

Effect of the cyber crime act on the police power of search in Nigeria

Azah Aisosa Anderson

Legal Officer, Department of Edo State Board of Internal Revenue Service, Nigeria

Abstract

In order to effectively administer justice, the law has clothed enforcement agents with certain rights and privileges, among which include but not limited to the power to conduct searches and seizing a suspect's property in order to obtain evidence that will be used to prove their case during criminal trial.

With the prevalence of cybercrimes, the issue of searches conducted on suspects has become rampant, and these have raised so many questions as to whether the Police has the right to search phones and other electronic devices in a bid to obtain evidence against an accused, especially as it relates to cyber crimes.

It is in light of the above therefore, that this work seeks to critically examine searches in general with a bid to resolving these issues raised while examining both case laws and statutory provisions.

This work is limited to Police Act and some relevant sections of the Cybercrimes Prohibition Act.

Keywords: cyber crime, administer, Prohibition Act, Police

Introduction

Search, is a process employed to recover either from the body of a person, property or his premises, materials needed for the purpose of Law enforcements. Hence the police can make use of the process to recover criminal evidence, in course of their investigation, where necessary, in order to forestall the commission of crime ^[1].

A search is conducted on a suspect in order to obtain evidence to be used at the trial ^[2].

The right of police to conduct searches is entrenched in several legislations for example: The Police Act, specifically in section 28(1) and 29 respectively ^[3] and it provides as follows,

28(1) "a superior police officer maybe by authority under his hand authorized any police officer to enter any house, shop, ware house, or other premises in search of stolen property, and search there in and seize and secure any property he may believe to have been stolen, in same manner as he would be authorized to do if he had search warrant, and the property seized, if any, corresponded to the property described in such search warrant."

29 "Police officer may detain and search any person whom he reasonably suspect 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."

Types of Searches that can be identified from the above sections are

1. Search of person,
2. Search of premises.

However, for the purpose of this work, another kind of search to be considered is the search of things.

Search of a person

Section 29 of the Police Act, arms a Police officer with the right to conduct search on a person whom he reasonably believes or suspects to have been in possession any property

stolen or unlawfully obtained. If a person is arrested and detained in law custody, his body maybe searched in connection of the offence, in this circumstance, the law allows such search to be extended to the suspect being medically examined. For instance, if a person is arrested in connection with being in unlawful possession of hard drugs, the suspect may be subjected to medical examination to detect if he has swallowed to his stomach some substances.

Note the words used in section 29 of the Police Act as earlier highlighted, if a person must be searched, the police officer conducting such search must have "reasonable suspicion" that the accused has in his possession anything stolen or unlawfully obtained. This appears to actually provide justification upon which search should be based.

However, the provision seems to have created a lacuna, as the Statute does not in any way describe or give an interpretation to the word "Reasonable", and as a result, it is sad to say that, that which is meant to be a protection has suddenly become an opportunity for abusing rights of citizens, little wonder the police often result in abusing and harassing people under the disguise of search. It is on this note that the court has stood up to its responsibility to interpreting the Act, so as to forestall the abuse of rights.

In laying the text for reasonable suspicion, the court *Markby, J.* said in the celebrated case of *Q. Behary Singh* ^[4]

" what is a reasonable suspicion must depend on the circumstance of each particular case; but it must at least be found on some definite facts tending to throw suspicion on the person and not on mere vague surmise or information."

The Nigeria case of *Sarkin Kinkiba Tsoho Ladan v. Zaria Native Authority* ^[5] has also helped in the interpretation of the word "reasonable suspicion" as found in the Act, In that case, a police constable wanted to arrest the appellant's son on a suspicion of involvement in a riot. There was no evidence that the suspect had committed any offence or was there any complaint against him. In other words, there was nothing by way of 'definite facts' on which suspicion could

be based. When, therefore, the constable wanted to arrest the appellant's son, the appellant resisted him by force. It was for this, the appellant was convicted for obstructing a police officer, and then he appealed against the conviction. In allowing the appeal, the court held that, although the police suspected the appellants son, but there was no evidence on ground upon which his suspicion is based; therefore it is impossible to say that the suspicion was reasonable.

From the above case laws and precedence considered, both foreign and municipal, it is glaring, "reasonable suspicion" "as used in the Act is a suspicion based on facts and not merely a vague believe based on assumptions. Hence any search conducted on a person without reasonable justification in accordance with the law will amount to an illegal search. Where an individual feels search has been conducted on him without reasonable justification, he can proceed to the Court of Law to seek redress ^[6].

Search of premises

Another form of search that can be affected by the police is search of premises. This kind of search are searches carried out in an accuse person's premises, store, ware houses or other premises ^[7]. The reason for this is to seize any property believed to have been stolen or unlawfully obtained.

In other for a police officer to be able to conduct this kind of search, he must do so with a permission or authority of a superior police officer ^[8] which must be in writing. The Police Act under its interpretation section ^[9], defines a superior police officer to mean any officer above the rank of a Cadet assistant Superintendent of Police. This sort of authority is called a search warrant.

The Administration of Criminal Justice Act, 2015 under section 146, has also included other persons who can issue search warrants and these include;

1. Judge
2. Magistrate and
3. Justice of peace in the North.
- 4.

What this means therefore is that, before a legal search can be carried out in premises, any of the above mentioned persons must have authorized such search and such authorization must be in writing.

It is important to note that, although under Section 28 of the police Act, the law allows search of premises to be authorized by a superior police officer, yet, Section 28(3) limits the power of the police when issuing a search warrant to another officer. By the provision, a superior police officer is only allowed to issue a search warrant on premises only on the following grounds;

1. Where in the last twelve months the premises is occupied by a person previously convicted of receiving stolen property or harboring thieves, or
2. Of any offence involving fraud or dishonesty.

Hence, where a superior officer, issues a search warrant other than on the ground stated above, such warrant will be invalid. It is important to state again however, that this limitation only applies to the police and not a judge or a Magistrate or justice of peace as the case maybe, as these ones can issue a search warrant under any circumstance upon complaint.

After all said, it becomes clear that, searches on premise although provided under the Act only becomes valid and legal when the police officer conducting such searches complies with all requirements of the law, thus, failure to comply can incur the wrath of law on such officer and the Nigeria Police, as it will amount to violation of one's right of privacy, which is clearly entrenched under section 37 of the Constitution of the Federal Republic of Nigeria

Search of things

Search of things as used in this context means search of anything other than persons or premise. This no doubt includes things, such as Electronic devices, as Phones, Laptops, etc.

Clearly looking at the provision of section 28 and 29 of the Police Act, only search on person and premises were mentioned and no other, hence bringing to mind one of the rules of interpretation of statute "*expression unius est exclusion alterius*" which when interpreted means; "The express mention of one thing is the exclusion of all others". This principle was applied in the case of *Attorney General of Bendel State .v. Aideyan* ^[10] where the court held that, when a Status expressly mentions a particular thing, those not mentioned are excluded. In applying the above stated rules of interpretation to the express provision of the Police Act, it appears therefore that, the police Act having expressly mentioned the search of person and premise clearly never intended any other form of searches. Thus it will be safe flowing from the above to say that, other than searching a person or premises, the police are barred from conducting any other form of search.

Even as this appears to be the clear position of things, some have also argued to the contrary, that the search on person captured under the Act, has the sole aim of helping a police officer ascertain if a person being searched has in possession anything illegal or suspected to be stolen and as a result could mean, conducting a thorough search on such property to ascertain if such was actually stolen. And this no doubt technically amounts to searching the thing in question. This was the position taken by *ACP Jimoh Moshood* (Force Public Relation Officer, Abuja) in the Punch News ^[11]

Well, I do seem to agree with this later argument but not in its entirety. For no doubt to ascertain if something is stolen or illegally obtained, an element of search has to be conducted on such. Thus, where such a person upon being found with anything reasonably suspected to be stolen or illegally obtained is able to show any proof of ownership, by tending a valid receipt, or even an affidavit of ownership, the officer in question becomes barred from conducting further search on the property.

Hence, the question as to whether or not according to the police Act a police officer can conduct search on a thing, appear to be "Yes", but very limited as earlier explained in preceding paragraphs.

Police right to search phones and other electronics devices in a bid to obtain evidence against an accused, especially as it relate to cyber crimes.

A subject that has generated heated argument in recent times is, whether a police officer has the power to search a person's phones or laptops in a bid to obtaining evidence that can be used to prosecute cyber related offences.

Generally speaking, the purpose of searches in criminal investigation basically, is to gather evidence that can be

used against an accused during trial. But to be very precise, we must state categorically that nowhere in the Police Act which is the substantive law that stipulates the powers, functions and duties of the Nigeria police give police officers the right to search Electronic devices, as a matter of fact, Section 28 and 29 of the Act ^[12] which provides for power to conduct searches only restrict such power of search to premises and persons. However, it is worth of note that the Cyber Crime Prohibition Act ^[13] has extended the search power of the police to include search through a suspect's electronic devices, but in order to prevent abuse of power, the Act has laid down special procedures which must be followed strictly, else, such search will be regarded illegal. The court in case of *Deepak Babaria v. State of Gujarat* ^[14] held that when a thing is required to be done in a particular manner, same shall be done in that manner alone. In applying same principle, the provision of Section 45 of the Cybercrime Act is mandatory and must be strictly complied with, failure to comply thus will render search of such nature illegal.

The said Cybercrime (Prohibition, Prevention etc.) Act 2015, specifically in 45 (1) provides thus;

(1) A law enforcement officer may apply ex-parte to a judge in his chambers for the issuance of a warrant for purpose of obtaining electronic evidence in related crime investigation.

The word law enforcement officer as used in the this section was clearly defined in section 58 of the Cyber Crime Act (supra) where it was said to include any agency for the time being responsible for implementation and enforcement of the Act, which no doubt includes officers of the Nigeria Police Force. The Act further proceeds to provide that, in order to obtain electronic evidence that can be used against an accused during trial, the officer in charge of such investigation must first apply to the judge for a warrant authorizing such.

At this point, it is important to state that all forms of evidence obtained from phone, laptops and all other electronic device, since they are all computer within the definition of computer under the Evidence Act ^[15] are all within the meaning of computer generated evidence provided in Section 84 of the Evidence Act ^[16]. Hence, whether the content in such document was produced by the computer itself or was fed to the computer by the operator is immaterial. The Supreme Court in the case of *Omisore v. Aregbesola* ^[17] when interpreting section 84 of the Evidence Act held that, section 84 is not limited to internet generated documents only, but extend to any other document produced by a computer whether the content was produced by the computer itself or feed to the computer by the operator.

Conclusively, having considered Section 45 of the Cyber-crime Act and establishing that all evidence obtained from electronic devices such as phones and laptops etc. all qualifies as electronically generated evidence, it become glaring that search of electronic devices (phones, Laptops etc.) with intent to obtain evidence for purpose of establishing cyber offence only becomes legal when it is done upon the issuance of warrant issued by a judge.

Conclusion/recommendations

Even when the Law relating to searches appears clear, current trends shows that many police officers who are expected to help protect citizens right from violation have

often been found involving themselves in illegal searches therefore violating the rights expected to be protected by them. This no doubt has resulted mainly because of ignorance of the Law among some officers especially the junior ones, in many instances too, this has also been occasioned by the deliberate desires of the officers to breach the Law.

On this note, it is recommended as follows:

1. That, superior officers of the Police, such as Inspector General of Police, Assistant Inspector, Commissioners etc. should ensure to a very large extent that, the junior officers are sufficiently aware and educated on the scope and limits of power of such officers as it relates to searches considering the fact that the action of one, is binding on all others when such arises from the course of their duty as a Police officer.
2. Ensure that any officer found illegally carrying out searches is duly sanctioned in other to serve as a deterrent to others.

Awareness on the part of the Citizen whose rights are being abused in this regard is also imperative. Citizens should be educated on their rights and limitation of the police when being searched.

References

1. Alhaji Ahmed Abdullahi 'Searches and seizure in Nigeria with particular reference to the Northern states' a thesis submitted to the postgraduate school, Ahmadu Bello University, Zaria. Iv 1985
2. A.F Afolanya 'Criminal Litigation in Nigeria' 3rd edition Chengo Law publication Limited pg.68
3. Police Act Cap P19 LFN 2004
4. (1867) 7 W.r cr. 3; see also (1958) Journal of Criminal Law, Vol. 22, 260 - 261
5. (1962) N.N.L.R, also reported by Alhaji Ahmed Abdullahi 'Searches and seizure in Nigeria with particular reference to the Northern states' a thesis submitted to the postgraduate school, Ahmadu Bello University, Zaria. Iv 1985, p. 58
6. Section 6 Of the 1999 Constitution as amended
7. Section 28 police Act P19 LFN 2004
8. Ibid
9. Section 3
10. (1989) 4 NWLR (pt. 188) 640
11. Published April 9, 2018
12. Supra
13. 2015
14. 3SCC 504
15. 2011
16. Supra
17. (2015) 15NWLR (PT.1482) 205