Supreme Court Reference No. 5 of 1987: in re State v. Songke Mai and Gai Avi

Supreme Court
Kidu C.J., Kapi Dep. C.J., Amet, Los, and Cory J.J.
3 June 1988

Police powers—power to detain—whether constitutional rights vesting in arrested persons apply to persons detained.
Criminal procedure—arrest without warrant—de facto arrest—constabular obligation to inform suspect of constitutional rights—s. 42(2) of Constitution—whether obligation extends to person detained but not arrested.
Criminal procedure—arrest or detention—deprivation of person's personal liberty—whether both arrest and detention involve total denial of a person's personal liberty.
Fundamental rights—rights of criminal suspect—reasons for arrest or detention and right to counsel—whether rights apply to detained person as well as arrested person.
Constitutional law—fundamental rights—rights of suspect—right to personal liberty—whether rights of s. 42(2) apply to both arrested and suspected persons.
Evidence—interrogation of suspect—whether constable may ask further questions after suspect exercises right to see a lawyer.

The National Court referred three questions to the Supreme Court for consideration. (Section 18(2) of the Constitution provides for a constitutional reference to the Supreme Court.) The three questions were as follows:

1. Does a police officer have any obligation to inform a person detained, but not actually arrested, of his rights pursuant to section 42(2) of the Constitution?
2. When is a person "arrested" and when is a person "detained"?
3. When an accused person is asked in a record of interview whether or not he wishes to see a lawyer and the accused says "yes", should the interviewing officer then suspend the record of interview or is he permitted to ask another question as follows, "Do you wish to see the lawyer now or after the record of interview?"?

Although the three questions of law lack a factual context, the cases of Songke Mai and Gai Avi in the National Court present a real case and controversy. In those criminal prosecutions, Songke Mai and Gai Avi were charged with robbery. The prosecution sought to lead evidence of interviews with the suspects, and defence counsel objected, on the grounds that the suspects' constitutional rights under section 42(2) of the Constitution had been denied. (Section 42(2), set out in full in the judgment of Kidu C.J., concerns suspects' rights to be informed of the reasons for arrest or detention and right to counsel.)

HELD:

(1) There is no police power to detain suspected persons. If such a power is

granted to the police, by statute, only section 42(2)(a) would apply.

(2) As there are non-criminal detention powers (Quarantine Act, Public Health Act, Migration Act, etc.), a detention under such provisions would give rights under section 42(2)(a) only.

(3) The words "detain" and "arrest" both mean total denial of a person's right to personal liberty.

(4) When a person who is being interrogated advises the police that he wishes to see a lawyer, the police must cease the interview, taking genuine and practicable steps to comply with section 42(1).

50 **Other cases referred to in judgment:**

Blake v. *Pope* [1986] 1 W.L.R. 1152; [1986] 3 All E.R. 185
Brown, Michael Edward (1976) 64 Cr. App. R. 231
Clowser v. *Chaplin* [1981] 1 W.L.R. 837; [1981] 2 All E.R. 267
Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362
Dallison v. *Caffery* [1965] 1 Q.B. 348
Fox v. *Chief Constable of Gwent* [1985] 1 W.L.R. 1126; [1985] 3 All E.R. 392
Ireeuw, Application of [1985] P.N.G.L.R. 430
Maneka Gandhi v. *Union of India* [1978] 2 S.C.R. 621
Premdas v. *Independent State of Papua New Guinea* [1979] P.N.G.L.R. 329
60 *Public Curator of Papua New Guinea* v. *Public Trustee of New Zealand* [1976] P.N.G.L.R. 427
State, The v. *Paro Wampa* [1987] P.N.G.L.R. 120
State, The v. *Silih Sawi* [1983] P.N.G.L.R. 234
S.C.R. No. 1 of 1986; Re Vagrancy Act [1988] S.P.L.R. 233; [1988] P.N.G.L.R. 1
Williams v. *The Queen* (1986) 161 C.L.R. 278; 66 A.L.R. 385
Wiltshire v. *Barret* [1966] 1 Q.B. 312; [1965] 2 W.L.R. 1195; [1965] 2 All E.R. 271

Legislation referred to in judgment:

Arrest Act (Ch. No. 339), sections 3, 5, 14, 16, and 17
Constitution, sections 18 and 42
70 Criminal Code (Ch. No. 262), section 600
Customs Act (Ch. No. 101)
Human Rights Ordinance 1972
Migration Act (Ch. No. 16), section 13
Motor Traffic Act (Ch. No. 243), sections 19, 24, 30, and 31
Public Health Act (Ch. No. 226), section 26
Quarantine Act (Ch. No. 234)
Search Act (Ch. No. 341), section 3(1)

Other sources referred to in judgment:

Annotated Constitution of Papua New Guinea
80 Blackstone, *Commentaries*
Constitutional Planning Committee Report
Halsbury, *Laws of England* (4th. ed. 1984) vol. 11, paragraph 99
Jennings, Sir Ivor, *The Law and the Constitution*
Lidstone, K.W., "A Maze in Law" [1976] Crim. L.R. 332
Parker, Lord, "The Role of the Judge in Preservation of Liberty" (1961) 35 A.L.J. 63
Shorter Oxford Dictionary

Telling, D., "Arrest and Detention—The Conceptual Maze" [1978] Crim. L.R. 320
Zander, "When is An Arrest Not An Arrest?" [1977] New Law J. 352, 379

Counsel:
90 Lawyer for the affirmative case: *E. Kariko*, Public Solicitor
Lawyer for the negative case: *C. Russell*, Acting Public Solicitor

KIDU C.J.

Judgment:

The National Court pursuant to section 18(2) of the Constitution, referred the following questions to this Court for consideration:

1. Does a police officer have any obligation to inform a person detained, but not actually arrested, of his rights pursuant to section 42(2) of the Constitution?
2. When is a person "arrested" and when is a person "detained"?
3. When an accused person is asked in a record of interview whether or not he wishes to see a lawyer and the accused says "yes", should the interviewing officer then suspend the record of interview or is he permitted to ask another question as follows, "Do you wish to see the lawyer now or after the record of interview?"?

There is no doubt that these three questions involve the interpretation and application of section 42(2) of the Constitution and are properly referred to this Court. They arose during a criminal trial before a judge of the National Court. In the course of the trial the State sought to tender records of interview between the two accused and the police investigator (two separate records of interview). The basis of the objection was that the police investigator failed to inform the two accused (separately) of all the rights contained in section 42(2) of the Constitution. This provision is as follows:

(2) A person who is *arrested* or *detained*—
(a) *shall be informed promptly*, in a language that he understands, of the reasons for his *arrest or detention* and of any charge against him; and
(b) *shall be permitted* whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and
(c) *shall be given adequate opportunity* to give instructions to a lawyer of his choice in the place in which he is detained,

and shall be informed immediately on his arrest of his rights under this subsection. [My emphasis]

The questions this Court has been requested to answer are in the context of a criminal trial although section 42(2) by its very wording is not confined to criminal matters.

Section 42 guarantees every person in Papua New Guinea the right to *personal liberty*. Subsection (1) thereof is as follows:

42. Liberty of the person.
(1) No person shall be deprived of his personal liberty except—
(a) in consequence of his unfitness to plead to a criminal charge; or

(b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or

(c) by reason of his failure to comply with the order of a court made to secure the fulfillment of an obligation (other than a contractual obligation) imposed upon him by law; or

(d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or

140 (e) for the purpose of bringing him before a court in execution of the order of a court; or

(f) for the purpose of preventing the introduction or spread of the disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or

(g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes; or

(h) in the case of a person who is, or is reasonably suspected of being of
150 unsound mind—

(i) or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community, under an order of a court; or

(ii) for the purpose of taking prompt legal proceedings to obtain an order of a court of a type referred to in Subparagraph (i).[1]

It is highly essential to emphasize the constitutional dictate contained in section 42(1) — that a person's personal liberty is guaranteed and may not be taken away unless one of the exceptions therein allows it.

I also emphasize from the outset that the exceptions enumerated under section
160 42(1) all relate to *total deprivation* of a person's personal liberty as distinct from *temporary restriction* of a person's freedom of movement. The word "*deprive*" is defined in the *Shorter Oxford Dictionary* as meaning "to divest, bereave, to dispossess, to take away, to remove"—i.e., in my view total denial or loss. So section 42(1) guarantees the right not to be denied totally of one's personal liberty unless such denial or loss is allowed by one of the exceptions enumerated thereunder.

I. Personal liberty

The Constitution does not define what "personal liberty" means and includes in section 42 thereof, and this Court has not had the opportunity to consider the matter until now.

170 Long ago the well-known Englishman, Blackstone, had the following to say about it:

This personal liberty consists in the power of locomotion, of changing situation,

1 Semble, "or addicted to drugs or alcohol" was intended to form part of the introductory words to paragraph (h).

or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law.

Sir Ivor Jennings, in *The Law and the Constitution*, says, at 263:

> The right to personal freedom is a liberty to so much personal freedom as is not taken away by law. It asserts the principle of legality, that everything is legal that is not illegal. It includes, therefore, the 'rights' of free speech, of association, and of assembly. For they assert only that a man may not be deprived of his personal freedom for doing certain kinds of acts—expressing opinions, associating, and meeting together—unless in so doing he offends against the law.
> The 'right' of personal freedom asserts that a man may not be deprived of his freedom for doing any act unless in so doing he offends against the law. The last is the genus of which the others are species.

Although Jennings and Blackstone say "personal liberty" includes freedom of speech, freedom of movement, freedom of assembly, etc., they were writing in the context of the English situation—i.e., that the English do not have a written constitution that guarantees specific rights and freedoms. We have a written constitution and it guarantees freedom of speech, movement, assembly, etc. in specific provisions: e.g., freedom from inhuman treatment (section 36); freedom of expression (section 46); freedom of assembly and association (section 47); right to privacy (section 49); freedom of information (section 51); freedom of movement (section 52). So in my view section 42 relates to rights to *personal liberty* excluding those specifically covered by other provisions in the Constitution.

In this respect I consider that the exceptions in section 42(1) very clearly support my view as to what "personal liberty" means in section 42(1). The authors of the "Annotated Constitution of Papua New Guinea" note at 156 that the Indian Supreme Court has interpreted "person liberty" widely in *Maneka Gandhi* v. *Union of India* (1978) 2 S.C.R. 621. But as I have pointed out, it is very clear from the exceptions enumerated in section 42(1) that the provision relates to deprivation of the liberty of what Raine Dep. C.J. called ". . . the body of a man" in *Premdas* v. *Independent State of Papua New Guinea* [1979] P.N.G.L.R. 329 at 347.

With respect to this matter I also refer to what Cory J. said in *Application of Ireeuw* [1985] P.N.G.L.R. 430 at 437:

> In determining the interpretation of the words '*deprived of his liberty*' assistance is obtained from the case of *Guzzardi* v. *Italy* 3 E.H.R.R. 333. Section 42(1) is in similar terms to article 5 of the European convention on Human Rights which reads:
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> > Everyone has the right to liberty and security of the person. No person shall be *deprived of his liberty* saving the following cases in accordance with the procedure prescribed by law. [Emphasis by Cory J. in original.]
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> The judgment of the European Court of Human Rights, at 365, par 92 provides:
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> > The Court recalls that in proclaiming the "right to liberty" paragraph 1 of Article 64 is contemplating the physical liberty of the person; its aim is to ensure that no-one should be dispossessed of his liberty in an arbitrary fashion. As is pointed out by those appearing before the court, the paragraph

are governed by Article 2 (in the same way as s 52—Rights to Freedom of Movement—is determined under the Papua New Guinea Constitution, such rights being restricted to citizens only). In order to determine whether someone has been deprived of his liberty within the meaning of Article 5, *the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.* [Emphasis by Cory J. in original]

Paragraph 93 provides:

> The difference between deprivation of and restrictions upon liberty is none the less merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these classifications, sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.

Paragraph 94 provides:

> As provided for under the 1956 Act, special supervision accompanied by an order for compulsory residence in a specified district does not itself come within the scope of Article 5.

In considering the facts in the present case there is some restriction upon the applicants' freedom of movement, and in some respects the individual liberty of each applicant is *restricted*, but none of the applicants are *deprived* of their liberty.

I should mention also, in support of what I consider "personal liberty" means in section 42(1), that the whole of section 42 makes it absolutely clear.

From the foregoing it is my view that the terms "arrested" and "detained" (or "arrest" and "detain") in section 42(2), (3), (5), and (6) mean total deprivation of personal liberty—they are two different forms of deprivation of personal liberty. And the deprivation must be legal. There cannot be any legal deprivation of personal liberty outside section 42(1).

In section 42(2) the two terms are used as follows:

1. "arrest" only for criminal purposes; and
2. "detain" both for criminal and non-criminal purposes.

Under section 42 a person may be detained (i.e., deprived totally of his personal liberty) without being arrested. For instance under the Quarantine Act (Ch. No. 234) a person may be quarantined without being arrested in order the prevent the spread of disease (of humans, plants, or animal) and such deprivation of liberty is sanctioned by section 42(1)(f). In such a case he does not have to be informed of the rights under section 42(2)(b) and (c). He has the right to be told only why he is detained. Under the same Act police are given the power to arrest: see section 38. In such cases section 42(2) requires that the person concerned be informed of all the rights granted by it.

Under the Public Health Act (Ch. No. 226), section 26, a person may be detained in a hospital or quarantine station if he is suffering from an infectious disease under a certificate to that effect signed by a medical practitioner. This is allowed once again by section 42(1)(f). There is no arrest involved but nevertheless such a person is deprived of his personal liberty and must be informed of the reason for his detention.

Section 13 of the Migration Act (Ch. No. 16) empowers the Minister for Foreign

Affairs to order that a person who is in the country unlawfully be detained until he leaves the country. Such action is sanctioned by section 42(1)(g). A person detained only has to be told why he is detained.

In the above circumstances it is difficult to see the logic of making it mandatory that the person detained be informed that he has the right to communicate with a lawyer, etc. What can a lawyer do about a man whom the doctors have certified to be suffering from smallpox and must be kept in confinement? Of course if the person asks to see a lawyer, etc., then section 42(2) obliges the person or persons responsible for detaining him to *permit* or *allow* him to do so for whatever purpose.

A person may be detained because he is unfit to plead to a criminal charge. In such a case the court has the power to order him to be detained and usually the practice in the National Court is to issue a warrant of commitment or remand. There is no arrest involved. So it is not compulsory for the person who keeps him in custody to give him the rights under section 42(2). But if the person expresses a wish to see a lawyer, etc. *he must be allowed to do so.*

It is apparent, in my view, that section 42(2) allows the police to detain a person without arresting him if the police suspect that he has committed an offence or is about to do so. The condition on this right to detain without arrest is that an Act of Parliament (as in cases of health, quarantine, immigration, etc.) must provide for it. If such an Act is promulgated it would be sanctioned by section 42(1)(d) of the Constitution. At present I am not aware of any statute which permits the police to detain a person suspected of having committed an offence or of being about to commit an offence without arresting him.

The view that exceptions to the right guaranteed by section 42(1) must be implemented by Acts of Parliament finds support in the Constitution, section 52, and the Constitutional Planning Committee Report:

Section 52 provides:

(1) Subject to Subsection (3), no citizen may be deprived of the right to move freely throughout the country, to reside in any part of the country and to enter and leave the country, *except in consequence of a law that provides for deprivation of personal liberty in accordance with Section 42 (Liberty of the person).*

(2) No citizen shall be expelled or deported from the country except by virtue of an order of a court made under a law in respect of the extradition of offenders, or alleged offenders, against the law of some other place.

(3) A law that complies with Section 38 (*general qualifications on qualified rights*) may *regulate* or *restrict* the exercise of the right referred to in Subsection (1), and in particular may regulate or restrict the freedom of movement of persons convicted of offences and of members of a disciplined force. [My emphasis]

Very clearly subsections (1) and (3) say three things:

1. freedom of movement is guaranteed only to citizens;
2. when a law is made under section 42 depriving persons of their personal liberty it necessarily deprives them of their right to move freely throughout the country;
3. subsection (1) also clearly says an exception under section 42(1) is to be implemented by a law (including an Organic Law or an Act);

4. subsection (3) relates to restriction or regulation of movement; it permits legislation restricting or regulating freedom of movement—examples of such legislations are as follows.

A. *Motor Traffic Act* (Ch. No. 243) section 19

19. Prevention of driving under the influence etc.

(1) Subject to Subsection (2), where a member of the Police Force is of opinion on reasonable grounds that a person who is driving, or appears to him to be about to drive, a motor vehicle is by reason of his physical or mental condition incapable of having proper control of the vehicle, he may do all or any of the following things:—

(a) forbid the person to drive the vehicle while he is so incapable; or

(b) require him to deliver up immediately all ignition or other keys of the vehicle in his actual possession; or

(c) take such other steps as are in his opinion necessary to make the vehicle immobile or to remove it to a place of safety.

(2) Subsection (1) does not authorize—

(a) the detention of keys; or

(b) the immobilization or detention of a motor vehicle,

for any longer period than is necessary in all the circumstances of the case in the interests of the person or any other person, or of the public.

(3) Subject to Subsection (4), a person who—

(a) contravenes or fails to comply with a prohibition or requirement made by a member of the Police Force under this Section; or

(b) attempts to obstruct a member of the Police Force in the exercise of any power conferred on him by this section.

is guilty of an offence,

Penalty: For a first offence—a fine not exceeding K100.00.
For a second or subsequent offence—a fine not exceeding K200.00 or imprisonment for a term not exceeding six months.

(4) A person shall not be found guilty of an offence against this section unless the court is satisfied that the member of the Police Force concerned had reasonable grounds for believing that in all the circumstances of the case the action taken by him under Subsection (1) was necessary in the interests of the person or of any other person, or of the public.

30. Production of licence, etc, on demand

(1) A driver of a motor vehicle who fails to produce his licence when required to do so by a member of the Police Force in the execution of his duty under this Act is guilty of an offence.

(2) A driver of a motor vehicle who, when required by a member of the Police Force in the execution of his duty under this Act to state his name and place of abode—

(a) refuses to do so; or

(b) states a false name or place of above,

is guilty of an offence.

Penalty: A fine not exceeding K100.00 or imprisonment for a term not exceeding three months.

B. *Criminal Code (Ch. No. 262), section 600*

600. Restriction of movement

(1) Where a person is convicted on indictment of an offence, the court that convicts him may, in addition to or instead of any other punishment that may be imposed, order that—
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(a) he shall not come or be within such part of the country as is specified in the order; or
(b) he shall be removed to and remain in such part of the country as is specified by the Head of State, acting on advice,

during such period as is specified in the order.

(2) An order made under Subsection (1)—
(a) may be made subject to such exceptions and conditions as to the court seem proper; and
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(b) remains in force, subject to Subsection (3), for such period as is specified in the order.

(3) The National Court may, on application by a person against whom an order under Subsection (1) is in force, vary or revoke the order.

(4) An order made under Subsection (1)(b) or (3) does not operate so as to hinder or prevent a person from leaving the country.

(5) A person who, without reasonable excuse (proof of which is on him), contravenes or fails to comply with an order made under Subsection (1) is guilty of an offence.

Penalty: Imprisonment for a term not exceeding six months.

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(6) A person who is convicted of an offence against Subsection (5) is liable to be again removed from the part of the country specified in the order, or to be removed to the part of the country specified by the Head of State, acting on advice, as the case may be, or a new order under this section may be made against him.

(7) For the purposes of any law relating to appeals against sentence, an order under Subsection (1), or the refusal of an application under Subsection (3), shall be deemed to be a sentence.

The above restrictions are permitted by section 52(3).

Also from the C.P.C. Report it is apparent that exceptions in section 42(1) were
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meant to be implemented or provided by either Acts or Organic Law.

C. *Protection of Personal Liberty*

Protection of personal liberty

2.(1) No person shall be deprived of his personal liberty, *except as authorized by law in any of the following cases:*—
(a) to a reasonable extent in the normal course of the *education or discipline of a child*, by his parent, guardian or other person into whose care he has been committed, or for his protection or the protection or others;
(b) in consequence of his *unfitness to plead to a criminal charge*:
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(c) *in execution of the sentence or order of a court in respect of a criminal offence* of which he has been found guilty or in the execution of the order of a *court of record* punishing him for *contempt* of itself or of another court or tribunal;

(d) by reason of his failure to comply with the order of a court made to secure the fulfilment of any obligation other than a *contractual obligation*, imposed upon him by law;

(e) upon reasonable suspicion of his having committed, or being about to commit an offence;

(f) for the purpose of bringing him before a court in execution of the order of a court;

(g) in the case of a person who has not attained voting age, under the order of a court or with the consent of his guardian, for the purpose of his education or welfare during any period ending not later than the date when he attains voting age;

(h) for the purpose of preventing the introduction or spread of a disease or a suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine;

(i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community (under the order of a court); and in the case of a person reasonably suspected to be of unsound mind, for the purpose of taking prompt legal proceedings to obtain such an order of a court;

(j) for the purpose of preventing the unlawful entry of a person into Papua New Guinea or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of these purposes. [My emphasis]

II. Question 1

I consider that there is no doubt that section 42(2) has to be read disjunctively as it says "a person arrested *or* detained" and not "a person arrested *and* detained". When we read the provision this way it is clear that it says the following:

(a) when a person is arrested he—

(i) shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charges against him;

(ii) must be informed that he has the right to communicate without delay and in private with a member of his family or a friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and

(iii) must be informed that if the lawyer of his choice comes to where he is he will be given adequate opportunity to give him instructions.

. . .

(d) When a person is *detained* he—

(i) shall be informed promptly in a language that he understands, of the reasons for his detention and of any charge against him; and

(ii) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and

(iii) shall be given adequate opportunity to give instructions to a lawyer of

his choice in the place in which he is detained. [My emphasis]

From the foregoing it is my opinion that an arrested person must be informed promptly of all the rights guaranteed by section 42(2) but a detained person needs only to be informed of his right under section 42(2)(a). There is no obligation on the part of the person who detains him to inform him of his rights under section 42(2)(b) and (c) unless he makes the request. If he does, the person who detains him must allow him to exercise his rights under section 42(2)(b) and (c). This is, of course, if a law allows detention short of arrest.

460 The Report of the Constitutional Planning Committee (the C.P.C.) bears out what I have concluded. It says:

> Whenever a person is *arrested* or *held*, he must be informed promptly, in a language he understands, of the reasons of his *arrest* or *detention*, and given the opportunity whenever practicable, to contact a member of his family or a personal friend, and to seek advice from a lawyer of his choice without delay. He should be able to speak with any of these people in private. (Ch. 5, p. 5/1/9, paragraph 40)

The actual C.P.C. recommendation is as follows:

> 2. (a) A person who is *arrested* or *detained* shall be informed promptly, in a
> 470 language which he understands, of the reasons for his *arrest* and *detention* and of any charges against him, and shall be permitted whenever practicable, to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor, if that person is entitled to legal aid), and to leave adequate opportunity to give instructions to a lawyer of his choice in the place in which he is *detained*.
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> (b) A person who is *arrested* or *detained* shall be informed immediately upon his *arrest* of his rights under paragraph (a) of this clause. (C.P.C. Report p 5/1/22—Recommendation 2(2)(a) and (b))

480 I would answer question 1 as follows:

> When a Police Officer arrests a person he is obliged to inform him of all his rights guaranteed by s 42(2) of the Constitution.
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> Where a law allows the Police to detain a person without arresting him he need only inform the detainee of his right under section 42(2)(a).

III Question 2

I have already determined that both "arrest" and "detain" in section 42 of the Constitution involve total denial of a person's personal liberty.

A. *Arrest*

The Arrest Act (Ch. No. 339) does not define what an arrest is, but it does clearly set
490 out what a legal arrest is.

There are two types of arrest: with a warrant issued by a court empowered to do so; and without a warrant. These circumstances are set out in sections 3–7 of the

Arrest Act.

For any arrest to be lawful it must be done according to the procedures laid down under section 14 of the Act. Any person deprived of his liberty in breach of section 14 is not arrested—he is illegally detained and must be released. Any admissions made by the person illegally held in custody will of course be scrutinized by the Court critically: see *Constitutional Reference No. 1 of 1977* [1977] P.N.G.L.R. 362.

B. *Detain*

500 As I have said there is no law in Papua New Guinea which permits the police to detain a person (i.e., deprive a person of his liberty) for questioning. Any detention of this nature will be clearly illegal and would amount to false imprisonment.

IV. Question 3

A person who has expressed the desire to consult a lawyer must be allowed to see one. Section 42(b) says "shall be permitted . . . without delay" to see a lawyer. This right can only be delayed if there is no lawyer available (e.g., in a place like Vanimo or Maprik). In places where there are lawyers resident, the right must be allowed to be exercised without hindrances of any sort, blunt or subtle.

There have been expressions of disapproval of the practice of asking a person, 510 after he has made it known his wish to see a lawyer, whether he wants to see the lawyer straight away or later. I mention two cases only. The first is *The State* v. *Silih Sawi* [1983] P.N.G.L.R. 234, where Pratt J. said at 237–238:

> . . . where a suspect says that he does want to see a lawyer . . . then there must follow at least some attempt by the investigating officer to comply with the request. . . . In short what it comes down to is this—one must see on the record of interview or hear in the witness box that some genuine attempt has been made by the officer to comply with the request, and not, as happened in this case, evidence that the whole business was regarded as an unnecessary troublesome requirement which could be turned into a mere charade.

520 In the second case, I refer to what the Deputy Chief Justice said in *The State* v. *Paro Wampa* [1987] P.N.G.L.R. 120 at 122:

> It is important to emphasise that the essence of this right for the person arrested or detained is to communicate without delay. It is important that when a person's liberty is lost at the point of arrest or detention, he needs to communicate with his relatives, friends and a lawyer for advice. He must appreciate that it is his right and he may choose to exercise that right at that point in time. It is also up to the person to waive the right to see any of those persons at that point in time. He has a choice of either exercising the right or of waiving the right to communicate. The choice is not between exercising this right at that point in time or at another point 530 in time, that is essentially different from to waive the right not to communicate. It would have been proper to put this choice to the person if the right given under this provision was 'to communicate at any time'. The proper choice to put to a person would be whether to exercise the right to communicate with any of those persons at the point in time or to waive the right to do so at that time.
> If a person wishes to exercise the right to see any of those persons, it is the duty of

> the police to permit him to do so. This duty comes from the words 'shall be permitted'. The duty to do this is subject to the words 'whenever practicable'. Any number of circumstances could make it impracticable to communicate. What is not practicable is a question of fact and can be determined on the facts of each case. It may be proper, depending on the circumstances of each case, for a policeman not to permit a person to communicate.

The point to be once again emphasized is that the right to communicate with a lawyer etc. must be exercised in a genuine way. There should not be any attempt, veiled or otherwise, to prevent a person from exercising this right, subject to the practicalities of a given situation.

KAPI Dep. C.J.:

The National Court has referred three questions for consideration by this Court under section 18(2) of the Constitution. These questions arose during the trial of the two accused persons on charges of robbery. During the course of the trial, the prosecution sought to tender the accuseds' records of interview and these were objected to by the lawyer for the accused persons. The objection was based on non-compliance with section 42(2) of the Constitution in that the accused persons had not been informed of their rights under that section. During the course of the hearing, the trial judge expressed the view:

> I then asked him if an accused person must be informed of his rights under section 42(2)(b)(c) when he is only detained rather than arrested. It seemed to me that he must be informed of section 42(2)(a) when he is detained but there is no obligation to inform him of his rights pursuant to section 42(2)(b) and (c) until he is actually arrested.

Having heard preliminary arguments from counsel, the Court decided to refer the following questions [set out in the judgment of Kidu C.J., *supra*, at page 252].

The first question is based on the assumption that the police have power under the law to detain a person without having to arrest him. Such an assumption is so important to the liberty of the person that the law relating to this should be examined. The appropriate approach is first, to determine when a person is "arrested or detained". Question 2 raises this issue. I will deal with this question first.

I. Question 2

Section 42(2) has not defined the context or the circumstances in which a person may be "arrested or detained". This can be determined from reading the whole of section 42. Section 42(1) sets out the rights of all persons not to be deprived of their personal liberty. Personal liberty under this provision may be deprived only under the exceptions provided in section 42(1)(a)–(h). On a close examination of this provision, it is clear that s 42(1) does not purport to create a separate and self-contained law under which a person's liberty may be deprived. The exceptions do not set out any details of who has the authority to deprive personal liberty and the

manner in which the person may be deprived of his liberty and other related questions.

The exceptions by their own nature must be read with other laws. For instance, under section 42(1)(a): one has to go to other laws to determine who is unfit to plead to an offence and what happens to a person who is unfit to plead. Every one of these exceptions lack such details. In such case, the law provides for all the details. Section 42(1) simply sets out the circumstances under which a person may be deprived of his liberty, but the full extent of how this is done is to be found in other laws. One has to go to the appropriate law to determine when a person's liberty may be deprived. Support for this interpretation may be found in section 52 of the Constitution. This section provides for the right to freedom of movement and the exception reads "... *except in consequence of a law* that provides for deprivation of personal liberty in accordance with section 42 (*liberty of the person*)". The reference here is to the exceptions set out under section 42(1) of the Constitution. This provision indicates that the exceptions set out under section 42(1) are to be provided by law. Section 42(2) is to be read together with section 42(1) of the Constitution. A person may be "arrested or detained" in accordance with the exceptions provided by law under section 42(1) of the Constitution. As an example, a person may be deprived of his personal liberty if he is suspected of having committed or been about to commit an offence: section 42(1)(d). The circumstances and the manner in which his personal liberty may be deprived is set out under statute law. I will return to this matter later on in my judgment as the facts raised in this reference arise under this exception.

As I have stated before, section 42(2) has not defined the circumstances under which a person is "arrested or detained" as is the case under section 42(3) (where a person is "arrested or detained" for purposes of being brought before a court in the execution of an order of a court or upon reasonable suspicion of his having committed or being about to commit an offence) and section 42(6) (where a person is "arrested or detained for an offence"). Section 42(2) may have wide application. It is not necessary to determine this question or to determine all the circumstances to which section 42(2) is applicable. There is no question that section 42(2) is applicable where a person is arrested and detained for an offence.

Now I must come back to the facts of this case. This is a case in which two persons were charged with robbery. The law relating to arrest and detention of persons who are suspected of having committed or being about to commit an offence is now set out under the Arrest Act (Ch. No. 339). The provisions in this Act are in addition to other statutes which also provide for powers of arrest and detention in relation to offences.

The common law is no longer applicable as it has been abolished by this Act. I make no references to common law cases for this reason. Apart from this, the meaning given to the words "arrest" and "detention" in the common law cases are confusing: see articles D. Telling, "Arrest and Detention—The Conceptual Maze" [1978] Crim. L.R. 320 and K. W. Lidstone, "A Maze in Law" [1978] Crim. L.R. 332.

Under the Arrest Act, a policeman or a member of the public is authorized to make arrests (sections 3 and 5). They may make arrests upon belief on reasonable grounds that a person:

1. is about to commit; or
2. is committing; or
3. has committed

an offence.

This is a repetition of the grounds set out under section 42(1)(d) of the Constitution. The manner of effecting arrest is set out under section 14 of the Act. Insofar as we are considering the deprivation of liberty of a person who is suspected of committing a crime, arrest is the means by which his liberty is first deprived.

When a person is arrested in accordance with the Act, he is immediately "detained" (sections 16(1)(b) and 17(1)(b) of the Act). That is when detention begins: see also section 138 of Customs Act (Ch. No. 101); the person detained is then taken to a police station where he may be released or further detained (section 18).

It is clear from this Act that "arrest" is the initial step of depriving a person of his liberty and "detention" is the means by which his liberty is continually deprived for a period. To put the matter differently, "arrest" and "detention" are two distinct procedures under the law and deprivation of liberty, which is common to both, commences upon "arrest" and continues during "detention". The moment a person is "arrested", he is "detained" from that point on. "Arrest" is very closely followed in the point of time by "detention". That is the law relating to "arrest" and "detention" in relation to persons who are suspected of committing a crime.

Can a person be detained without arrest? I am not aware of any law which authorizes a person to be detained in relation to the commission of a criminal offence without being arrested under the Arrest Act. It has been suggested that the police may detain a person as an alternative to arrest under section 42(3)(b) of the Constitution. It is in the following terms:

(3) a person who is arrested or detained—

. . .

(b) upon reasonable suspicion of his having committed, or being about to commit, an offence,

shall, unless . . .

I would reject this submission for the following reasons. First, section 42(3) is not dealing with the law of arrest or detention, it is concerned with those who are arrested or detained *in accordance with the law* "to be brought without delay before a court or a judicial officer". According to the law as it presently stands, the police cannot detain a person without arrest in accordance with the Arrest Act. Secondly, to interpret the Constitution in this way is to grant the police a power of detention without arrest which has not been provided for under the Arrest Act. That interpretation is not consistent with the construction that all the exceptions to protection of liberty are to be provided for by law under section 42(1).

II. Question 1

The conclusion by the trial judge that the police are obliged to inform a person of all the rights under s 42(2)(a), (b), and (c) of the Constitution on arrest is correct. Under the Arrest Act, the obligation arises at the outset of deprivation of liberty, i.e., at arrest. This of course is followed by detention, but by that time he should have been informed of all the rights.

This is also reinforced by section 18(1)(c) of the Arrest Act. Whether a person is "arrested" (section 14 of the Arrest Act) or "detained" (sections 16(1)(b), 17(1)(b), and 18(1)(b) of the Arrest Act), the officer-in-charge of a police station shall at all times permit such persons, whenever practicable, without delay and in private, to

communicate with a member of his family or a personal friend and a lawyer of his choice, including the Public Solicitor if he is entitled to legal aid, and to give instructions to such a lawyer (section 18(2) of the Arrest Act).

With regard to question 1, I have concluded in determining question 2 that the assumption in this question is wrong in law. That is to say, it is not permissible according to the Arrest Act and other relevant written laws to detain a person without first arresting the person. Therefore, the question was wrongly framed. It is not proper to answer the question in the form it is referred.

In a case where there is unlawful detention, that is to say, contrary to the Arrest Act or other relevant statutes, it would be in breach of the right of personal liberty under section 42(1) of the Constitution. If a record of interview is obtained during the period of unlawful detention, its admissibility may be challenged on the grounds that the fundamental right of the accused has been breached. It would be in the discretion of the court whether to admit or reject such a record of interview (*Constitutional Reference No. 1 of 1977* [1977] P.N.G.L.R. 362).

As I have indicated before, there are other circumstances under which the law permits the police to "detain" a person without "arrest". For instance, a person may be subjected to detention without arrest under the Quarantine Act (Ch. No. 234) or detained for purposes of search under the Search Act (Ch. No. 341). The question in its present form may be asked in such circumstances. However, these issues do not arise in the case before us; it would not be proper to address these issues in this case. Nevertheless, several members of the Court have expressed opinions on the issue. I do not wish to discuss the issues in any great detail because they were not fully argued before us. I wish simply to state the issues which should be argued in the future. Section 42(2) gives a person who is arrested or detained three rights:

1. to be informed promptly of the reasons for his arrest or detention and of any charges against him;
2. to be permitted whenever practicable to communicate without delay with a member of his family, a personal friend or lawyer of his choice; and
3. to be given adequate opportunity to give instructions to a lawyer in the place in which he is detained.

In addition to these rights, the provision goes on to give the right to be informed of these rights. It is clear that on the present wording of this provision, the right to be informed of the rights is confined to a person who is arrested. It follows from this that where a person is lawfully detained without arrest under some other law, there is no obligation on the police to inform a person of those rights. However, that is not the end of the matter. The question in its present form falls short of asking the crucial question which is vital to the rights of persons who are detained. The question is: what happens to the substantive rights under section 42(2)(b) and (c) of the Constitution? Do they, of their own force, compel the police to do anything or enable persons detained to exercise those rights? Can the policeman turn a blind eye to section 42(2)(b)(c) rights until someone requests them? I reserve my views on these questions until the issue arises in an appropriate case.

III. Question 3

This question was fully argued before me in the case of *The State* v. *Paro Wampa* [1987] P.N.G.L.R. 120. I adopt my reasoning in that case. In the present case, the question is referred in the context of a person who is arrested and detained and has

exercised the right to see a lawyer under section 42(2)(b) of the Constitution. It would follow from my reasoning that the police at that point shall permit the accused person to communicate with the lawyer without delay. The only qualification of this is "whenever practicable". A person may not be permitted to communicate with a lawyer if it is not practicable. What is practicable is a question of fact and can be determined on the facts of each case. Apart from this qualification, it is not proper for the police to ask the question, "Do you wish to see the lawyer now or after the record of interview?".

IV. Answers

I would answer the questions as follows:

A. *Question 1*

Detention of a person without arrest is not authorized by the Arrest Act or other relevant Acts. The assumption in the question is wrong in law and the question in its present form should not be answered.

Where in a case a person is detained in breach of the Arrest Act, that would be a breach of the right to personal liberty under section 42(1) of the Constitution. Any confession which may be obtained during any such detention may be admitted or rejected at the discretion of the court.

B. *Question 2*

Arrest and detention are two separate procedures prescribed by law for depriving a person of his personal liberty. Whether a person is arrested or detained is to be determined with reference to the particular law which comes within the exceptions set out under section 42(1) of the Constitution. In this case, the relevant law is the Arrest Act. Under the Arrest Act, a person is first arrested and then detained.

C. *Question 3*

When a person who is arrested or detained requests to see a lawyer under section 42(2)(b) of the Constitution, it is not permissible for the police to follow up with a question "Do you wish to see the lawyer now or after the record of interview?".

AMET J.:

I. Questions

The National Court has referred to this Court three questions relating to the interpretation of the Constitution, section 42(2), pursuant to the Constitution, section 18(2).

A. *Question 1*

> Does a police officer have any obligation to inform a person detained but not actually arrested of his rights pursuant to section 42(2) of the Constitution?

A number of separate questions arise in the examination of section 42(2). They are:

1. What are the rights of a person who is arrested or detained?
2. What are the obligations of a police officer towards the arrested person?
3. What are the obligations of a police officer towards the detained person?

Section 42(2) is in the following terms [as cited by Kidu C.J., *supra*, at page 252].

There is no dispute whatsoever as to the meaning of paragraph (a), that a person who is arrested or detained shall be informed promptly, in a language that he understands, of the reasons for his arrest or detention and of any charge against him. The language used is precise and unambiguous. It directs that the person arrested or detained "*shall be informed promptly*" by the person effecting the arrest or detention.

I consider that the phrases italicized are important to the construction of what paragraphs (b) and (c) require. They are important in contradistinction to the phrase used in paragraph (a), and the concluding terms of the whole of sub-section (2). It is, in my view, significant that paragraph (a) directed that the person "arrested or detained *shall be informed*" whereas paragraphs (b) and (c) do not direct in similar language. For instance, paragraph (b) does not state or require that the police officer or person effecting the arrest or detention "*shall inform the person arrested or detained that he has the right to be permitted whenever practicable to communicate . . .*". Put another way, and in the language of section 42(2), paragraph (b) does not state that:

A person who is arrested or detained—

(b) shall be informed promptly that he is permitted whenever practicable to communicate without delay.

This, in my view, would be the kind of expression one would expect to find to support the submission that the arresting or detaining police officer has an obligation to inform the person arrested or detained of the rights under the paragraphs (b) and (c). But the paragraphs are not in these terms. They require the police officer or detaining officer to permit communication without delay, and enable adequate opportunity to give instruction. These do not deny or detract from the detained person's right to communicate without delay or give instructions to a lawyer of their choice.

The concluding words of section 42(2) in my opinion make it abundantly clear that if a person is "arrested", then he "*shall be informed immediately on his arrest of his rights under this section*". Thus under paragraphs (b) and (c) a person who is "*arrested*" "*shall be informed*" *immediately* that:

(b) he is permitted whenever practicable to communicate without delay . . . and
(c) he has an opportunity to give instructions.

Under paragraphs (b) and (c), therefore, the police officer is only under an obligation to inform the person of the right to be permitted to communicate and the right to give instructions upon his *arrest*, but not if the person is only detained. The rights to so communicate and give instructions under paragraphs (b) and (c) are available to both persons arrested or detained. But the right to be informed of all the rights under paragraphs (a), (b), and (c) are only available to a person "arrested". Conversely, the obligation to inform, on the part of a police officer, of the rights under paragraphs (a), (b), and (c) are only to a person arrested. The obligations of a police officer under paragraphs (b) and (c) are to permit communication without delay should the person arrested or detained require or request it and to give adequate opportunity to such a person to give instructions to a lawyer of his choice.

I consider, with respect, that to construe paragraphs (b) and (c) otherwise than in the manner that I have, and to hold that upon *detention only* the detained person

should be "informed promptly/immediately of his right to communicate and of his right to give instructions to a lawyer", is to do violence to the express intention manifested in the language used. The expressions used in paragraphs (b) and (c) are markedly and deliberately different to the expression in paragraph (a) and reinforced by the language used in the concluding words of the whole subsection (2).

810 B. *Question 2*
When is a person "arrested" and when is a person "detained"?

I have answered question 1 on the quite obvious basis, in my respectful view, that the terms "arrested" and "detained" as used in the Constitution are quite distinct legal conditions. Although a condition of arrest does, and necessarily, include detention, the converse is not necessarily true, that detention does not include arrest. There need not be an arrest for there to be detention. Both, however, have as a primary immediate consequence the common element of physical deprivation of liberty (section 42(1)).

The terms are therefore advisedly and deliberately used in section 42(2) in 820 contradistinction to one another. This distinction is further emphasized by the omission, in the concluding and binding words to the whole of section 42(2), of the word "detention" where only "arrest" is used.

1. *Detention*—The Constitution does not define what the term detention means, but we can gain useful guidance from the context of the general provisions in which those terms are used. The first such provision is section 42 itself which is subheaded, "Liberty of the person". It provides [as cited by Kidu C.J., *supra*, at page 253].

It is trite that terms such as "detention", "arrest", "custody", and "imprisonment" share a common element, the deprivation of personal liberty. Section 42(1), therefore, in my view permits deprivation of personal liberty in the circumstances 830 prescribed. These may be upon "detention", "arrest", "imprisonment", or any other form of deprivation of personal liberty.

In section 42(2), (3), and (6) we find the two terms "detained" and "arrested" used disjunctively as "arrested or detained" and not conjunctively as "arrested and detained". It is true that after the technical formal arrest the person is thereafter detained or in detention. But I consider that the Constitution clearly envisages two distinct legal statuses. If the condition of being detained can only be simultaneous with or consequent upon an arrest, then one might expect to see it being express conjunctively as "*arrested and detained*", or rather as merely "*arrest*" as might be suggested was the intention in the binding words to section 42(2), because to add 840 "and detained" would be quite superfluous and meaningless if "arrest" was sufficient to convey both the legal status and the consequent fact of physical deprivation of personal liberty which is detention. However, with respect the intent of section 42 is quite clear, the conditions are distinct. There is a condition of legal detention before an arrest.

I find the discussion by D. Telling in the article "Arrest and Detention—The Conceptual Maze" in [1978] Crim L.R. 320 to be useful on the distinction between the two legal conditions:

The word 'detention' connotes a confinement or a restraint on the movement of

an individual or the fact that a person is kept waiting or delay. Thus detention could be said to occur in the following instances:

(i) A momentary interference with the individual's liberty where a policeman stops a person in the street for questioning.
(ii) A long delay where a person and his vehicle are searched for drugs.
(iii) An extended detention of a person in a police station for two days during a complicated fraud investigation.

Such situations undoubtedly occur, whether or not they are lawful, is another matter altogether.

I could add to this the following:

(iv) Being detained in custody upon arrest, before and after being charged.
(v) Being detained in prison serving sentence for an offence.

And so, putting aside for the moment the lawfulness or otherwise of the various circumstances of physical detention, in my view "detention" connotes the *physical restraint* on the freedom of movement of an individual, from one extreme being the momentary delay where a policeman is making routine traffic inquiries, to the permanent position consequent upon a court sentence of imprisonment for an offence. Again, putting aside for the moment the question of lawfulness of all such detentions, one can think of many instances of lawful detentions under various statutes, by police, quarantine officers, immigration authorities, health authorities, and so on. Such restraints upon the free movement of individuals are "detention", momentary or otherwise. They need not have to be necessarily arrested. There can be lawful detention without there being necessarily an arrest. There are numerous instances permitted under the Motor Traffic Act (Ch. No. 243)—sections 19, 24, 30, and 31, just to mention a few. Under section 3(1) of the Search Act (Ch. No. 341) there is lawful authority to detain and search without formal arrest.

In the case of *Michael Edward Brown* (1976) 64 Cr. App. R. 231, a road traffic case much discussed and criticized on various aspects of laws of arrest and detention, it was held (at 231–232) that:

> although every arrest involved a deprivation of liberty not every deprivation of liberty involved an arrest, when the applicant was seized and taken to the police vehicle, he was being detained for as long as it was necessary to confirm the constable's suspicions whether to arrest him on a specific charge or release him if their suspicions proved unfounded; and if the latter, he could obviously have resumed his uncompleted journey.

This decision in *Brown* was criticized as having created, for the first time, a power in the police to detain for questioning. The Court recognized that Brown was "detained", perhaps unlawfully, but they are saying no more than that the *detention was not an arrest.* To hold that there can be no lawfully permitted "detention" other than upon "arrest" is to ignore the practicalities of policing our roads and other ancillary statutory police functions and to confuse them with wider criminal law functions. Our Motor Traffic Act provides for such police powers to detain without arrest. It is, for quite obvious practical reasons, far better to sanction limited detention in order to carry out these duties rather than to oblige the police to arrest before they can make the most momentary enquiry about a traffic matter.

2. *Arrest*—Arrest connotes an interference with the individual's liberty, it involves a restriction on the movement of an individual and a deprivation of liberty. Halsbury's *Laws of England* (4th. ed., 1984), vol. 11, page 73, paragraph 99, defines "arrest" as:

> the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case they are calculated to bring and do bring to a person's notice that he is under compulsion and thereafter submits to the compulsion.

K. W. Lidstone, in "A Maze in Law" [1978] Crim. L.R. 332 at 336, suggests that the word "arrest" has two meanings, the broad natural meaning defined above in Halsbury and a narrower meaning applicable to its use in the criminal process. Blackstone uses this narrower meaning when he says:

> Arrest is the apprehending or restraining of one's person in order to be forthcoming to answer an alleged or suspected crime.

As Lidstone suggests in "A Maze in Law", one tends in modern times to use the term "arrest" in its narrower context as a step in the criminal process.

I consider that there can be two broad situations of arrest. The first is the technical arrest effected in the manner prescribed by section 14 of the Arrest Act, which has, in my view, added nothing new to the common law requisites of a "legal arrest". As Part IV of that Act suggests, it prescribes the "Manner of Effecting Arrest". It does not define the legal term "arrest". It can be suggested that when the provisions of section 14 are complied with, then, and only then, can someone be under "arrest" or "arrested". And therefore any other circumstance or condition of physical restraint or deprivation of personal liberty will amount to "unlawful arrest". If the argument is extended that "arrest" referred to in section 42(2) is the technical arrest effected in compliance with section 14 of the Arrest Act and none other, then until that technical arrest is effected the officer holding the person is not obliged to administer section 42(2) rights. Such a construction would be to ignore the practical realities of situations of "arrest" lawful or otherwise, and would not be to the benefit of the person held who would in effect be under "arrest", for all intents and purposes. This is the broad second category of "arrest", one might term "de facto arrest". In my view the term "arrest" as used in section 42(2) refers to the physical fact of a deprivation of liberty in either situation.

In my view, it is to this broad second category of "arrest" that the Constitution, section 42(2), was addressed. It is a step in the criminal process. It must be with an intention to subject the person arrested to the criminal process, to bring the person within the machinery of the criminal law.

I agree with Professor Smith that "a false arrest is still an arrest" (at 334), until a court determines it to be false with the attendant legal/constitutional consequences. If it is in fact an arrest, then it is an "arrest" such that all constitutional rights and obligations must be complied with in favour of the subject until a court determines he was unlawfully arrested with other consequences also in his favour.

I do not think that the legislature would have intended that the term "arrest" should be strictly and narrowly construed to apply only to an arrest as prescribed by the Arrest Act to the point of denying the person his section 42(2) rights who is being

deprived of his personal liberty, and who is for all practical purposes under arrest, but not yet so formally informed under section 14 of the Act. Such an argument would mean that the section 42(2) rights of an "arrested" person and the obligations of the person effecting the "arrest" could only be enforced after the technical formal arrest is effected under section 14. It would seem odd, as Professor Smith suggests in his commentary on *Brown,* that a person unlawfully imprisoned/arrested should be worse off than if he had been lawfully arrested.

Lidstone suggests in "A Maze in Law" (at 336) that the arguments may be summarized in the following terms:

> that arrest, in the context of the criminal law, is more than a deprivation of liberty. It is a step in the criminal process; the apprehending or restraining of a person in order that he may be forthcoming to answer an alleged or suspected crime, made in the lawful exercise of an asserted authority with an intention to bring the person within the criminal process, this intention being communicated to the person by words or conduct together with the reason for the arrest.

In the final analysis I am of the view that the term is not capable of a precise constitutional definition to suit all circumstances. The courts, I consider, will have to determine for themselves in given circumstances when a deprivation of personal liberty in fact amounts to an arrest. When the formalities of section 14 of the Arrest Act are complied with there would appear to be no difficulties, but I am of the firm view that that is not the only manner of arrest. There are many instances of "detention" or deprivation of personal liberty which do amount to an arrest, which section 42(2) is directed at, and should apply to. These must be determined in each case by the trial judge in the circumstances before him.

C. *Question 3*

I have had the benefit of reading the draft judgment of the Chief Justice, with which I agree. I have nothing further to add.

II. Answers

A. *Question 1*

No, a police officer or any person effecting the detention has no obligation to inform a person detained, but not actually arrested, of all the rights under section 42(2) of the Constitution, only the rights under section 42(2)(a). When a person is arrested, then all of the rights under section 42(2) are to be administered to that person.

B. *Question 2*

Arrest—A person is arrested when he is deprived of his personal liberty by the seizure and touching of his person or by words in circumstances calculated to bring and which do bring to that person's notice that he is under compulsion and thereafter submits to the compulsion in order to be forthcoming to answer an alleged or suspected crime.

Detention—A person is detained when he is deprived of his personal liberty and there is a physical restraint upon his freedom of movement. Both arrest and detention share as a common element the deprivation of personal liberty.

CORY J.:

This is a reference under section 18(2) of the Constitution. The three questions raised by the Reference for the determination of the Court are as [set out in the judgment of Kidu C.J., supra, at page 252].

The interpretation of section 42(2) of the Constitution requires an interpretation of the whole of section 42 [Subsections 42(1) and (2) are set out in the judgment of Kidu C.J., supra, at page 252. Subsections 42(3)–(9) are set out below.]

(3) A person who is arrested or detained—

(a) for the purpose of being brought before a court in the execution of an order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, an offence,

shall, unless he is released, be brought without delay before a court or a judicial officer and, in a case referred to in paragraph (b), shall not be further held in custody in connexion with the offence except by order of a court or judicial officer.

(4) The necessity or desirability of interrogating the person concerned or other persons, or any administrative requirement or convenience, is not a good ground for failing to comply with Subsection (3), but exigencies of travel which in the circumstances are reasonable may, without derogating any other protection available to the person concerned, be such a ground.

(5) Where complaint is made to the National Court or a Judge that a person is unlawfully or unreasonably detained—

(a) the National Court or a Judge shall inquire into the complaint and order the person concerned to be brought before it or him; and

(b) unless the Court or Judge is satisfied that the detention is lawful, and in the case of a person being detained on remand pending his trial does not constitute an unreasonable detention having regard, in particular, to its length, the Court or a Judge shall order his release either unconditionally or subject to such conditions as the Court or Judge thinks fit.

(6) A person arrested or detained for an offence (other than treason or wilful murder as defined by an Act of the Parliament) is entitled to bail at all times from arrest or detention to acquittal or conviction unless the interests of justice otherwise require.

(7) Where a person to whom Subsection (6) applies is refused bail—

(a) the court or person refusing bail shall, on request by the person concerned or his representative, state in writing the reason for the refusal; and

(b) the person or his representative may apply to the Supreme Court or the National Court in a summary manner for his release.

(8) Subject to any other law, nothing in this section applies in respect of any reasonable act of the parent or guardian of a child, or a person into whose care a child has been committed, in the course of the education, discipline or upbringing of the child.

(9) Subject to any Constitutional Law or Act of the Parliament, nothing in this section applies in respect of a person who is in custody under the law of another country—

1030 (a) while in transit through the country; or
(b) as permitted by or under an Act of the Parliament made for the purposes of Section 206 (visiting forces). [My emphasis]

I. Questions

A. *Question 2*

I propose to deal with the second question first.

2. When is a person "arrested" and when is a person "detained"?

Section 42(1) is providing that a person is not to be deprived of his liberty except in the situations and circumstances specified in section 42(1)(a) to (h).

Section 42(2), when read in conjunction with section 42(1), (3), and (6), is in 1040 effect providing that where a person is "lawfully" arrested or detained in any of the situations or circumstances specified in section 42(1)(a) to (h), he has certain rights. Section 42(3) and section 42(6) provide for the person's rights where he is arrested or detained in the situation or circumstances of section 42(1)(d) or (e).

By contrast, whereas section 42(2) is dealing with a "lawful" arrest or detention, section 42(5) makes provision for a person's rights where he is "*unlawfully* or unreasonably *detained*".

The wording of section 42(3), namely:

(3) A person who is arrested or detained—
1050 (a) for the purpose of being brought before a court in the execution of an order of a court; or
(b) upon reasonable suspicion of his having committed, or being about to commit an offence,
shall [etc. . . .]

indicates that a person can be "detained" upon reasonable suspicion of his having committed an offence etc. as distinct from being "arrested", and implies that such detention is short of or different from an "arrest".

I have had the benefit of reading the draft judgment of the Chief Justice and I agree with his reasoning and conclusion (at 255) that "the words 'detain' and 'arrest' in section 42(2) must mean the total denial of a person's right to personal liberty by 1060 being arrested or detained", and are to be distinguished from a restriction on his freedom of movement.

The "deprivation of personal liberty" referred to in section 42(1), as Raine Dep. C.J. said in *Premdas* v. *Independent State of Papua New Guinea* [1979] P.N.G.L.R. 329 at 347:

> . . . clearly directs itself to the body of a man. . . . It is aimed at situations where the authorities locked somebody up for no good reason, or, if there was good reason, kept him locked up without charging him or trying him.

In my view the deprivations of personal liberty which are permitted under section 42 are only those which are authorized by law embodied in an Act of Parliament 1070 dealing with one of the exceptions set out in section 42(1)(a) to (h). This view is supported by the recommendation contained in the final report of the Constitutional Planning Committee, Ch. 5, Part 1, paragraph 39, p 5/1/9:

Protection of Personal Liberty

39. Again following closely the provision of the Human Rights Ordinance, we recommend that the personal liberty of all people be safeguarded, subject to certain specific exceptions. No one shall be arrested or imprisoned except under a *written law* [my emphasis], in one or other of the circumstances set out in the recommendations.

The Human Rights Ordinance 1972 had provided that exceptions to deprivations of personal liberty were to be "authorised by law" and stated as follows:

Protection of Personal Liberty

(1) No person shall be deprived of his personal liberty, *except as authorised by law* in any of the following cases:—

(a) . . . (i) . . .

The exceptions (a) to (i) are similar or identical to the exceptions in section 42(1)(a) to (h).

The legal draft of the actual recommendation in the Constitutional Planning Committee Report was as follows:

Ch 5 p 5/1/21.

Protection of Personal Liberty

2(1) No person shall be deprived of his personal liberty, *except as authorised by law* [my emphasis] in any of the following cases:—

(a) . . . (j) . . .

Again the exceptions set out in (a) to (j) are similar or identical to the exceptions set out in section 42(1)(a) to (h).

In relation to an "arrest", the Arrest Act (Ch. No. 339) is the law which authorizes the deprivation of personal liberty under the exception provided by section 42(1)(d) "upon reasonable suspicion of his having committed, or being about to commit an offence".

A person is "arrested" when the requirements of the Arrest Act have been complied with.

In relation to "detention", as mentioned by the Chief Justice, there are a number of Acts, for example the Quarantine Act, the Public Health Act, and the Migration Act which authorize the deprivation of personal liberty under the other exceptions to section 42(1), but at present there is no Act authorizing the detention of a suspect prior to his arrest.

I would answer question 2 thus:

1. *Arrest*—A person is "arrested" when he is arrested in accordance with the provisions of the Arrest Act.

2. *Detain*—A person is "detained" when he is detained under any of the Acts authorizing his detention under section 42(1) such as the Quarantine Act, Public Health Act, and Migration Act but there is no Act authorizing his detention or questioning prior to his arrest.

B. *Question 1*

1. Does a police officer have any obligation to inform a person detained, but

not actually arrested, of his rights pursuant to section 42(2) of the Constitution?

I consider that a person who is lawfully arrested or detained, has three separate "rights" set out in section 42(2)(a), (b), and (c), but that is only *upon his arrest* that the person has the additional concomitant right to be immediately informed of his rights under (b) and (c) above. This interpretation is supported by the final recommendations of the Constitutional Planning Committee, paragraph (2) of which reads as follows:

(2) (a) A person who is arrested or detained shall be informed promptly . . . of the reasons for his arrest or detention, and shall be permitted . . . to communicate without delay . . . with a member of his family, and with a lawyer . . ., and to have adequate opportunity to give instructions to a lawyer.

(b) A person who is arrested or detained shall be informed immediately upon his arrest [my emphasis] of his rights under par (a) of this clause.

The fact that a "detained" person is not required to be informed of his rights under paragraphs (2)(b) and (c) above does not alter the existence or nature of the person's rights therein stipulated. For example, if a "detained" person should request to see a lawyer, then it would be mandatory for the investigating officer to permit the person "whenever practicable" "to communicate without delay" with his lawyer, in compliance with the detainee's right under section 42(2)(c).

I would therefore answer the first question thus: A person has the right to be immediately informed of his rights under section 42(2)(b) and (c) upon his arrest but not when he is only detained.

C. *Question 3*

3. Where an accused person is asked in a record of interview whether or not he wishes to see a lawyer and the accused says "yes", etc.

Under section 42(2)(b) a person who is arrested or detained "shall be permitted whenever practicable to communicate without delay . . . with a lawyer of his choice". The words "without delay" indicate that the accused person is to be permitted whenever practicable to communicate then and there with his lawyer. If, having been given the opportunity, the person decides that he does not want to see a lawyer then but later, that is his choice. If the accused person decides that he wants to see a lawyer then, but there is not a lawyer available, then the person must decide in the circumstances what he wishes to do. If he makes a choice with which it is not practicable to comply, then he should be informed of the reasons why it is not practicable and again be requested to decide what in the circumstances he wishes to do. He could be asked: "In the circumstances is it alright if we proceed with the record of interview?", but if he rejects that, then an attempt should be made to comply with his wish. If the investigating officer decides that it is not practical to comply with the detainee's choice and proceeds with the interview, then it will be for the court to determine whether in all the circumstances his decision to proceed was a reasonable one or not.

I would answer the question thus: The interviewing officer should suspend the record of interview unless he decides it is not practicable to comply with the accused

person's wish. He should not attempt in any way to defer or restrict the accused person's wish to see a lawyer by posing a question such as "Do you wish to see the lawyer now or after the record of interview?" or in any other way.

LOS J.:

This is a reference under section 18(2) of the Constitution by Hinchliffe J. The questions under reference are [set out in the judgment of Kidu C.J., *supra*, at page 252].

Section 42 of the Constitution [as cited by Kidu C.J., supra, at page 252] deals with personal liberty of each person, a right deeply entrenched in the Constitution for well-considered reasons, and therefore it "must be jealously guarded by the Court": (S.C.R. No. 1 of 1986; *Re Vagrancy Act* [1988] P.N.G.L.R. 1.).

I. Questions

A. *Question 1*

I consider that as a matter of strict construction of section 42(2) and other general arguments in favour of that construction the obligation to inform (under paragraph (a)) a person of the reasons for his detention does not extend to informing the person of the rights in (b) and (c) when the person is detained but not under arrest.

The obligation in paragraph (a) is *to inform* a person the *reason* for his arrest or detention; there is nothing about informing him of the rights in (b) and (c). The obligation *to inform* of *all the rights* immediately, arises not under paragraph (a) but in the closing paragraph of subsection 2: "shall be informed immediately on his arrest of his rights under this subsection". Detention is not mentioned at all in this closing sentence. Therefore there is no obligation to advise a detained person of the rights in (b) and (c). His rights under these paragraphs are intact and available. If upon detention, he himself asks to see a member of his family or lawyer and give instructions, the detaining officer is obliged to allow him to exercise those rights; whereas if a person is arrested the obligation to inform him of all the rights is automatic.

A general argument in favour of this construction is that the police should not be unnecessarily curtailed in their job by requiring them to advise all the rights in (a), (b), and (c) every time they stop someone to ask one or two questions. A person's personal liberty must be protected, but this right should not be stretched to the point where the police cannot interview or ask any questions of any person at all. The police have a duty to protect society as a whole against those who commit crimes. In pursuance of that duty they must be able to detain any person for a few minutes just to clear up any slight suspicion so long as they explain to him why they are detaining him.

However, in my respectful view, the police should inform a detained person in certain circumstances the rights in (b) and (c) even if he does not ask for any. I consider it necessary to inform a detained person of the rights in (b) and (c) for various reasons. The constitutional right in each paragraph is joined by a conjunctive "and" which suggests that they be administrated together at the same time. Section 42 prohibits deprivation of personal liberty. Arrest and detention interfere with personal liberty. Section 42(2) exists to protect that liberty. A person could be detained for a long time without being given any opportunity to exercise his rights in

paragraphs (b) and (c) simply because he does not ask to exercise those rights and that he does not ask because he does not know that he has those rights. On the other hand an arrested person may decide to exercise those rights because he is informed immediately of all those rights. In my view a difference in treatment of persons who are in what seems to me a situation equal in all respect may be in breach of "rights to full protection of the law": section 37(1) of the Constitution.

Another is purely a human rights reason. Throughout the Division on Human Rights in the Constitution, from the basic rights to the qualified rights, an outstanding theme emerges: fear of governments and fear of entrenched private groups. Without checks upon their powers they could do anything. Reasons, yes, they can give reasons. Whether an individual likes it or not, that is irrelevant. The C.P.C. drew on the experience of other countries: detention for political reasons; detention for non-existent crimes; disappearance or death during detention. The right to inform itself does not require the informer to tell the truth or to give justifiable reasons. If the informer is also required to inform the detained person of his rights to communicate and to give instructions, this may stand as a check on the reasonableness of the reason for such a detention.

Further, what a detained person says during his detention may lead to his formal arrest and what he says may be the only evidence against him. What can be protected if the right in paragraph (a) only is exercised promptly but the rights in (b) and (c) are postponed? A cunning interviewing officer may organize the questions in such a way that a detained person may never have a chance of taking the initiative to exercise his rights in (b) and (c). The interviewing officer when questioned may simply say that the detained person was not given any opportunity to see a friend or a lawyer because he did not ask to see any.

Also, it is fair to advise a detained person of his rights under (b) and (c) because he can only decide to exercise those rights if he knows about them. In their country where the levels of sophistication and education, whether general or legal, are low among the majority of the people, including a lack of and sufficient spread of lawyers, fair play should be the rule rather than an exception. Such a view is not so novel: see, for example, *Public Curator of Papua New Guinea* v. *Public Trustee of New Zealand* [1976] P.N.G.L.R. 427.

Lastly the police may be well advised to inform a person that they intend to hold him longer because at the end a court may hold that what they think in a case a mere detention may turn out as a matter of law to be an arrest. In such a case, failure to inform under a belief that the person is just detained may amount to a serious breach of section 42(2).

B. *Question 2*

I consider detention as a fact of stopping and keeping a person from freely going about his business. The stop may be a clear verbal direction from the police (or other authority), by a physical barrier like holding on to the person, or an enclosure like a fence or locked room. Further it may be merely a situation created by police, or a situation as perceived by the person concerned. Detention may mean an arrest, effected in accordance with the procedure under section 14 of the Arrest Act (Ch. No. 339), or a detention that has no lawful purpose at all, hence false imprisonment.

The common law principles in relation to arrest and detention are confusing as may be seen in the articles D. Telling, "Arrest and Detention—The Conceptual Maze" [1978] Crim. L.R. 320 and K. W. Lidstone, "A Maze in Law" [1978] Crim L.R.

332. There does not seem to be a clear demarcation between the two. The English cases seem to have followed a zigzag path. The cases talk about detention upon arrest or after arrest but except in breathalyser cases there is never a detention before arrest. This is so because the common law does not allow any detention short of arrest. This principle is reflected in a statement strongly put by Lord Denning M.R., in *Wiltshire* v. *Barret* [1965] 2 All E.R. 271 at 274:

> The most effective way to do it is by arresting him then and there. The police have to act at once on the facts as they appear on the spot and they should be justified by the facts as they appear to them at the time and not on any ex post facto analysis of the situation.

He said this in a case where a police constable was sued for assault and wrongful arrest. He had much in mind the balance of the liberty of the individual and the protection of the public from offenders and the difficulties of police officers in apprehending suspected offenders. Indeed in an earlier case he said the community interest in the administration of criminal justice could be served by the police making further investigation after they arrested a suspect: *Dallison* v. *Caffery* [1965] 1 Q.B. 348 at 367.

Little over a decade after Lord Denning's stern statement, the Court of Criminal Appeal in *Brown* [1976] 64 Cr. App. R. 231, appeared to have relaxed the common law rule protecting personal liberty. If I can state the facts briefly here, they will highlight the issues. Brown was seen by two police officers to be driving at a high speed. They signalled him to stop and, when he stopped, he ran off. The officers stopped, gave chase, tackled him, and took him to their van and placed him at the back. It was only then that one of the officers noticed the smell of alcohol on Brown's breath. They asked him to take a breath test. He refused and tried to get away. They asked him repeatedly but he refused. Finally they took him to the police station where his blood analysis showed his blood alcohol content to be more than twice the prescribed limit. Subsequently he was convicted. Upon appeal he unsuccessfully argued that the evidence of the concentration of alcohol in his blood was tainted with an unlawful arrest.

There has been never-ending criticism of *Brown*'s case. The articles on arrest and detention by Telling and Lidstone (supra) are critical of *Brown*'s case because the court appeared to have sanctioned as a matter of law that police officers could detain people for questioning without being arrested on a particular charge. Michael Zander, in his article "When is An Arrest Not An Arrest?" [1977] New Law J. 352 and 379, analyses and evaluates numerous cases with a view to ascertaining whether the decision in *Brown*'s case has any support. He concluded that *Brown*'s case was contrary to the overwhelming weight and accepted legal principle. It was wrong, though it did conform to a common police practice.

Some later cases were slightly critical of the no-nonsense approach but the basic common law principle has not changed: *Clowser* v. *Chaplin* [1981] W.L.R. 837; *Fox* v. *Chief Constable of Gwent* [1985] 1 W.L.R. 1126; and *Blake* v. *Pope* [1986] 1 W.L.R. 1152.

With respect, the no-nonsense approach by Lord Denning in *Wiltshire* v. *Barret* , while appearing to subscribe a sensible principle, also imposes severe restrictions on the application of the criminal law. Taken to the extreme, every time a police officer wants to ask one or two questions of a person he has to arrest him for fear of the legal

consequences. The police as well as the individual concerned may have no chance to clear any suspicion. The result may be more than one may like to advocate: many, many arrested persons at the police station.

I turn now to the position under the Constitution. Unlike in England and Australia, the individual rights in Papua New Guinea are guaranteed by the Constitution. Section 42 protects one such right: personal liberty. Positively put, it protects a private person's personal liberty from the Government and its instrumentalities. Negatively put, it prohibits the Government and its instrumentalities from depriving any person of his personal liberty except for the reasons stated in paragraphs (a)–(h) in subsection (1). Neither the word arrest nor detention is used in any of these paragraphs. These words appear later in subsections (2), (3), (5), and (6). The whole section deals with the same subject, deprivation of personal liberty. Obviously detention and arrest both deprive personal liberty. Irrespective of what their dictionary meaning may be, their seriousness must be implied by the strong prohibition in subsection (1): "No person shall be deprived of his personal liberty". Their effect and seriousness must be equal because they are not made dependent upon each other like "arrested and detained", or "detained upon arrest".

Further, it is my view that if a comparison is made between the basic position of an individual *vis–à–vis* Government or its instrumentalities at common law and the position under the Constitution, it will be found that there is a reason for the word "detention" in section 42. The fundamental principle at common law is that a private person can do anything which is not prohibited by a statute or which does not infringe the rights of others; whereas a public authority may only do that which the law specifically authorizes it to do: see Lord Parker, "The Role of the Judge in Preservation of Liberty" [1961] 35 A.L.J. 63. Ours is a constitutional government limited by the Constitution. The Government and its instrumentalities, therefore, can only do what is authorized by the Constitution. The fact that both detention and arrest interfere with personal liberty, yet section 42(1) allows for such an interference, means detention is allowed in certain circumstances. On the question under reference, section 42(1)(d) is relevant. That is, a person may be detained "upon reasonable suspicion of his having committed, or being about to commit, an offence".

I think detention was deliberately allowed into the Constitution to cater for the circumstances in the country. We are dealing with a section of a home-grown Constitution. I suggest that, while the members of the Constitutional Planning Committee formed strong views on personal liberty, they must have considered the kind of society in which the right would be enforced. There is a strong tribal wantoks, or extended family system. In a group situation, for example, people tend to react and hit back quickly. The only justification for doing so seems to be that a relative has been hurt or insulted. Certain detention by police is therefore vital to the administration of criminal law in the country. There is a need to remove a person away from the group situation: for his own protection even if he is fighting to free himself; or to ask him questions away from a crowd, either about himself or other people; or to remove and/or detain to neutralize what could be an explosive situation.

I suppose the next question that necessarily arises is how far can a person's personal liberty be deprived under the exception in paragraph (d)? The extent to

which deprivation is allowed in other circumstances is provided for by different legislation covering the specific field. For instance, detention for the purpose of paragraph (f) is regulated by the Public Health Act (Ch. No. 226) and for the purpose in paragraph (g) is regulated by the Migration Act (Ch. No. 16). For the purpose of paragraph (d), the arrest part is regulated by the Arrest Act (Ch. No. 339). For detention there is no specific legislation. I think, in a way, detention may be regulated by the Motor Traffic Act (Ch. No. 243), the Search Act (Ch. No. 341), and even, I would suggest, by the Arrest Act. I do not think, for example, an arrest either under section 14 or section 16 of the Arrest Act comes as a lightning strike. In the few moments before an arrest there must be certain questions asked as to name, identity, and certain suggestions or allegations put to the person before he is arrested. The extent to which a detention is permitted, however, is determined under the Constitution itself.

Section 42(3) commands that any person detained must be "brought without delay before a Court or a judicial officer" and that any person that has been detained "upon reasonable suspicion of his having committed, or being about to commit an offence" "shall not be further held in custody in connection with the offence . . .". Section 42(4) prohibits detention for the purpose of interrogation. Section 42(5) provides an avenue for complaint if any detention is unreasonable.

"Without delay" may cause come concern. But in my view the combined effect of section 42(3) and section 42(4) is that a person is detained only *for the purpose of bringing him before a court.* So that, except for exigencies of travel and other practical considerations, such as no court or judicial officer being available, say, between 6 p.m. to 6 a.m. on working days, and none being available at weekends or public holidays, a person detained cannot be kept for anything else. One may ask, when can the police do any investigation, like conducting interviews? In my view the courts in Papua New Guinea have followed a course that, as long as the rights in section 42(2) are observed, further investigations or interviews may be conducted. England and Australia have a slight difference in application of the common law rights which I want to mention for the purpose of comparison. It seems the English approach is more flexible, that is, once a person is arrested, subject to the without delay qualification, investigation may be continued; whereas the Australian approach is that a suspect may be asked questions but that "when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before the justice which must be delayed": see *Williams* v. *The Queen* (1986) 66 A.L.R. 385 at 401.

Both the English the Australian authorities deal with a different situation. They deal with detention and questioning after arrest, whereas the question under reference deals with detention independent of arrest, e.g., detention before arrest. There is a need to give time to police to make proper investigations. This is a policy consideration which could be incorporated into an Act of Parliament by stating a specific time-limit within which a person may be detained. In the absence of that I think the Australian approach accords with the requirement of section 42(3) and section 42(4).

C. *Question 3*

I concur with the judgments of the Chief Justice and the Deputy Chief Justice on this question. I conclude, with respect, with the joint remarks by Mason J. (as he then

was) and Brennan J., in *Williams* v. *The Queen*, at 400:

> Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.

1400 **II. Answers**

I would answer the questions as follows:

1. Except as in the circumstances and for the reasons I have advanced suggesting that police should inform a detained person of the rights in (b) and (c), my answer is "No".
2. Detention, like arrest, is deprivation of personal liberty. Detention can occur before a formal arrest or after, as a consequence upon arrest. For the purpose of criminal justice administration a detention must be effected in accordance with paragraph (d) of subsection (1) and subject to section 42(3); (4), and (5) of the Constitution.
3. Subject to the extreme circumstances as described by the Chief Justice, my answer is "No". The interviewing officer should suspend the record of interview.

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Questions answered accordingly