Jonathan Burchell.

Judicial control of arrests and detention: Theory and Reality

The highest court in the land has recently affirmed that a police officer effecting an arrest without warrant under the notorious section 29 of the Internal Security Act 74 of 1982 (and certain provisions in the Criminal Procedure Act 51 of 1977) must have reasonable grounds for believing at the time of the arrest that the arrest fell within the framework of the statute. If the legality of the arrest is subsequently challenged, the arresting officer must satisfy the court that there were factual grounds for his belief and the court must then examine whether these grounds were reasonable. This welcome conclusion was reached in the unanimous judgement of the Appellate Division in **Minister of Law and Order** v **Hurley** 1986 (3) SA 568 (A).

THE MANNING CASE.

Not long after these basic theoretical limits on State power were authoritatively established by the Appellate Division a judge in the Durban and Coast Local Division of the Supreme Court has, in a judgement which has not yet been reported, provided a gloomy insight into the application of these principles in practice **(Manning** v **The Minister of Law and Order & others,** judgment of Thirion J delivered on 30 June 1987* case no 2517/87).

Ms Claudia Manning was arrested on 2 April 1987 on instructions given by one Colonel Büchner (B) of the Security branch of the South African Police. He ordered her arrest in terms of section 29(1) of the Internal Security Act which provides that a police officer of a particular rank may order without warrant the arrest and detention for interrogation of any person who he has reason to believe has committed or intends to commit, amongst other things, terrorism or subversion or who is withholding from the South African Police information regarding the commission of such offence. Section 29 is designed for the purpose of interrogating detainees and such detention may in fact amount to detention for an indefinite time. Dr Manning, the detainee's father, applied for an order declaring his daughter's detention to be unlawful.

EVIDENCE.

The evidence of the arresting officer (which would have done credit to a South African television documentary on the ANC) can be summarized as follows: The aim of the ANC is to overthrow by violence the State authority in South Africa. The ANC has, as part of its aim of intimidation and violence, established cells inside South Africa in order to provide logistic support, including accommodation, transport and information to trained ANC 'terrorists' entering South Africa (Thirion J commented on this evidence: 'As Colonel Büchner is a police officer who can speak on these matters with authority, I have to accept his evidence on this point as correct'). B alleged further that he had received information from a source, which he refused to disclose, that Ms Manning was a member of an ANC cell in the Durban district. One of the members of the cell had been arrested and this member confirmed that Ms Manning was a member of this cell. B's reason for not disclosing his source was that it would endanger the safety of the source (Thirion J considered himself bound to accept this explanation since it had emanated from 'a highranking police officer with experience in this field'). The evidence linking Ms Manning to the Wentworth cell of the ANC contained some ambiguity and lack of clarity which Thirion J tacitly acknowledged by having to explain what the police officer meant to say.

THE JUDGEMENT

Thirion J accurately stated the **Hurley** principles which apply to arrests and then emphasised two important variables which affect the assessment whether 'reasonable grounds' for an arrest existed: the reliability of the source and the nature of the information –

> 'If the source is trustworthy, one would tend to regard the information as reliable despite the fact that the information itself may not be detailed or persuasive. On the other hand, if the reliability of the source is not beyond question the probabilities and the surrounding circumstances may be decisive.'

The judge held that the source was known to the South African Police and had previously supplied trustworthy information to them. Police investigations had also confirmed the correctness of aspects of the information supplied by the source, certain persons mentioned in the information had been identified and some of them after arrest had under interrogation confirmed the correctness of the information received from the source. There was, therefore, in the judge's opinion, 'ample reason why Colonel Büchner could have trusted' this source.

Although accepting that B did not state that Ms Manning had done anything as a member of the ANC cell, Thirion J concluded that B was entitled to infer that she associated herself with the activities of the cell. B, had, therefore, discharged the burden of demonstrating reasonable grounds for believing that Ms Manning had committed the offence of conspiracy to bring about an act or threat of violence or an act aimed at causing such act or threat in contravention of section 54(i) (iii) of the Internal Security Act.

The applicant also applied for an order calling on the State to produce the detainee in order to testify on the reason, facts and information relied on by B and, alternatively, an order that the evidence of Ms Manning be heard, either orally or by means of an affidavit. Thirion J rejected this alternative application on the grounds that the evidence of the detainee would not be relevant to the question whether B had reason to believe that her arrest was justified.

DISCUSSION.

Obviously the belief of the arresting officer does not have to be based on conclusive evidence of the guilt of the

arrested individual. This degree of proof is only required when the detainee is finally brought to trial – something which cannot be guaranteed in the present South African situation. As one commentator has stated – . . . 'the police need show only that their belief is reasonable, not that it is correct' (E Mureinik (1985) 102 **South African Law Journal** 80). It is difficult in **Manning's** case to regard the incomplete and virtually untested evidence of the arresting officer regarding membership of a specific ANC cell based on an unrevealed source and an inference of association with certain activities of the ANC drawn from this evidence of membership of the organization as constituting proof on a balance of probabilities of reasonable grounds for believing that the arrest was justified. But even assuming the court in Manning's case was right in concluding that there were reasonable grounds for believing an arrest and detention was justified, there is a more disturbing aspect of the judgment. Despite the flimsy basis for arrest, the detainee herself, who according to B denied her membership of the ANC or that she had had any involvement in its activities and maintained this stance in a statement which she made a few days after her arrest, was not heard either orally or by means of affidavit. She would undoubtedly be able to indicate, for instance, whether she had been questioned or interrogated after her arrest on her alleged involvement in the ANC cell. In fact, in an affidavit filed in a subsequent application for the release of other detainees, Ms Manning did allege that a total of only about ten minutes of her interrogation had been devoted to her alleged involvement with the ANC and that she could have supplied the information without being detained.

The object of an arrest under section 29 of the Internal Security Act is clearly to interrogate the detainee and evidence that a detainee was never questioned at all or at least not in connection with the main reasons for the arrest and detention would constitute strong evidence of an improper purpose in the detainee's arrest and subsequent detention. Even assuming, which is a dubious assumption, that the evidence of a detainee is not relevant in determining the issue whether the arresting officer had reasonable grounds for believing that the arrest and detention were justified, evidence of a detainee would be crucial in order to determine whether the police had used the detention as a device to interrogate the detainee about aspects unrelated to the activities forming the basis of his or her arrest.

Furthermore, the oral evidence of the detainee should be heard where there are reasonable grounds for doubting the correctness of an allegation made by the arresting officer.

The refusal of a police officer, to reveal the source of his information is a contentious matter. On the one hand, genuine and legitimate reasons for such refusal may prompt non-disclosure but, on the other hand, non-disclosure can be abused and utilized to throw a blanket of secrecy over the arrest. Such a tactic could effectively hide any evidence that there may be from the testing scrutiny of the court. There is, however, another approach to the problem which may help to provide some justice for detainees. Disclosure of sufficient information to constitute reasonable grounds for believing that an arrest is justified does not necessarily involve the disclosure of the identity of the source of the information. Surely it is not expecting too much of a police officer to disclose enough information to enable a court to decide whether reasonable grounds for the arrest existed and at the same time not to pin-point any individual who might be the subject of reprisal action or other intimidation? Furthermore, as has been suggested by Professor Mathews in the context of the Minister's refusal to disclose sufficient reasons for detention to the detainee, **in camera** examination of the evidence would avoid most of the difficulties involved in open-court disclosure (A S Mathews **Freedom, State Security and the Rule of Law** 69).

The **Hurley** principles for determining whether grounds existed for a valid arrest in terms of s29 of the Internal Security Act provide a powerful means of controlling State power and, therefore, must not be diluted in their practical implementation. At a time when the role of the court in scrutinizing State excesses is being slowly wrenched from it, the court must not surrender any more of its dwindling power. The purpose of detention under s29 is interrogation, not necessarily bringing the detainee to trial. Thus, a detainee may never be brought to trial and if his or her evidence is never adduced in court, an abuse of power that may have been present at the time of the arrest and unnoticed when the arrest and detention were initially questioned, may never be detected. □

Among our contributors:

E.K. MOORCROFT - Eastern Cape farmer and former Progressive Party MP for Albany.

JONATHAN BURCHELL - Professor in the School of Law, University of Natal, Pietermaritzburg.

ALAN PATON - Author.

SYDNEY KENTRIDGE Q.C. - one of South Africa's leading Advocates.

MICHAEL WHISSON - Professor of Social Anthropology, Rhodes University, Grahamstown.