

IN RE: THE PRISONS ACT NO. 8 OF 1959.

O P I N I O N

The questions raised for my opinion are concerned with the provisions of sections 44 (e) and (f) of the Prisons Act No. 8 of 1959, which are as follows:

*44. Any person who -

.....

(e) without the authority in writing of the Commissioner -

(i) sketches or photographs any prison, portion of a prison, prisoner or group of prisoners, whether within or outside any prison, or any burial referred to in paragraph (b) of sub-section (4) of section thirty-five; or

(ii) causes any sketch or photograph of any prison, portion of a prison, prisoner or group of prisoners or of any burial referred to in paragraph (b) of sub-section (4) of section thirty-five to be published in any manner; or

(f) publishes any false information concerning the behaviour or experience in prison of any prisoner or ex-prisoner or concerning the administration of any prison, knowing the same to be false, or without taking reasonable steps to verify such information (the onus of proving that reasonable steps were taken to verify such information being upon the accused),

shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or, in default of payment, to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine, and the court convicting any person of an offence under sub-paragraph (i) of paragraph (e) may, if it thinks fit, declare the sketches or photographs and the negatives from which such photographs were taken to be forfeited to the State."

These / ...

These provisions must be read with section 1 (x) which defines a "prison" as:

"any place established or deemed to have been established under this Act as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody, and includes all land, outbuildings and premises adjacent thereto and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, labour, treatment or otherwise, and all quarters of members of the Prisons Service used in connection with any such prison; and for the purposes of any offence committed under this Act by or in respect of prisoners further includes every place used as a police cell or lock-up;"

and section 1 (xii) which defines a "prisoner" as

"any person, whether convicted or not, who is detained in custody in any prison."

I have been asked to consider whether in the light of these provisions, the following acts would be permissible.

1. To take a photograph of an arrest in the street (e.g. a pass raid).

A person who has been, or is in the process of being arrested, but has not yet been detained in a "prison", is not a "prisoner" as defined by section 1 (xii) of the Act. It follows, therefore, that the mere photographing of an arrest (provided that it is not the arrest of an escaped prisoner) does not fall within the purview of section 44 (a) of the Act. If, however, the arrest is made in the proximity of a "prison" the photographer is not entitled to include such prison in any photographs which he might take.

2. To take a photograph of arrested persons (not convicts), in a "kwala-kwala", filing into one etc.

This depends upon whether a "kwala-kwala" can be regarded as a prison. The definition of "prison" in section 1 (x) of the Act is "any place established" for the reception etc. of prisoners, and every place used as a police cell or lock-up. A "kwala-kwala" is a vehicle, and cannot in my view be regarded as a place. If I am correct in this view it follows that a "kwala-kwala" is not a prison as defined by

section 1 (x) of the Act, and that the photographing of persons in a "kwala-kwala" is not in itself restricted by section 44.

The photographer must, however, be careful not to include a prison in the background of any such photograph.

3. To take a photograph of convicts in the streets at work.

A convict is a "prisoner" within the meaning of section 1 (xiii) of the Act. Section 44 (e) restricts the photographing of a prisoner "whether within or outside any prison". The written authority of the Commissioner of Prisons is therefore necessary before such a photograph can be taken or published.

4. To take a photograph of a prison.

This falls directly within the purview of section 44 (e) of the Act and requires for its permissibility the written authority of the Commissioner of Prisons.

5. To publish a report of conditions on a farm (not a farm prison) by a prisoner sent to the farm to work his hard labour term.

By definition a "prison" includes any place to which prisoners "have been sent for the purpose of ... labour". A farm to which convicts have been sent for the purposes of labour would therefore be a prison within the meaning of section 44 of the Act. The publication of a report of conditions on such a farm is therefore subject to the provisions of section 44 (f).

6. To publish a report of jail conditions by a released prisoner.

This is subject to the provisions of section 44 (f) of the Act.

7. To publish a report of the treatment of persons arrested by the police alleging ill-treatment etc. at a time before such persons were locked up.

Section 44 (f) of the Act deals with the publication of information concerning the behaviour or experience in prison of any prisoner or ex-prisoner. Reports on the treatment of arrested persons who have not yet been locked up will depend upon whether the events reported upon took place inside or outside the prison. If the former, the reports will be subject to section 44 (f); if the latter, section 44 (f) will not apply. In this regard it is important to bear in mind that by definition a prison includes all "land, outbuildings and premises adjacent"

to the place of detention and "used in connection therewith" and includes for the purposes of section 44 "every place used as a police cell or lock-up". It follows, therefore, that an arrested person who has been detained in custody at a police station, will be regarded as having been detained in a prison, even if he has not yet been locked up in a cell.

8. To publish statements of police treatment of prisoners locked up at police stations.

A prison is defined as including any place used as a police cell or lock up. Reports on the treatment of persons locked up at police stations are therefore subject to section 44 (f).

9. How far does one have to go to discharge the onus of taking "reasonable steps" to verify the correctness of reports which fall within the purview of section 44 (f).

The sub-section deals with the publication of false information. There is no restriction on the publication of information which is correct. To establish an offence, therefore, the State must first prove beyond a reasonable doubt that the report was incorrect. If in any case the State is unable to discharge this onus, the accused will not be called upon to give any explanation. If, however, the primary onus is discharged by the State the accused, to escape conviction, must show that he took reasonable steps to verify the information before publishing it. To discharge this onus the accused must prove on a balance of probabilities (not beyond a reasonable doubt) that reasonable steps (whatever that may mean) were taken. R. v. Viviers 1939 T.P.D. 402; R. v. Bolton 1941 A.D. 345.

I have been unable to find any decided case which deals with the standard of conduct required of a person who wants to publish a report on conditions in a prison. I have referred to decided cases on section 2 of the Stock Theft Act No. 26 of 1923 and section 37 of the General Law Amendment Act No. 62 of 1955, which requires a person found in possession of stolen stock or goods to prove that he had reasonable cause for believing that the person from whom he acquired such stock or goods was either the owner thereof or had the authority of the owner to dispose thereof. These cases, however, do not provide any assistance, and do no more than state the obvious i.e. that reasonable cause means grounds which in the circumstances of the case would satisfy a reasonable man.

Each case must obviously be judged in the light of its own facts, and it is not possible therefore to lay down a rule of thumb applicable to all cases. In deciding the degree of verification factors such as the following seem to me to be of importance.

(a) Iha / ...

- (a) The character of the informant. The more responsible the informant the less need there will be to look for evidence aliunde to support the allegation. If for instance the Bishop of Johannesburg were to report an incident which he himself had observed a reasonable man would ordinarily rely on the correctness thereof without making any further enquiries. Conversely, if a hardened criminal were to make a report on his treatment in prison a reasonable man would ordinarily require strong evidence aliunde before being satisfied of the correctness of the report.
- (b) The nature of the report. When serious or improbable allegations are made greater caution must be exercised before publication.
- (c) The sources of verification available to the publisher. If an allegation can be verified by way of simple investigations a reasonable person should make such investigations before publishing the report. If, however, the allegation cannot easily be verified, the publisher will have to depend largely on other factors i.e. the character of the informant etc.
- (d) The knowledge of the informant. Hearsay allegations will ordinarily require closer investigation than reports from eye witnesses.

In each case the publisher should make enquiries as to the character of his informant; should satisfy himself that the informer was in a position to have observed the facts reported on; and should make enquiries from any other person who ought reasonably to have knowledge of the allegations made. Where there are serious allegations of misconduct on the part of the police or prison officials, enquiries should be made to ascertain whether charges were laid against the offenders and if so the results thereof. If charges were not laid this omission should be explained to the satisfaction of the publisher.

In all cases the informers should be required to furnish a statement in affidavit form, and where serious allegations are made the Department of Prisons should ordinarily be asked for an explanation. The publisher is naturally not bound by any explanation that might be given, but must take it into account in deciding whether or not the proposed publication is correct.

10. Can the publisher be compelled to divulge the name of his informant.

It is an offence for the informant to supply incorrect information to the publisher. (The supplying of such information is itself a publication / ...

publication within the meaning of the Act.) In terms of the Criminal Procedure and Evidence Act a person who is believed to be able to give evidence about an offence or suspected offence can be compelled to furnish a statement thereon to a Magistrate. If, therefore, a report is published, or the Department of Prisons is asked to comment on a proposed publication, the publisher can always be compelled to furnish the name of his informant.

11. Can the two letters from the Bloemfontein schoolboys be published.

The portions of the letters which relate to the manner of arrest and the treatment in the police vans are not in my opinion subject to the provisions of section 44 (f). The portions of the letters which relate to the detention and treatment of the writers in the police station are in my view within the purview of section 44 (f) and should not be published without prior verification. The allegations are serious, and are made by persons still at school. It seems to me, therefore, that it would be dangerous to publish these letters without first making close investigations to verify the facts stated therein. I suggest that the following precautions be taken before publication.

- (a) Affidavits be taken from the writers.
- (b) The allegations in the last paragraph of the first letter be established.
- (c) The allegations in the second paragraph of the first letter be checked with the writers' parents and neighbours.
- (d) The allegations in the third paragraph of the first letter be checked with other persons who were arrested on that day and who are apparently known to the writer.
- (e) The allegations in the fifth and sixth paragraphs of the letter be checked by reference to injuries which were observed by the writer; by complaints made to the Court hearing the charge; and by complaints made to officials and co-prisoners.

If these enquiries leave any doubt as to the correctness of the allegations, the Department of Prisons should be asked for their comment. If the allegations are denied and there is a real doubt concerning the truth of the allegations, the letters should not be published unless the publisher is willing to risk a conviction.

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