

THE WHITE COLLAR

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Fruit of the Poisonous Tree: Police Investigative Powers

Custodians of the Law

The Police is your friend" we all know. But not all one's friends are able to stop you, search you, arrest you, and throw you in jail. The Police are who they are though, an essential part of the framework of Nigerian society, maintaining "law and order" and protecting the rule of law, that delicate fabric upon which all our social contracts are premised.

But it is exactly that which we take for granted, that unspoken agreement to abide by one law under which all are "equal" that should once in a while provoke us to remind ourselves why and by what degrees the Police are invested with powers to protect society. This reminder will then allow us to evaluate how well citizens are protected, and what they know of their rights. After all what good is having rights if they can be abused without us knowing? Or what use is having one law that applies to some and not to others? We must ask regularly how the custodians of law and order are faring in their keep, and this is precisely what this article attempts to do contemplating Police Investigative Powers of Search, Arrest and Seizures in our contemporary Nigeria.

Review of Foundational Police Powers

For the sake of completeness it may not be too trivial to begin here with reference to the founding authorities on Police Powers in Nigeria. The Powers of the Nigerian Police emanate from many prominent sources including the Constitution of the Federal Republic of Nigeria (as amended) 1999 -the Constitution and the Police Act (PA) 1990. But specifically s.214 of the Constitution creates the Nigerian Police Force and s. 3 of the Police Act is premised on this and stipulates for the establishment and structure of the Nigerian Police. The Criminal Procedure Act (CPA) 1945 is the main body of law governing Southern Nigeria (i.e. Abia, Akwa-Ibom, Anambra, Bayelsa, Cross-River, Delta, Ebonyi, Edo, Ekiti, Enugu, Imo, Ogun, Ondo, Osun, Oyo and Rivers States), except Lagos which is administered by the Administration of Justice Law of Lagos State (ACIL) 2007. The Criminal Procedure Code (CPC) 1963 administers the former Northern Region (which comprises Adamawa, Bauchi, Benue, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara). These three regional laws create specific powers for the Police to investigate and prosecute crime.

Scope of Authority: Search, Arrest and Seizures

At this point it is useful to narrow down to

specific Police Powers, specifically the Powers of Search, Arrest and Seizures for the purpose of prosecuting crime. These are some of the investigative powers that allow Police stop, search, arrest, question and charge to court persons suspected to have committed a crime under Nigerian law. S. 29 of the PA creates the Power to Detain and Search when it states "A police officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe to have been stolen or otherwise unlawfully obtained". Clearly the right to personal freedom is qualified here by the "reasonable suspicion" and "reasonable belief". Therefore the premise under which this power is exercised is a stringent objective evaluation that is necessarily demonstrable, absence of which renders the power unlawful.

Arrest

The Police have the power to arrest a person by a Warrant of Arrest issued by a Judge Magistrate of Justice of the Peace - **IKONNE v COMMISSIONER OF POLICE & ANOR** (1986) 4 NWLR (Part 36) or by a Police Officer "Without Warrant" as exceptions where (a) the suspect commits a crime in the Officer's presence (b) the officer suspects on "reasonable grounds" that a person has committed an offence (c) a person obstructs a Police Officer in his lawful duty or escapes/attempts to escape lawful custody (d) the Officer suspects on "reasonable grounds" a person of being a deserter (e) the person is found in unlawful possession of housebreaking implements (f) Officer has "reasonable cause to believe" there is a warrant already out for the suspect (g) a person is found to be hiding with a view to committing a crime. These circumstances are stipulated by s. 10 CPA, s. 26 CPC and s. 366 ACJL.

Search and Seizure

Again the Police may search premises and seize property named within the stipulated premises in a 'Search Warrant'. Note that the breadth of the power is defined by the specific stipulation of premises and listed property to be seized for the prosecution of a matter. Further a Search Warrant may only be issued by a Judge, Justice of the Peace, Magistrate or Police Officer of the rank of Assistant Superintendent Police (ASP) or above. The basis for this being s.109 (1) CPA, s. 74 CPC and s.28 (1) of the PA.

Still the Police can search and seize property at premises without a Search Warrant under the exceptions where (a) a person wanted with an arrest warrant is suspected of being in the said premises s. 7(1) CPA, s. 34 CPC, s. 7(1) ACJL. (b) a Justice of the Peace orders the search of the premises in his presence in s.85 CPC, and (c) a person is thought to have been abducted



or held unlawfully for the purposes of freeing them as s.77 (2) CPC stipulates.

Unlawful Use of Investigative Powers and Effects

For the most part these powers are used in great lengths towards the preservation and protection of society, and the Police do so day in, day out without event. What we are concerned with though, are those moments that do not conform with the stipulated restrictions on those Police Powers. What happens where a search and consequent seizure is unlawful because there is a "defective warrant" or no "reasonable suspicion" element to support the Officer's action? More poignantly where prosecutions stand solely on the basis of unlawfully obtained evidence from unlawful arrests where, for example, a wrong person is arrested at an address not stipulated in a search warrant and Officers erroneously confiscate confidential material which is then used against the Defendant. These questions become relevant because the prevalence of the rule of law in society is only as persistent as the situations where it is threatened.

Fruit of the Poisonous Tree v. Section 14 Evidence Act 2011

In such situations s. 14 of the Evidence Act (EA) 2011 states that:

"Evidence obtained (a) improperly or in contravention of a law; or (b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighted by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained."

In essence all unlawfully obtained evidence is

first of all admissible, unless the court believes the undesirability of admitting outweighs the desirability of admitting it. And although the Court is to consider factors in s.15 of the EA on which to balance the decision to admit or not to admit evidence, in truth the simple fact that unlawful evidence may be admitted in lawful proceedings freely and without consequence will continue to ensure that those powers given to investigate crime once abused are continuously abused. It is unfortunately human nature to do so because there is absence of consequence for the abuse.

If a Police Officer uses excessive force, deception or breaks the law in order to secure a prosecution, even if the prosecution is otherwise legitimate, and a court admits the fruit of his unlawful action, the reality is that the Officer is rewarded for his unlawful action and the consequence is more unlawful action and less diligent investigation.

The US on the other hand formed the doctrine of the "Fruit of the Poisonous Tree" from **SILVERTHORNE LUMBER CO. v UNITED STATES**, 251 U.S. 385 (1920) where an unconstitutional search and seizure by the US Government helped them unlawfully obtain documents to use against a Corporation in a criminal prosecution. The doctrine holds that evidence gathered through illegally obtained information is excluded from trial. The practical result of this is that Police Officers must work diligently, carefully and with reverence for the law which they protect because they know that if they fail to keep it, or break it to obtain evidence, that evidence will not be admissible nor will their actions go without consequence.

Black and White

In the end we know that it is never really black or white. There may in fact be situations where it is equitable and just to use evidence obtained under questionable circumstances to prosecute a matter, history is replete with exceptions where the general rule cannot suffice. But perhaps that is exactly the question that we should be asking. Should the general rule be all evidence is first admissible? Are we creating a framework that preserves the sanctity of the rule of law or are we conveniently eating from the fruit of the poisonous tree when it suits us? Are we allowing for the preservation of law and order and the custody of one law in which ordinary citizens repose their trust, to remain foremost in prosecuting crime, or are we continuously encouraging impunity in justifying the prosecution's end? These questions, though seemingly trivial, have a way of becoming important, the significance being that the Police are the foundation of civil society. After all you can teach a guard to prosecute strangers without compassion, but it will be a sad day when you become that stranger.