forest officer or constable of having committed or attempted **to** commit, an offence against this Act, if he has reasonable grounds for believing that that person will abscond unless arrested or if the name and address of that person are unknown to and cannot reasonably be ascertained by him.

⁹ **Police Federation et al v Commissioner of Independent Investigations et al** [2013] JMFC Full 3

The power of arrest and detention by a **Constable** of police can only be valid if it conforms to the constitution.

The Charter of Rights and Fundamental Freedoms, 2011 in section 13 guarantees the rights and freedoms set out in subsections (3)¹⁰ and (6)¹¹ of this section and in sections 14, 15, 16 and 17; and the main issue is does the power of arrest abrogate, abridge or infringe rights guaranteed under the **Charter of Rights, 2011**. Can such a power be justified in a free and democratic society?

Section 13(2) (b) of the **Charter** states:-

Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

The power of arrest is on the face of it an interference with the constitutional guarantee of liberty.

THE COMMON LAW, STATUTE AND THE POWER OF ARREST

¹⁰ (3) The rights and freedoms referred to in subsection (2) are as follows **(a)** the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted; **(b)** the right to freedom of thought, conscience, belief and observance of political doctrines; **(c)** the right to freedom of expression; **(d)** the right to seek, receive, distribute or disseminate information, opinions and ideas through any media; **(e)** the right to freedom of peaceful assembly and association; **(f)** the right to freedom of movement, that is to say, the right **(i)** of every citizen of Jamaica to enter Jamaica; and **(ii)** of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica; **(g)** the right to equality before the law; **(h)** the right to equitable and humane treatment by any public authority in the exercise of any function; **(i)** the right to freedom from discrimination on the ground of (i) being male or female; (ii) race, place of origin, social class, colour, religion or political opinions; (j) the right of everyone to **(i)** protection from search of the person and property; **(ii)** respect for and protection of private and family life, and privacy of the home; and **(iii)** protection of privacy of other property and of communication; **(k)** the right of every child **(i)** to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State; **(ii)** who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels; **(l)** the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage; **(m)** the right of every citizen of Jamaica **(i)** who is qualified to be registered as an elector for elections to the House of Representatives, to be so registered; and **(ii)** who is so registered, to vote in free and fair elections; **(n)** the right of every citizen of Jamaica to be granted a passport and not to be denied or deprived thereof except by due process of law; **(o)** the right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7); **(p)** the right to freedom of the person as provided in section 14; **(q)** the protection of property rights as provided in section 15; **(r)** the right to due process as provided in section 16; and **(s)** the right to freedom of religion, as provided in section 17.

¹¹ No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

The powers of arrest entrusted to a **Constable** are a mixture of common law and statutory powers.

CATEGORIES OF ARREST

The powers of arrest are divided into 2 categories:-

- [1] Arrest without a Warrant; and
- [2] Arrest with a Warrant

ARREST WITHOUT WARRANT

The police have at common law and at statute the power to arrest and lay charges. Section 15 of the **Constabulary Force Act** confers upon the police the power to arrest without warrant in certain circumstances

It shall be lawful for any Constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or grant that person bail in accordance with the Bail Act.

Moriarty's Police Law 19th edition lists these certain and special circumstances. At common law the police are only empowered to arrest without a warrant in certain cases.

- [i] Where the offence is committed within his own view. The Court of Appeal of Jamaica has held that where a power is conferred by statute to arrest a person found committing an offence, the arrest must, in most cases, be made while the offence is actually being committed, or on fresh pursuit¹².
- [ii] On his own reasonable suspicion, which must be based on two factors: **[1]** the information and evidence that he has before him and **[2]** his honest belief that an offence has been committed or is about to be committed.
- [iii] on the charge of a third person.

Some examples of arrest without warrant are as follows:-

Section 18 of the **Constabulary Force Act** states that “it shall be lawful for any Constable to apprehend without warrant any person known or suspected to be in unlawful possession of opium, ganja (*Cannabis Sativa*), morphine, cocaine or any other dangerous or prohibited drugs, or any person known or suspected to be in possession of any paper, ticket or token relating to any

¹² **R v Owen Sampson** (1954) 6 JLR 292

game, pretended game or lottery called or known as Peaka Peow or Drop Pan, or any game of a similar nature and to take him forthwith before a Justice who shall thereupon cause such person to be searched in his presence”.

In relation to the possession of ganja those provisions are subject to the recent amendment to the **Dangerous Drugs Act** where the weight of the substance is the relevant factor.

Section 62 of the **Larceny Act** not only empowers the Constable to arrest without a warrant **but also the ordinary citizen** where they find any person committing a breach of the provisions of the Larceny Act (eg. Simple Larceny, Robbery With Aggravation, Praedial Larceny, False Pretences etc) and forthwith have such person taken together with the property, if any, before a Parish Judge or Justice of the Peace to be dealt with according to law.

Section 4 of the **Towns and Communities Act** prescribes that it shall be lawful for any constable to take into custody, without warrant, any person who shall commit any of the offences hereinbefore mentioned¹³ within view of any such constable, and in like manner when the offender is unknown, without warrant to take into custody any such offender who shall be charged by any other credible person with recently committing any of the said offences, though not committed within view of such constable, but within view of the person making such charge.

Section 7 of the **Towns and Communities Act** also mandates a constable to take into custody, without a warrant, all drunken, loose, and disorderly persons whom he shall find disturbing the public peace, or disturbing any inhabitant or passenger, and all persons whom he shall find between the hours of nine at night and six in the morning lying or loitering in any high-way, piazza, or other open place, and not giving a satisfactory account of themselves. All such persons shall be guilty of an offence against this Act.

Section 31 of the **Public Order Act** states that a constable may arrest without warrant any person reasonably suspected by him to be committing or to have committed any offence against the provisions of the Act.

ARREST WITH WARRANT

Section 16 of the **Constabulary Force Act** prescribes the power of arrest with a warrant. It states that:-

Any warrant lawfully issued by a Justice for apprehending any person charged with any offence may be executed by any Constable at any time notwithstanding that the warrant is not in his possession at that time but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest.

CONSTITUTION AND ARREST

¹³ See offences contrary to sections 3,

Although said before that an arrest is technically an infringement to the rights of liberty and free movement it must also be said that no rights are absolute and constitutionally guaranteed fundamental rights can be derogated from when it can be demonstrably justified as necessary in a free and democratic society.

Section 14 (1) of the **Charter** states that no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in certain circumstances. Importantly two of those exceptional circumstances are in subsection (1)(f) which states that one's liberty may be deprived by way of arrest or detention:-

- (i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or
- (ii) **where it is reasonably necessary to prevent his committing an offence.**

This provision in the Charter is a constitutional codification of principles of common law touching and concerning the power of arrest.

ARREST TO PREVENT

At common law the police has the power to arrest where they reasonably suspect that an offence is about to be committed.

At common law where the offence is a felony (murder, attempted murder, wounding with intent, Causing Grievous Bodily harm with Intent, Simple Larceny, Larceny of Cattle, Praedial Larceny, Illegal Possession of a Firearm etc) the Constable can arrest without warrant in the circumstances where: **[a]** the felony is committed or **[b]** on reasonable suspicion that a felony has been committed or is about to be committed¹⁴.

Where the offence is a misdemeanour the rule is that the officer's power to arrest (without a warrant) may be exercised where there was a reasonable ground for supposing that a breach of the peace was about to be committed or renewed in his presence¹⁵.

The reasonableness of the exercise of this power of prevention rests on two plinths.

- [1] **That the exercise of the power was justifiable; and**
- [2] **That the period of detention was not unjustifiably lengthy.**

¹⁴ **Christie and Another v Leachinsky** [1947] A.C. 573 ; **Police Powers of Arrest by Dennis Daly QC 1997.**

¹⁵ **R v Owen Sampson** (1954) 6 JLR 292

At all times when exercising this power the police must act in accordance with the provisions of s.14 (2)(b) of the **Charter** which states that:

“at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of the reasons for his arrest or detention”.

In addition any person so arrested or detained shall have the right:

- (a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice¹⁶; and
- (b) to communicate with and retain an attorney-at-law¹⁷.

Furthermore, the police must be mindful of the provisions of s.22 of the **Bail Act** which state that where a person who is arrested or detained is not charged within twenty-four hours after such arrest or detention, he shall be brought forthwith before a Resident Magistrate or a Justice of the Peace who shall order that the person be released or make such other order as the Resident Magistrate or the Justice of the Peace thinks fit, having regard to the circumstances.

IN SUMMARY

It is very important to be reminded of the following propositions of law:

- [i] An arrest must be justified by some rule of positive law. In short the power to arrest must be exercised for a proper purpose. Therefore an arrest is lawful if one has reasonable grounds for suspecting that person has committed an offence or is about to commit one.

However, the police officer (when acting on reasonable suspicion) must approach the arrest function with objectivity and make all such inquiries as are immediately and reasonably practicable. However, she is **not** obliged to discount all possible defences or seek complete proof before carrying out an arrest.

- [ii] An arrest will be unlawful-even if made on the basis of reasonable suspicion of having committed an offence- if the arrester knows at the time of the arrest there is no possibility of a charge ever being made¹⁸.
- [iii] *“Reasonable cause”* or *“Reasonably suspected”* refers to the facts in existence at the time of the arrest and not on the state of the law or the arrester’s particular view of the law and those facts can be based on evidence which would not be admissible in Court such as hearsay as long as it is reasonable and the **Constable** believes in it¹⁹. The factual

¹⁶ S.14(2)(a) of the **Charter of Rights, 2011**

¹⁷ S.14(2)(d) of the **Charter of Rights, 2011**

¹⁸ **Blackstone’s Criminal Practice 2006**. Para D1.3

¹⁹ **Blackstone’s Criminal Practice 2006**. Para D1.5

circumstances should be such that the ordinary man in the street, acting without bias or prejudice, would fairly have suspected the suspect/accused of having committed the offence.

- [iv] Every Police officer on arresting a citizen must inform the person arrested of the reason for the arrest - **Either at the time of the arrest or as soon as is reasonably practicable after the arrest. This applies even though the reason for the arrest is obvious** –unless this information is given, the arrest is not lawful²⁰ and then the constable becomes liable for false imprisonment²¹.

The authorities establish the proposition that if one arrests without a warrant upon reasonable suspicion for a crime which does not require a warrant the arrester must in the ordinary circumstances of the case inform the suspect of the reason for his arrest²².

The grounds for arrest may be in colloquial language or slang if the constable forms the view that the person being arrested is likely to understand. As long as the words used aptly describe the offence for which the arrest is made. So words such as *“Hey rude you! me a scrape you up fi tief de yam dem from off a Mass Claudie farm down a Junction”* may be regarded as sufficient.

The officer may not give reasons on which he does not intend to rely. He may not lead a person to think that he will be arresting him for one offence when in truth he plans on arresting him for another²³.

However, the requirement that the person arrested ought to know the grounds upon which he is being arrested **does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained**²⁴. E.g. he is caught in the act of committing the offence by the constable.

- [v] A Police Officer may use reasonable force to make an arrest of a suspect/accused especially if he resists or attempts to escape. Reasonable force is determined by taking into account all the circumstances including the nature and degree of the force used, the gravity of the offence for which the arrest is to be made, the harm that would flow from the use of force against the suspect, and the possibility of making the arrest or preventing the harm by other means. The only force that may be used is that which is necessary to secure and subdue the suspect.

²⁰ **Blackstone’s Criminal Practice 2006**. Para D1.6

²¹ **Stones Justice Manual 1974 vol.1**. CT Latham and JR Richman (Eds).

²² **Stones Justice Manual 1974 vol. 1**

²³ **Blackstone’s Criminal Practice 2006**. Para D1.6

²⁴ **Stones Justice Manual 1974 vol. 1**

Force cannot be used where the suspect does not resist arrest or attempt to escape. Accordingly constables must resist the temptation to drop a few ‘licks’ on the suspect to punish or chastise him for his offence (Please see also the Jamaica Constabulary Force Human Rights and Policy Use of Force and Firearms Policy).

- [vii] Where in the lawful course of his duties – such as making an arrest- a **Constable** is assaulted or the suspect/accused resists his arrest by the officer, such a person is guilty of an offence. Such a person would be liable on conviction to the punishment of a fine of two thousand dollars (\$2000)²⁵.
- [viii] Non-Jamaican nationals are entitled to the diplomatic protection of their countries. So the relevant embassies are to be notified when such an arrest is made.
- [ix] Just because an arrest has been made does not necessarily lead to the assumption that a charge will be laid. Where an arrestable offence has been committed (e.g. murder), and the constable in his investigation had reasonable cause for suspecting the person arrested to be guilty of the offence, he was entitled to arrest him and that the interrogation of a suspect in order to dispel or confirm a reasonable suspicion was a legitimate cause for arrest. So when a constable exercised his discretion to arrest and took into consideration that the suspect might be more likely to confess their guilt if arrested and questioned at the police station that was a relevant matter and therefore did not render the exercise of his discretion unreasonable and did not make the arrest unlawful²⁶.

EXTRAORDINARY CIRCUMSTANCES

The **Constabulary Force Act** makes allowances for arrest and detention in extraordinary circumstances where upon an evaluation of the nature or extent of criminal activity in any particular locality or area, the Commissioner of Police²⁷ has reasonable grounds to believe that in the interest of public safety or public order or for the purpose of preventing or detecting crime, it is necessary so to do he may establish a cordon around the area²⁸.

The cordon can only last for twelve hours²⁹.

²⁵ Section 30 of the **Constabulary Force Act**

²⁶ **Holgate-Mohammed v Duke** [1984] A.C. 437

²⁷ 50B(2) The powers exercisable by the Commissioner pursuant to this section may be exercised by a member of the Force not below the rank of Assistant Commissioner who is duly authorized by the Commissioner for that purpose.

²⁸ S.50B(1)(3)(a).

²⁹ S.50C(a)

For more drastic measures such as a curfew which would restrict citizens within that locality to remain within their premises during the hours so specified unless otherwise authorized in writing by the member of the Security Forces who is in charge of enforcing the curfew then the Commissioner of Police must receive written approval of the Minister of National Security.³⁰

During the period of such cordon or curfew the police shall have the powers of search without a warrant in relation to searching dwelling houses in order to apprehend any person upon reasonable suspicion that he is in the course of committing or has committed or is about to commit, an offence³¹.

This arrest or detention can only be made where the Officer in charge of the cordon or curfew is satisfied that there is reasonable ground for the arrest or detention of such person³².

SAFEGUARDS

Where any person is arrested or detained that person shall -

- (a) immediately be told the reason for his arrest or detention;
- (b) forthwith be taken before a Justice of the Peace who shall determine whether or not there are reasonable grounds for the arrest or detention.

If a Justice of the Peace is satisfied that the detention or arrest of any person is reasonably required in the interest of justice he may, having regard to such further investigations as may be necessary, order that -

- (a) such person shall be remanded in custody for a period not exceeding twenty-four hours; and
- (b) at the expiration of the period of twenty-four hours, the person shall be taken before a Resident Magistrate³³

Where a Justice of the Peace is not satisfied that the detention or arrest of any person is reasonably required in the interest of justice, he shall order that the person be released forthwith³⁴.

CONCLUSION

³⁰ S.50B(2)(b)

³¹ S.50B(5)

³² S.50F(1)

³³ S.50F(2)(a)(b)(3)(a)(b)

³⁴ S.50F(5)

In our view at the Office of the DPP the phraseology ‘**preventative detention**’ is merely descriptive of what powers the common law has always provided for a **Constable** where that Constable is arresting a citizen who is reasonably suspected to be about to commit an offence—no more and no less. We have deliberately sought to trace the history of this functionary, that is, the **Constable** as well as to examine the issues of “arrest” and reasonable suspicion. This will show that the power of the Constable to arrest a citizen once they have reasonable cause to suspect that this citizen is about to commit an offence was well known at common law and has been recognised by the Constitution. Again we reiterate that the phrase “preventative detention” is interchangeable with the phrase “preventative arrest” in the context previously outlined.

It is hoped that this opinion prepared in consultation with me, by the Legal and Legislative Unit of the Office of the DPP headed by Mr. Jeremy Taylor, Senior Deputy Director of Public Prosecutions, will provide clarity in discussions on this matters in the public domain.

Ms. Paula V. Llewellyn, Q.C.
Director of Public Prosecutions