

FALSE IMPRISONMENT:- WHEN DETENTION
BECOMES UNLAWFUL?



Submitted in partial fulfillment of
the requirements for,

The Diploma in Law
at the

Mara Institute of Technology
Shah Alam
Selangor.

October, 1987

PREFACE

The concept of fundamental liberties have been discussed thoroughly from theoritical to practical aspects by various writers. On the other hand, in relation to bodily restraint specifically, there is still a lacuna. Little is known about the practical and application of the law regarding detention. The person who is being detained by the authorities concerned is guilty in the eyes of the public but he is not guilty in the eyes of the law, until proven to the contrary.

It is the aim, objective and intention of this paper to examine matters concerning detention where the detention made by the authorities concerned is not always lawful. The writer proposes to discuss in greater detail the detention carried out by the authorities with specific reference made to the Internal Security Act 1960 and other legislations relating to the law of detention. The writer also discusses the conflicts in law which arises and to what extend does the Federal Constitution prevails over the Internal Security Act.

Finally, the writer is of the opinion that it is essential to observe how exhaustive and effective is the fundamental liberties in question involving the law of detention in Malaysia.

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ACKNOWLEDGEMENT

To say that this project paper is solely mine, it is untrue. The completion of this paper has left me in great debt to many people. I take this opportunity to express my deepest gratitude to my supervisor Mr. Valentine Manuel and also to Mr. Jaginder Singh for their guidance, interest and comments which they have shown in the completeness of this paper.

I also wish to extend my gratitude to the staff of the law section of the Perpustakaan Tun Abdul Razak of Institut Teknologi Mara, the staff of the law library, University Malaya, Kak Timah who has typed this paper and also to my fellow friends for their assistance in doing the subject matter.

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1. Criminal Procedure Code (F.M.S. Chap. 6)
2. Federal Constitution.
3. Internal Security Act, 1960

ABBREVIATIONS

1. A.C. Appeal Cases (England)
2. A.I.R. All India Report
3. L.T. Law Times
4. M.L.J. Malayan Law Journal
5. T.L.R. Times Law Report

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Specially dedicated to my
beloved mak & bapa for being
there when I needed you most &
also to my beloved brothers and
sisters for their support in
my study.

Cviri

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CHAPTER 1

INTRODUCTION

CHAPTER I

INTRODUCTION

A. Definition

The greater part of the learning on false imprisonment relates to the detention of persons who are, or are supposed to be, offenders against the law or mentally defective.¹ An action of false imprisonment lies at the suit of a person unlawfully imprisoned or detained against the person who causes the imprisonment or the detention.

Any total restraint of the liberty of the person, for however short a time by the use or threat of force or by confinement is an imprisonment. A restraint of personal liberty or detention may be made:-

- i. In order to effect an arrest and to enforce laws and ordinances.
- ii. When necessary for the protection of the public safety.
- iii. When necessary for investigation purposes by a law enforcement officer.

¹ A note of Contractual Restraint of Liberty, 1928 Law Quarterly Review pg. 464.

An arrest must include detention but many detentions, are used in situations where there is no arrest. Arrest is the legalized procedure in which detention is used to bring the person arrested before a court to face a charge.

Detention may be classified in two classes :-

i. Physical.

ii. When a person is not physically detained but is stopped from doing a certain act or is being guarded or controlled by another person.

In the case of Meering v. Grahame - White Aviation Co. Ltd.² a person may be imprisoned without being aware of it at the time. In this case the plaintiff was taken to a police station and put into a waiting room, where two--policemen stayed on duty in the vicinity of the waiting room. The plaintiff was suspected of stealing a keg of varnish from his employer. The plaintiff later brought an action for false imprisonment against his employer. The defence of the defendant was that the plaintiff was free to go where he liked, that he knew it and that he did not desire to go away. The Court of Appeal held that the defendants were liable because the plaintiff from the

² (1919) 122 LT 44.

moment that he came under the influence of the police was no longer a free man. Atkin L.J. said:

"It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. Of course the damages might be diminished and would be affected by the question whether he was conscious of it or not."

The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant. The onus then lies on the defendant of proving a justification.

B. Provisions Of The Law Regarding Detention

(i) The Federal Constitution

The constitution of the Federation of Malaysia makes some provision to preserve a free society by protecting the liberties or fundamental rights of the individual members. Part 11 of the constitution consisting of Article 5 to Article 13 is the Malaysian Bill of Rights. It sets out most of the fundamental liberties. Some liberties are absolute, while others are qualified by the provision of Part 11.

Under Article 149 Parliament may in certain circumstances pass laws inconsistent with Article 5, Article 9 or Article 10.

Article 5(1) reads as follows:-

"No person shall be deprived of his life or personal liberty save in accordance with law."

Article 5(2) :-

"Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

The complaint is of course, in the nature of an application for a writ of habeas corpus but the constitution prescribes no form of words or procedure for the complaint.

Article 5(3) provides that:-

"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

Article 5(4) :-

"Where a person is arrested and not released he shall without unreasonable delay and in any case within twenty-four hours (excluding the times of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."

Any person who is illegally or unlawfully detained is entitled to the writ of habeas corpus. This was stated in the case of Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs³:-

"Habeas corpus is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid."

Therefore, as long as the detainee is unlawfully detained the court has a discretion in granting the writ. In Wharton's Law Lexicon, the writ of habeas corpus is defined as :-

"The most celebrated prerogative writ in the English Law, a remedy for a person deprived of his liberty. It is addressed to him

³ [1975] 2 MLJ 219

who detains another in custody and commands him to produce the body with the day and cause of his detention and caption and to do submit to and receive whatever the judge or court shall consider in that behalf."

From the above definition, it can be concluded that the writ of habeas corpus is a remedy for a person who is deprived of his liberty. The law of habeas corpus gives such a person an opportunity to complaint to the court of his detention if he feels that he is illegally or improperly detained.

(ii) Internal Security Act (ISA) 1960

Pursuant to Article 149 of the Federal Constitution, the Internal Security Act (ISA) 1960 was passed to provide for the internal security of the Federation and through preventive detention achieve the prevention of subversion, the prevention of organised violence against persons and property.

Section 8 the operative section of the Act authorise the Minister of Home Affairs to make an order directing that any person may be detained for any period not exceeding two years, if he is satisfied that it is necessary to do so with a view to prevent such person from acting in any manner prejudicial to any of the following groups of social interests.

- i. the security of Malaysia or any part thereof.
- ii. the maintenance of essential services therein.
- iii. the maintenance of economic life.

The Act requires the authority making the order of detention to serve it on the person to whom it relates as soon as may be a copy of every order, section 11(1) ISA and to communicate to each person detained of the grounds on which the order has been made, Section 11(2) ISA. Section 8 ISA is worded in such a way as to confer a wide power of detention without trial on the Minister. However, the validity of the section cannot be challenged on the ground that it does not lay down any objective standard for the Minister to observe in exercising his power.

An outline of the procedures and the relevant provisions relating to the detention order are as follows:-

Section 73(1):

"Any police officer may without warrant arrest and detain, pending enquiries, any person in respect of whom he has reason to believe -

- (a) that there are grounds which would justify his detention under section 8 and

- (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof.

From the above mentioned provisions of the law a wide discretionary power of arrest and detention is conferred upon the police authority. The only requirement to be fulfilled before this power can be exercised is the existence of a state of mind that there is reasonable cause to believe that there are grounds which would justify his detention.

Section 73(3) ISA even goes a step further to make it within the competency of the police authority to detain a person for a period of 60 days. Hence it is logically possible to conclude at this point that a person may be lawfully detained without trial at 2 stages under the law.

- i. A detention for a maximum of 60 days by the police authority.
- ii. A detention for a further maximum period of two years after a detention order is made.

Under section 12 ISA, if a person is detained for a period exceeding three months without his representation having been considered and no recommendation having been

made by the Advisory Board within three months from the date of his detention, such detention would be illegal. This section is inconsistent with the provision of Article 151(1)(b) of the Federal Constitution.

iii. Criminal Procedure Code (F.M.S. Cap. 6)

The power conferred on the High Court to free a person in detention is subject to certain conditions. That is when the applicant is detained in any prison within the limit of the Federation on a warrant of extradition or the applicant is alleged to be illegally or improperly detained within the limit of the Federation. These two conditions are mentioned in section 365(1) of the Criminal Procedure Code (C.P.C.).

Any application for a writ of habeas corpus should be forwarded to the High Court under section 365 CPC. Another situation when the writ can be issued is when the defendant is in custody under a writ of attachment. The procedure to issue writ of habeas corpus under section 365(2) CPC is laid down in section 369 and section 370 of the code.

In cases where a person is alleged to be illegally detained or a person is detained on a warrant of extradition, section 366 of the CPC requires the application to be supported by an affidavit. Three factors need to be shown.

- i. The place where he is detained.
- ii. By whom he is detained.
- iii. Facts relating to such detention.

The third requirement is not absolute. Section 367 C.P.C. states as follows:-

"The affidavit required by the last preceding section shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which case it shall be made by some other person."

This is the situation where a detainee is rendered unable to make the affidavit.

Section 117 provides as follows:

(i) whenever any person is arrested and detained in custody and it appears that the investigations cannot be completed within the period of 24 hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigations shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produced the accused before such Magistrate.

(ii) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction.

(iii) A Magistrate authorising under this section detention in the custody of the police shall, record the reasons for so doing.

This section provides for detention so that investigations may continue after the lapse of 24 hours limited under section 28 C.P.C. (F.M.S. Chap. 6). No charge can be preferred against the arrested person at this stage, since investigations have not been completed.

The Magistrate has a duty to scrutinize the acts of the police and to see whether the act was legal and proper and further whether the formalities required by law have been complied with. The object of this section is to prevent abuses by the police. To raise a suspicion that the arrested person may have committed an offence, sufficient evidence has to be obtained. It appears that by such detention further evidence may be obtained.

Under this section, the object of requiring an arrested person to be produced before a magistrate is to enable him to make representations he may wish to make in the matter. A person cannot be detained on a mere expectation that time would show his guilt.

As regards to the fundamental liberties some provisions of the law cannot be read in isolation. Article 5 of the Federal Constitution has to be read together with other provision of the ordinary law as well as the constitution itself.

Article 5 and other provisions of fundamental liberties contained in Part II of the constitution are to be read together with the provision of Article 149 and Article 150.

CHAPTER 11

POWERS OF DETAINING AUTHORITIES