[1999–00 Gib LR 437]

IN THE MATTER OF WALKER

SUPREME COURT (Pizzarello, A.J.): March 29th, 2000

Police—arrest—detention pending charge—under Criminal Procedure Ordinance, s.42, detained suspect to be brought before magistrates' court as soon as reasonably practicable, whether or not sufficient evidence to support charge—no implied time-limit—police obliged to charge or release once preliminary factual investigations completed

The applicant applied for a writ of habeas corpus to secure his release from police custody.

The applicant was arrested at 7 p.m. on suspicion of being in possession of a stolen vehicle contrary to s.184(1) of the Criminal Offences Ordinance, and detained in police custody pending inquiries in England as to the origin of the vehicle. The applicant claimed to have borrowed the car from an acquaintance. Its chassis number had been obliterated and its documents belonged to another vehicle. He was not brought before the magistrates' court either at 10 a.m. or at 2.30 p.m. the next day. He made an *ex parte* application to the Supreme Court for bail, which was dismissed in favour of the present application for habeas corpus to be made the same afternoon.

He submitted that his detention was unlawful, since (a) s.42 of the Criminal Procedure Ordinance required the police to bring him before the magistrates' court within 24 hours or release him; (b) there was no requirement under s.42 or s.106(1) (governing the institution of proceedings) that the applicant first be charged, nor under s.184 of the Criminal Offences Ordinance (governing the offence in question); and (c) the delay was unnecessary, as the information required from the English police could be obtained almost instantaneously if requested.

The Crown submitted in reply that (a) the applicant's detention was not unlawful, since s.42 required only that he be brought before the court as soon as practicable, and the police were permitted a reasonable time to conduct investigations and gather the evidence necessary to substantiate a charge; (b) it was necessary that a charge be preferred before the applicant be brought to court, since the court's jurisdiction to authorize further detention or to grant bail was based on the existence of a charge; and (c) the applicant was deemed under s.18 of the Ordinance to be in lawful custody once lawfully arrested.

Held, ordering that the applicant be brought before the court at its next sitting:

(1) Under s.18 of the Criminal Procedure Ordinance a detained person was deemed to be lawfully detained in so far as that detention was authorized by the Ordinance. The usual methods by which criminal proceedings were commenced were by the court's issuing a summons or warrant in response to an information laid, or by the arrest, charge and production of the accused person. Since an arrest would be unlawful if the arrested person were not told the reason for his arrest, and any subsequent detention would be false imprisonment, it followed that the person should be charged within a reasonable time after arrest, or released if no charge was to be laid (para. 13; paras. 16–19).

(2) An arresting officer was permitted a reasonable time in which to ascertain the facts in order to find whether there was sufficient evidence to support his suspicions that an offence had been committed. Section 46 of the Criminal Procedure Ordinance provided that the custody officer should release an arrested person if satisfied *after due inquiry* that insufficient evidence existed to proceed. However, s.42(1) was clear that an arrested person should be brought before the court as soon as practicable. Even if it were not practicable to do so within 24 hours, and an officer of the rank of Sergeant or above intervened to release the arrested person on recognizance (for a non-serious offence) or detain him (for a serious offence), under s.42(4) the duty to place him before the court as soon as practicable remained, whether or not sufficient evidence had been gathered. If he had not yet been charged, the court would charge or release him. "As soon as practicable" was to be construed according to its literal meaning, and did not entail any maximum period (paras. 20–24).

(3) The court had already ordered that the applicant be brought before the magistrates' court at its next sitting, since there had been no reason not to bring him before it on the morning following his arrest (para. 14).

Cases cited:

(1) *Att.-Gen.* v. *Leoni*, 1999–00 Gib LR 120, referred to.

(2) *R.* v. *Holmes, ex p. Sherman*, [1981] 2 All E.R. 612; *sub nom. Re Sherman* (1980), 72 Cr. App. R. 266; [1981] Crim. L.R. 335, considered.

Legislation construed:

Criminal Offences Ordinance (1984 Edition), s.184(1), as amended by Criminal Offences (Amendment) Ordinance (No. 2 of 1993), s.51:

> "A person who is brought before the magistrates' court charged with having in his possession . . . or conveying in any manner in any place anything which may reasonably be suspected of being stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same is guilty of an offence . . . "

s.184(2): The relevant terms of this sub-section are set out at para. 17.

Criminal Procedure Ordinance (1984 Edition), s.18: The relevant terms of this section are set out at para. 13.
s.42(1): The relevant terms of this sub-section are set out at para. 10.
(4): The relevant terms of this sub-section are set out at para. 16.
s.46: The relevant terms of this section are set out at para. 20.
s.106(1): The relevant terms of this sub-section are set out at para. 16.

Magistrates' Court Ordinance (1984 Edition), s.21(1): The relevant terms of this sub-section are set out at para. 15.
(2): The relevant terms of this sub-section are set out at para. 15.
(3): The relevant terms of this sub-section are set out at para. 15.

S.L. Ffrench Davis for the applicant;
R.R. Rhoda, Q.C., Attorney-General, and *K. Warwick, Crown Counsel*, for the Crown.

1 **PIZZARELLO, A.J.:** This matter came before me on February 23rd, 2000 in the afternoon as an urgent *ex parte* application for bail, counsel undertaking to file papers in due course. I agreed to take the application provided that counsel for the Attorney-General was present, and Mr. Warwick attended at short notice.

2 The circumstances, as explained to me by Mr. Ffrench Davis, were these. The applicant, Gary Wilfred Walker, had been arrested at approximately 7 p.m. on the previous day at Safeway's car park where he had left his car, a Lexus sports car GS 300. His car had been clamped and he had gone back to pay the penalty and have the car released. The police and customs happened to be at the car park searching another car in a matter totally unconnected with the applicant or his car. For some reason the applicant was stopped on suspicion of driving a stolen vehicle, as counsel understood it, under s.47 of the Criminal Offences Ordinance. The police were refusing bail and had not taken the applicant before the magistrates' court that morning or, indeed, at 2.30 p.m., as they had not finished their investigations.

3 Mr. Warwick informed me that his instructions (though necessarily brief, having regard to the short notice of this matter) were that the police had found that the chassis number of the car had been scratched out and that the documents relating to the applicant's car could not be correct, as the numbers contained therein corresponded to numbers of a car in the UK which was extant and in the possession of the owner. The police had only just been given this information and now wanted to question the applicant about this. Mr. Warwick also suggested that the application for bail was not procedurally correct and that was another reason why he did not have full instructions, as he was uncertain about the nature of the application. If at all, the matter should have proceeded on habeas corpus.

4 I agreed with Mr. Warwick. The procedure was not correct, the application for bail stood dismissed, but I gave Mr. Ffrench Davis the opportunity to file by affidavit an application for habeas corpus and adjourned to take the matter at 4.30 p.m.

5 The application for habeas corpus then came before me. Mr. Ffrench Davis appeared on behalf of the applicant and the Attorney-General led Mr. Warwick with Sgt. McGrail in attendance. Mr. Ffrench Davis amplified on his earlier sketchy introduction. He had been instructed at 11 a.m. by a person who had been arrested at 7 p.m. the previous day. He had spoken to three police officers, one of whom was Sgt. McGrail and another was Sgt. Buhagiar, the custody officer. Section 47 of the Criminal Offences Ordinance had been mentioned for the offence of being in possession of a vehicle knowing it to have been stolen or having reason to believe that it had been stolen.

6 The circumstances, as told by them, were that the applicant was observed in the Safeway car park and his demeanour was suspicious. The police and customs happened to be in the area, examining another car. As it turned out, both that car and the applicant's car were clean—no drugs. In relation to the applicant, the police suspected that a stolen vehicle was involved and the applicant was arrested (under s.184) and arrived at the police station at 8 p.m. Mr. Ffrench Davis had spoken to the police at 12 p.m. on February 23rd and at that time they had had no reply from their investigation in England, Mr. Warwick's being the first intimation to him that an answer had come. The applicant had neither been charged nor had he been released, and no attempt had been made to bring him before the magistrates' court as required by the Criminal Procedure Ordinance.

7 Mr. Ffrench Davis submitted that there was no lawful reason why the applicant should not have been taken to the magistrates' court at 10 a.m. that morning, so his detention may be illegal, as it contravenes the provisions of the Constitution and s.42 of the Criminal Procedure Ordinance, under which a person cannot be detained for more than 24 hours before being brought to the magistrates' court.

8 The police had told him they wanted to see the correlation between the numbers in the documentation and the records in England and he suggested that that was something that could be obtained in England within seconds and surely the Gibraltar Police would not take much longer than that. The car was not the applicant's car; the car had been lent to him in Spain by a person (the owner of a bar) who was away in the United Kingdom on business. The applicant, as far as counsel was aware, did not have insurance documents with him.

9 Mr. Rhoda, Q.C. pointed out two fallacies in Mr. Ffrench Davis's presentation. First, counsel's statement that the police in England could

get the information within seconds is not evidence, as counsel is in no position to give that evidence and, secondly, that there is a 24-hour limit within which a person has to be brought before the magistrates' court, because that is not so. The provision in s.42 is to the effect that a person be taken before a magistrates' court as soon as is practicable, and that expression includes the reasonable time it takes the police to get their evidence together to substantiate a charge in the magistrates' court.

10 Mr. Rhoda calls attention to the exact wording of s.42(1):

> "On a person being taken into custody for an offence without a warrant, a police officer not below the rank of sergeant may, and, if it will not be practicable to bring him before the magistrates' court within twenty-four hours after his being taken into custody, shall, inquire into the case and, unless the offence appears to the officer to be a serious one, release him on his entering into a recognizance . . . "

It is his submission that a person cannot be taken to the magistrates' court without a charge having first been preferred, for that is what gives the magistrates' court its jurisdiction. Mr. Rhoda questions: If a person is brought before the magistrates' court without a charge, on what basis may the court continue to detain that person or give him bail? And he suggests that habeas corpus would lie immediately upon such a decision. Furthermore, it would not be right that where a person was properly being detained by the police prior to charging him, the prosecution should run the risk of a magistrate's releasing that person before the charge could be formulated.

11 Mr. Rhoda said he was emboldened to take that view because in the case of *Att.-Gen.* v. *Leoni* (1) in the Court of Appeal, in the course of argument, their Lordships appeared to favour the view that the expression "practicable" would cover the period of time the investigating officers reasonably required for their initial investigations.

12 At the close of counsel's submissions I ordered that the applicant be taken before the magistrates' court at 10 a.m. the following morning—that being the next sitting of that court—and remanded him in custody until then or his earlier release, with or without a recognizance, pursuant to s.42, and reserved for consideration the points raised by counsel.

13 I must confess that I have so far been of the opinion that a person who has been detained and not charged ought to be brought before the magistrates' court as soon as reasonably practicable, subject only to a consideration of the circumstances which arise to determine in any particular case what is "practicable." Once before the magistrates' court it would be for that court to determine whether the police should be allowed to continue to hold that person. After all, if the police may lawfully hold a

person for longer than the next sitting of the court why should not the court have the power to extend the time? What is lawful is set out in s.18 of the Criminal Procedure Ordinance:

> "Any person required or authorized by or under this Ordinance or any other law to be arrested or taken to any place or to be kept in custody shall, when arrested and while being so taken or kept, be deemed to be in lawful custody."

14 It is trite to say that it is the duty of police officers to do exactly what the law sets out. For instance, in the circumstances of this case, as I apprehend them, there seems to me to have been nothing to prevent the applicant's appearance at the magistrates' court at 10 a.m. on the morning following his arrest, unless, of course, the learned Attorney-General is right when he submits that an evidential requirement suffices to delay the production of a person under detention before the magistrates' court. So I turn to consider all these points.

15 The jurisdiction of the magistrates' court is contained in the Magistrates' Court Ordinance, s.21, which states:

> "(1) The court shall have such jurisdiction to try offences as may be conferred upon it by this Ordinance or by any other law.
>
> (2) The court shall have such power to sit as examining justices over any indictable offence as may be conferred upon it by this Ordinance or by any other law.
>
> (3) The court shall have jurisdiction in criminal matters as may be conferred upon it by this Ordinance or by any other law."

16 Other provisions governing the sitting of the court are contained in the Criminal Procedure Ordinance, and the manner of instituting proceedings is covered by s.106(1) of this Ordinance: "Criminal proceedings before the magistrates' court may be instituted by the laying of an information before a justice or the bringing before the court of a person arrested without a warrant." Note that there is no mention in s.106, in respect of a person arrested without a warrant, of the fact that he should have been charged before he is taken before the magistrates' court, and that goes hand in hand with the requirement of s.42(1) and s.42(4) which reinforces this point. Section 42(4) reads: "Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before the magistrates' court as soon as practicable."

17 In respect of the instant case, s.184(2) of the Criminal Offences Ordinance states: "A person with anything in his possession as aforesaid who does not give an account as required by subsection (1) to a police officer may be arrested without a warrant and brought before a court." However, that said, the usual procedures to start criminal proceedings

before the magistrate's court are (a) by arrest, charge and production before the court, or (b) by laying an information followed by summons or warrant. I have not come across any instance where a person has been brought before a magistrates' court in any other manner than these.

18 Having heard the submissions of counsel, I am now firmly of the opinion that the learned Attorney-General is absolutely right when he asks the rhetorical question: On what basis may the magistrates' court countenance a continuation of custody without a charge? The magistrates' court is a creature of statute, so it is to statute that one must look for its jurisdiction and powers, and that court cannot take to itself what is not given to it expressly, except possibly by necessary implication, and I do not think that can or ought to be done.

19 What, then, is the basis on which the police may detain a person without charge? Obviously, when a person is arrested without a warrant, and then, of course, that person must be told the reason for his arrest because a person is entitled to know for what offence or on suspicion of what offence he is seized. Otherwise, there is no lawful arrest and the detainer may be liable for false imprisonment, which is deprivation of liberty for any time, however short, without lawful cause. It follows that a person who is arrested should be charged within a reasonable time after his arrest, and if it becomes clear that no charge is to be preferred, he should be released.

20 There is a period, naturally, when a police officer "who arrests on suspicion may first do what is reasonably necessary to investigate the matter and discover whether his suspicions are supported by further evidence": see 11 *Halsbury's Laws of England,* 4th ed., para. 117, at 83. In other words, the police are entitled to hold such a person without charge while the facts of the matter are ascertained, or at least such of the facts as will justify or sustain a charge. This is recognized in s.46 of the Criminal Procedure Ordinance, under which the officer in charge of the station may release the detainee when he is satisfied that after due enquiry there is insufficient evidence to proceed. Section 46 reads:

> "Notwithstanding any other provisions of this Ordinance, the officer in charge of the police station to which a person arrested without a warrant is brought in accordance with the provisions of this Ordinance or any other law may release such person when he is satisfied after due police inquiry that insufficient evidence to proceed with an information is disclosed."

21 All that is covered on arrest without warrant by s.42, which governs the dealings of the police officers regarding their prisoners in the initial stages. If it is not practicable for a prisoner to be brought before the magistrates' court within 24 hours, an officer not below the rank of

sergeant inquires into the case. The section says what has to be done and that officer has to make the decision whether the offence is serious or not, and if it is a "non-serious" offence, if I may put it that way, the officer has to release the prisoner on recognizance. If the officer concludes that he is dealing with a serious offence, the implication of s.42(1) is that the prisoner be taken before a magistrates' court as soon as practicable.

22 But the section does not leave the matter to implication. Sub-section (4) is firm and states categorically that where the prisoner is involved in a serious offence he shall be brought before the magistrates' court "as soon as practicable." To my mind, that has no bearing on what is available as evidence: the prisoner is to be brought before the magistrates' court. If he has yet to be charged, the court will ensure that he is charged or release him.

23 Circumstances similar to the instant case were before the Divisional Court in *R.* v. *Holmes, ex p. Sherman* (2). There, the defendant had been arrested and not brought before a magistrates' court until four days later, after an application for a writ of habeas corpus had been made. The relevant part of Donaldson, L.J.'s judgment reads ([1981] 2 All E.R. at 614–616):

> "At the resumed hearing counsel for the Metropolitan Police made it clear that, whilst the commissioner would not have shared Sgt Holmes's surprise at our anxiety and would have expressed himself somewhat differently, he would on the facts of this case have been fully prepared to justify the actions of the police.
>
> Let me explain how this comes about. The commissioner's view of the law is set out in his written evidence to the Royal Commission on Criminal Procedure (at pp 42–70, 157–159) and I do not doubt that other chief officers of police share his views. His general orders to the force give effect to this view.
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> In the instant case there were two matters which caused us particular concern. The first was that Sgt Holmes appeared to display a complete disregard of the fundamental principle of the common law—
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> > 'that when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence.'
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> The quotation is from para (*d*) of the introduction to the 1964 Judges' Rules (see Practice Note [1964] 1 All E.R. 237, [1964] 1 W.L.R. 152).

The commissioner accepts this principle which he refers to as 'principle (*d*)', and I will use the same terminology. However, he says that he does not agree that Sgt Holmes had in fact enough evidence to charge the applicants, at any rate during the initial stages of the detention. This is interesting, but the fact remains that Sgt Holmes was the officer who had to reach a decision; he thought that he had sufficient evidence and accordingly he should have preferred a charge. Furthermore, the fact that he had further inquiries to make, and that these might become more difficult if the applicants were charged, is no justification for disregarding the mandatory requirements of principle (*d*).

We have not investigated the instant case in detail because to do so in open court might prejudice the subsequent trial of the applicants and, in any event, now that the applicants have been charged and bailed our principal concern is with the system rather than with the instant case.

The commissioner has criticised principle (*d*) in the following terms:

> '17.32. The unsatisfactory nature of principle (d) is that an officer may have sufficient evidence to charge but may wish to defer charging an arrested person to seek advice from his superior officers or to seek legal advice whether or not it is appropriate in all the circumstances of the case to charge. An officer so delaying a charge is in breach of principle (d). Equally he is open to criticism if he does *not* delay and goes ahead and charges although he wanted guidance from his superior officers or legal advice on the exercise of his discretion to prosecute. Additionally an officer may have sufficient evidence to charge a person but wishes to attempt to put that evidence to the test by seeking to obtain corroborative evidence in support. A typical example is that shown in the case [previously] referred to . . . where police received an admission to a murder sufficient to support a charge but the charge was delayed in order to test the veracity of the admission and in particular to recover the murder weapon from the river where it had been thrown. Had police charged immediately after the confession and the confession had proved as false as the earlier untrue explanations the suspect had put forward as to his movements police would doubtless have been criticised for charging prematurely although certainly they had sufficient evidence to charge; by delaying the charging until they had obtained corroborative evidence it could be argued that police were in breach of principle (d).

> 17.33. For these reasons I suggest that the principle in rule (d) be amended to recognise the fact that despite the possession by an officer of "enough evidence" to prefer a charge there may well be perfectly proper reasons why it is not appropriate to charge "without delay".'

Suffice it to say that, whilst there may well be strong grounds for amending the law, the amendment must be achieved in a constitutional manner and not by a process of modification in practice. The law at present is that, as soon as there is enough evidence to prefer a charge, the arrested person must *without delay* be charged or informed that he may be prosecuted for the offence. The principle is subject to no qualification and no qualification should be introduced by, for example, setting an unduly high standard of 'sufficient evidence'. The criticism that an officer refrained from charging and retained a man in custody is incomparably more serious than that he charged a man on insufficient evidence.

The second aspect of the instant case which caused us concern was the delay in bringing the applicants before a magistrates' court. Section 38(4) of the Magistrates' Courts Act 1952 is unequivocal and imperative in its terms. It reads as follows:

> 'Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a magistrates' court as soon as practicable.'

In both *R. v. Houghton* . . . and in *R. v. Hudson* . . . it was I think accepted that save in a wholly exceptional case the period between arrest and appearance before a magistrates' court should not exceed 48 hours. The same approach seems to have been adopted in the Prevention of Terrorism (Temporary Provisions) Act 1976. The Act abrogates s.38 of the Magistrates' Courts Act 1952 where it applies but only permits detention in right of an arrest exceeding 48 hours if the Secretary of State extends this period. This seems to me to point unmistakably to a period of 48 hours as being the maximum permissible period of detention in right of an arrest in the absence of special statutory provision. Counsel for the police drew our attention to s.29(5) of the Children and Young Persons Act 1969, as amended by the Bail Act 1976, which requires a young person to be brought before a magistrates' court within 72 hours. He submitted that this pointed to a longer period than 48 hours being acceptable under s.38 of the 1952 Act. I do not think that this inference can be drawn. Section 29 is a self-contained code applying to children and young persons which is designed primarily to achieve their immediate release from arrest or alternatively their transfer to the care of a local authority. It is primarily concerned with their welfare. It is only in a

well-defined and wholly exceptional case that a delay of 72 hours in bringing a detained child or young person before a magistrates' court is specially authorised.

It was against this background that we were told that in a specimen period of three months, for which statistics were specially prepared for the Royal Commission, 212 persons or 0.43% of those arrested in the Metropolitan Police District were detained for more than 72 hours before being brought before a magistrates' court. The percentage may be tiny, but we are concerned with people not percentages. No figures are available for the number of persons who were so detained for more than 48 hours, but clearly it must have been higher.

What is the reason? I think that it is largely the time lag between arresting on suspicion and the stage at which the police consider that they have sufficient evidence to charge. Curiously enough, s.38 of the 1952 Act makes no mention of the preferment of a charge as a precondition of bringing the arrested person before a magistrates' court. However, the commissioner takes the view that this is the position and I know that many lawyers would agree with him. He has recommended that this precondition be removed by giving magistrates power to consider bail before a charge is made and requiring the police to bring an arrested person before a magistrate within 72 hours of arrest.

There is much to be said for this recommendation, but both we and the police have to live not only with but by the law as it is. The arrested person has to be bailed or brought before a magistrates' court 'as soon as practicable'. Practicability is obviously a slightly elastic concept which must take account of the availability of police manpower, transport and magistrates' courts. It will also have to take account of any unavoidable delay in obtaining sufficient evidence to charge, but this latter factor has to be assessed in the light of the power of the police to release on bail conditioned by a requirement to return to the police station when further inquiries have been completed and a power to release and re-arrest when the evidence is more nearly sufficient. Any such release may involve a risk that the arrested person will abscond, commit further crimes or interfere with witnesses, but this risk has to be balanced against the vital consideration that no man is to be deprived of his liberty save in accordance with the law. 'As soon as practicable' still means 'within about 48 hours at most'.

The commissioner in his evidence to the Royal Commission says that:

> 'A suspect in custody aggrieved about the length of time taken before a charge is preferred is not without remedy because he can apply to the Divisional Court for a writ of habeas corpus. This is by no means a legal remedy that has fallen into disuse but a real and available remedy. In 1977 there were 55 applications to the Divisional Court for writs of habeas corpus.'

This is true, but habeas corpus is a remedy for an abuse of power and it should rarely be necessary to invoke it. Furthermore, if, as the commissioner seems to suggest, an application for such a writ is to be regarded as a routine method whereby any arrested person aggrieved by his detention can find out whether his grievance is justified, this court is going to be extremely busy and a great deal of police time is going to be spent in justifying detentions. This is not an attractive prospect. However, it is right that all should know that the writ of habeas corpus has not fallen into disuse, but is, as the commissioner says, a real and available remedy. They should also know that, if the arrested person is unable to apply for the issue of the writ, others may do so on his behalf. Furthermore, such applications are given absolute priority in the fixing of the business of the court. I would only add the caution that the costs to the applicant of a frivolous application may be considerable, as will be the cost to the police if the application is found to be justified.

The police are undoubtedly carrying out their duties under very considerable difficulties which are both logistic and legal. We are told that the report of the Royal Commission will be published in the fairly near future. Once that report has been published and the recommendations of the commissioner considered, I hope that Parliament will feel able to treat the clarification and improvement of the law in this field as a matter of the utmost urgency.

In this case the applicants were fully justified in making this application which has resulted in their being charged earlier than would otherwise have been the case and also expedited their release on bail."

24 As may be observed, the judgment in *R.* v. *Holmes, ex p. Sherman* (2) deals with many of the fears expressed by the learned Attorney-General, which are put to one side and dismissed. For my part, I agree with the judgment save for the sentiment that "'as soon as practicable' still means 'within 48 hours at the most'." I prefer to leave it that "as soon as practicable" means what it says.

Order accordingly.