THE SYSTEMATIC VIOLATION OF THE CRIMINAL SUSPECT'S FUNDAMENTAL RIGHT TO LIBERTY: WHO IS TO BLAME, JUDGES, POLICE OR LAWYERS?

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Fundamental human rights are inalienable rights conferred on human beings by nature. These rights include right to life, right to personal liberty, human dignity, freedom from slavery and forced labour, equality and freedom from discrimination, privacy of home and other property, fair trial, right to own property, as well as administrative, economic, educational and cultural rights.

There are some rights associated with particular groups of persons, and they exercise them in addition to the other fundamental human rights. These groups of people include disabled persons, children, sick persons, criminal suspects, remand prisoners and juvenile offenders. Articles 12 – 33 of the *Constitution of the Republic of Ghana, 1992* are on the protection of fundamental human rights. Article 33(5) of the Constitution provides that fundamental human rights are to be protected by the courts and are not limited to the rights specifically mentioned in the Constitution.

The rights of a criminal suspect commence from the time he/she is suspected to have committed a crime until judgment is delivered. The stages in criminal justice which shall be discussed under this topic are arrest, detention, investigation, bail (both police inquiry and court) trial and judgment.

ARREST

Article 14(2)(b) of the Constitution provides two instances, where a person who is a criminal suspect may be arrested. The first ground is where there is reasonable suspicion that he/she has committed a crime and the second is where he/she is about to commit an act which is a criminal offence under the laws of Ghana. The grounds of arrest under the *Criminal and Other Offences Procedure Act 196, Act 30* go beyond the constitutional provision.

The police may arrest with or without a warrant depending on the circumstances of the arrest as regulated by *Section 10 of Act 30.* The circumstances under which the police can arrest a citizen without a warrant are:

(i) Where the offence is committed in the presence of a Police Officer.
(ii) Where the person obstructs a Police Officer in the execution of his/her duty.
(iii) Where the person has escaped from lawful custody or he is attempting to escape.
(iv) Where a person possesses an implement adopted or intended to be used to enter a building unlawfully and he/she fails to give a reasonable excuse for possessing the implement.
(v) The person possesses a thing which may reasonable be suspected to be stolen property.

Where a police officer suspects a person on reasonable grounds for having committed any of the following acts, he/she may arrest without a warrant:

(i) Having committed an offence

(ii) Being about to commit an offence in order to prevent the commission of the crime

(iii) Where the person is about to commit an offence, where the Police Officer, finds that person is in any highway, yard, building or any other place during the night.

(iv) Where warrant has been issued by Court for the arrest of the person.

(v) Has deserted from the Armed Forces

(vi) Where he has committed an offence outside Ghana and if it had been committed in Ghana would have been punishable and for which that person is under an enactment, liable to be arrested and detained in the Republic.

With regard to what arrest means, *Section 3 of Act 30* provides that the mode of arrest by a policeman of a suspect is to actually touch or confine the body of the person unless the suspect submits to the custody verbally or by conduct.

Where a person is arrested he/she may be admitted to police enquiry bail but where the police refuses or fails to admit him/her to bail he/she shall be brought before a court within forty-eight hours after the arrest, restriction or detention. Thus, *Article 14 (1) (9)* provides that a person shall be deprived of personal liberty upon reasonable suspicion of his/her having committed or being about to commit a criminal offence under the laws of Ghana. Added to the procedure of arrest, *Article 14(2)* provides that where such a person is arrested he/she must be told in the language he/she understands

of the reasons for his/her arrest, detention or restriction and must be told of his/her right to consult a lawyer of his/her choice.

Just as the laws instruct on proper procedures of arrest, they also tell law enforcers what not to do. This way, *Article 15* provides that where a person is arrested or detained, he/she shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment and any other condition that would affect his/her worth as a human being.

INVESTIGATION

Investigators must solve the crime by using a method which is in consonance with law. It is the duty of the investigators to identify and locate the perpetrator. The investigator's duty is to objectively enquire into the complaint with the aim of building a case against the suspect. But, the suspect should not be forced to confess. In this sense, *Section 120 of the Evidence Act, Act 323,* provides that confession statement is not admissible against the accused person unless the statement was given voluntarily. Some of the mechanisms used by investigators are voluntary statements, forensic evidence, eyewitnesses' accounts, identification parades, and interrogation.

Dan Simon (2012) *in DOUBT, The Psychology of the Criminal Justice Process* described the role of investigators as having been entrusted with a great deal of discretion much of which is not easily teachable. For example, investigators have discretion in deciding whether a crime occurred which leads to pursuing whatever physical evidence to collect, which witnesses to question, which testimonies to trust, when to make an arrest, when to declare the case solved, and when to give up on it.

In sum, investigations follow an array of formal and informal policies, practices and idiosyncratic habits. The investigator's work is encumbered and complicated by departmental directives, public expectations, media exposure, the passage of time, limited resources and departmental politics.

METHOD OF INSTITUTING CRIMINAL PROCEEDINGS

Criminal proceedings may be instituted by criminal summons. If the person served with the summons fails to appear before the court, after satisfying itself that it was served by a police officer or by an officer of the court where the summons was issued or any public officer in accordance with law, the court may issue a warrant for the arrest of the accused person. However, a person who is arrested without a warrant may be brought to court on a charge sheet signed by the police officer or public prosecutor in charge of the case.

PLEA

A plea must be taken in the language the accused person understands. Where the accused person pleads guilty but offers an explanation the words of explanation shall be recorded as nearly as possible in the words used and the court shall enter a plea of not guilty for the accused where the explanation negates the commission of the crime and proceed to hear the case. Where the explanation admits the commission of the offence, the court shall record the plea of guilty and then proceed to convict the accused. This position was reiterated in the case of *Clifford Broni Bediako v. The Republic* (unreported H2/1/2010 delivered on 16th December, 2010) Court of Appeal.

BAIL

Bail is discretionary, but the discretion must be exercised judiciously. In bailable offences, bail should not be used as a punishment. The court may refuse bail where the prosecution is able to prove any of the grounds under *section 96 (5) of Act 30.* In non-bailable offences, bail could be granted by the High Court where the trial has been unreasonably delayed.

APPLICATION

1. **Arrest**

Recently the police in their efforts to arrest suspected criminals shoot and kill them under the pretext of being attacked by them. Are these cases investigated to ascertain their veracity? If it is not checked some policemen may use it as a tool to kill suspected criminals when they have not been convicted by any court of law as criminals.

It is a notorious fact that some suspected criminals are manhandled by the police when they have not shown any trait of aggressiveness. Some suspected criminals who are invited to the police station by the police are kept in custody for over a day when the offences they are alleged to have committed are misdemeanours. The common practice is that some of the suspected criminals are subjected to all forms of mistreatment to enable the police to extract confession statements from them. This behaviour of the police fall foul of *Article 15 of the 1992 Constitution,* which provides that any person who is arrested or detained shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment or any act that

is likely to detract from his/her dignity and worth as a human being. This treatment is a clear abuse of the criminal suspects' fundamental human rights.

2. **Confession Statement**

Section 120 of the Evidence Act, 1975, Act 323 makes confession statement inadmissible. Statement by a criminal suspect which was not voluntarily made is defined by *Section 120(4) of the Evidence Act* as follows:

(a) The accused when making the statement was not capable because of a physical or mental condition of understanding what the accused said or did or

(b) the accused was induced to make the statement by being subjected to cruel or inhuman conditions, or by the infliction of physical suffering upon the accused by a public officer or by a person who has a direct interest in the outcome of the action or by a person acting at the request or direction of a public officer or that interested person; or

(c) The accused was induced to make the statement by a threat or promise which was likely to cause the accused to make the statement falsely, and the person making the threat or promise was a public officer, or a person who has a direct interest in the outcome of the action, or a person acting at the request or direction of a public officer or the interested person.

More often than not when *voir dire* is conducted in criminal trial, the statement of the accused which the police describe as

voluntary is found to be obtained contrary to law and same is rejected. In the case of *Okere v. Republic [1974] 2 GLR 277* the Court of Appeal held that a statement taken in contravention of the Constitution or against the suspect's fundamental human rights is inadmissible.

Apart from the police, the public usually violates the fundamental human right of an accused person to liberty by taking statements which may implicate the accused person and is likely to ensure his or her conviction. The police sometimes intentionally take the statement from a criminal suspect without informing him/her of his/her right to a lawyer of his/her choice contrary to *Article 14 (2)* of the Constitution. In the case of *Republic v. Akosah and another [1975] 2 GLR 406* the High Court held that any statement taken from an accused person without informing him/her of his/her right to a lawyer of his choice is inadmissible.

Interestingly, some lawyers instead of protecting the rights of their clients allow inadmissible statements to be tendered without raising an objection, which negatively affect their client's case. Where a confession statement is taken contrary to law it must be objected to timeously when the statement is being tendered else the court cannot ignore it. Confession Statement is admissible unless an objection is raised to its voluntariliness. If an objection is not raised at the trial stage where the evidence is being tendered, an appellate court cannot expunge it from the record. It is different from cases where inadmissible evidence is admitted by the court, an appellate court shall expunge the evidence from the record. This position was reached in the case of *Edward Nasser & Co. Ltd. V. Mc Vroom and Another [1996-97] SCGLR 468.*

3. **Investigations**

The police in their investigation get emotionally involved in their cases. Where the police decide to apprehend a perpetrator, they are usually exposed to human tragedy inflicted by crime and confronted with gruesome crime scenes. This exposure arouses anger and disgust. As a result of anger some police react angrily toward a person who is believed to have committed a serious crime. A research by Ask and Granhag (2007) in their article on law and human behaviour discussed how police investigation is influenced by anger as they have experienced elsewhere. For example, they mentioned a case study of experienced Swedish police officers that showed that arousal of anger resulted in superficial processing of information and lack of sensitivity toward exculpating evidence. The person being judged was unrelated to the source of the anger.

The evidence of forensic experts could be one-sided. Almost all the experts in criminal cases testify for the prosecutors. In Ghana, for example, it is the police forensic laboratory which presents forensic evidence in court, and it is likely to be one-sided. In their analysis as policemen they see themselves as working for the law enforcement. The few other private laboratories are operated by retired policemen who also have worked for the police for years and see themselves as working for the police. Moreover, forensic experts are usually blinded by the information they receive about the accused person even though it may have nothing to do with forensic analysis under consideration.

Brandon K. Garrett in his book *Convicting the Innocent Where Criminal Prosecutions Go Wrong* described the effect of flawed forensics as follows:

"There is rarely any battle of the experts in a criminal case. Instead, the presentation of forensic evidence is almost entirely one-sided. Almost all of them testify for the prosecutions. Almost all of them work for the Police, at State or local law enforcement crime laboratories. These analysts, therefore, report to the law enforcement and see themselves as working for law enforcement.

Scientists design experiments that are blind, so that not all of those involved know certain aspect of the experiment, to prevent the influence of bias (concise or not) on their work. In contrast, forensic analysts do not do their work blind. They receive information about the crimes being investigated that may not have nothing to do with forensic analysis being conducted, such as the fact that a suspect confessed, or the prior criminal record of the suspect." (p. 92)

The finding described by Garrett was also reiterated by the U.S. Supreme Court in the case of *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009)* thus: "A forensic scientist may not be 'neutral' because an analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favourable to the prosecution."

4. **Identification Parade**

The Police identification parade results are not accurate to be relied on but because of their persuasive nature, the courts accept them as credible and ground conviction on them. Lawyers do not deem it necessary to learn more about identification of suspect and

how to impeach police evidence founded on it. The factors which are used to identify suspects are as follows:- pre-line-up factors, face composite construction, description of suspects, successive viewings, extraneous information, pre-line-up confidence, working of instruction, and suggestive communication.

A substantial body of research has shown that witness confidence is easily manipulated by feedback from line up administrator. It is not limited to the actual identity of the suspect, but the feedback when it is given to the witnesses in response to their choice at the line-up at times corresponds excellently with the identification to confirm the police suspicion.

This false evidence by the police is received by the court as credible and judgment is based on it. Lawyers are unable to create doubts in false evidence to make them unreliable to the extent that no court of law would rely on them for conviction. Under false evidence, it is my opinion that, lawyers, police and judges are to share the blame equally as each of them fails to play the role as required by law to ensure that the criminal suspect's fundamental right to liberty is not violated.

5. **Bail**

Another aspect of the law where the criminal suspect's fundamental right to liberty is violated is bail. The law is settled that bail is a privilege and not a right. This position was held in the case of *Gorman and others v. The Republic [2003-2004] SCGLR 784.*

Most of the accused persons are remanded upon applications by the prosecution. In some cases no cogent reason would be assigned except that the prosecutor may inform the court to remand

the accused person to enable the prosecution to investigate the matter.

In some cases, the prosecutor may inform the court that he/she has been instructed to remand the accused person. At times an accused person may be arraigned before a court without jurisdiction to hear a particular case, but the court may entertain it purposely to remand the accused person. For example, murder cases may be listed before a Circuit Court in a district where there is a District Court and the court may entertain the suit and remand the accused person. The case may be pending before the court for over ten years.

Recently, it was revealed that a murder case in which the accused person was remanded has been pending for 13 years. The sad aspect of it is that at a point the case was not called because the police officer continually renewed the warrant with the Court Clerk. When the application was made to the Registrar for record of proceedings, no proceedings on the remand could be furnished.

Most of the remand orders by the courts in bailable offences are without justification. Some lawyers also contribute to the continuous incarceration of their clients on remand. In non-bailable offences they would continue to apply for bail from the District and the Circuit Courts which do not have jurisdiction to grant bail even where there is unreasonable delay of time. In such cases the lawyers must repeat the bail application at the High Court and invoke *Article 14(4)* which empowers the High Court to grant bail in all offences where the accused person is not tried within a reasonable time. What constitutes unreasonable delay is determined by the courts on case by case basis depending on the facts and circumstances of the case. This position was stated in the case of *Republic v. Arthur [1981-83] GLR 247.*

Some police abuse police enquiry bail. In a simple matter or in misdemeanour cases, they may arrest a person and detain the person on Friday and arraign the person before the court on the Monday. They do that to defeat *Article 14 (3)* which enjoins them to bring the accused person to court within 48 hours. This way, the police use the bail as punishment which is against the principle governing the grant and refusal of bails.

Where the courts act in accordance with law by remanding in exceptional cases, the issue of congestion at the prisons; the violation of the accused person's right to liberty would be curtailed. In addition, if the judges who remand without just cause understand that they are dealing with the fundamental rights of the criminal suspects, they would exercise their discretion judiciously; there would be no need for the Chief Justice to promote the Justice For All Programme.

Circuit judges and magistrates are required to submit their monthly returns to the Chief Justice to enable Her Ladyship to know those on remand and the nature of offences so that she could dispense justice to them. But, most of them do not submit the returns at all. In the case of police enquiry bail it is the police who should take greater portion of the blame. Nevertheless, in court bails, I think the judges and magistrates should be largely blamed for the violation of accused persons' right to liberty.

With regard to cases of trial, some policemen worldwide have been accused of building their cases on trial by liars. Some of these liars are "professional" informants, jail house informants, and co-accused persons.

The learned author Gauen in his book *Evidence in Alton Rape Case* had this to say about jailhouse informants:

"The jailhouse informant's carefully crafted lies may have made the difference between the hung jury at the first trial and the conviction at the second trial. At his second trial, David Gray was sentenced to sixty years in prison. He served twenty years before being exonerated by DNA testing in 1999. As for the informant when asked about the Case years later, he said he no longer remembers David Gray having ever admitted his guilt to him." (p. 123)

However, in the case of co-accused who have been charged with the same crime, they are offered a deal to assist the prosecutors against the other accused person to be dealt with leniently. Again, Garrett in the *Convicting the Innocent* talked about co-defendants (co-accused) thus:

"Co-defendants, charged with helping tt commit the same Crime, may be offered a deal to co-operate with prosecutors, testify against their accomplices, and receive a more favourable sentence. Of the fifty-two exonerees that had informant testimony, twenty-three had co-defendant testimony." (p. 139)

Where it comes to conviction, some judges get the law wrong and convict some innocent people. The proportion of appeal cases that succeed at the appellate level attests to that fact. Some of the cases are also poorly handled that the Appellate Court cannot but order for their retrial. In such a case the trial judges should be blamed. In fact, some lawyers do not prepare adequately for the trial and

contribute to the conviction of their clients. Such lawyers should be up to the task.

This lecture will be incomplete if I fail to address briefly the respective roles by the Attorney General's Office and a section of the Press in criminal justice system in Ghana which impact negatively on the criminal suspect's fundamental right to liberty. With regards to the Attorney- General's office there are several questions which can be posed as follows:-

1. Why does it take the Attorney-General office between three (3) to ten (10) years to prosecute indictable offences when the suspect would be languishing in jail?
2. Why does it take the Attorney General office several adjournments to prosecute committal proceedings it files before the court, knowing the suspect is on remand?
3. What does the Attorney General do to ensure that cases are investigated expeditiously particularly where the original investigator is transferred and the suspect who is on remand is left unattended to and the investigation is stalled?

I am of the opinion that the courts should not simply be persuaded to refuse bail when it has taken the police over a year to investigate a case. The prosecution must provide cogent and convincing reason as to why the investigation delayed. In considering bail applications it is not enough to cite a ruling delivered in the 1980's, where the police and the Attorney General's office were not well resourced and technology was virtually unknown to facilitate investigation and prosecution.

A section of the media, including social commentators on the other hand tends to be sensational on their reportage of some criminal

cases, an example is the "Jesus One Touch" defilement trial at the Circuit Court. In most cases the facts are inaccurate, distorted and one sided and are likely to weigh on the minds of some judges who may easily be intimidated by public criticisms. Same can be said about court room reportage which usually invites the public to question the judge's right in granting or refusal of bail, knowing very well that the public are not knowledgeable in the law and cannot behave like appellate judges in those cases. I think the bar ought to engage the leadership of the mass media in ways by which training on reportage of court cases will be organized for journalist who report such cases to ensure the observance of due process and the rule of law.

General Conclusions

1. If the police try to be objective in their investigations, a lot of criminal suspect would not be arraign before the court.

2. The prosecutors should not also promise complainants that they will secure remands in bailable cases. In some places the police refuse to arraign accused persons before some courts because the magistrates and the judges in those courts would not remand accused persons for them. Some of the superior officers who instruct their subordinates to go for remand in bailable offences too should stop.

3. The police should always bring remand prisoners to court whenever the cases come on and should stop renewing the warrants with some Court Clerks who lack jurisdiction to renew same.

4. Judges should remand according to law and not to please the police and the complainants. Judges should properly consider the standard burden of proof when deciding criminal matters. They should not be intimidated by news media reports, community pressure and other pressure groups.

5. Lawyers who handle Criminal Cases should sharpen their skills in criminal investigation and trials as DNA reports and appeal records reveal incompetence of some lawyers, who in one way or the other contribute to the conviction of their clients.

6. The criminal suspects' fundamental right to liberty should be jealously guarded by the police, judges and lawyers as every person is likely to be a criminal suspect one day in his/her lifetime.

Thank you for the attention.