

No. 38 of 1979

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF CRIMINAL APPEAL OF THE
REPUBLIC OF SINGAPORE

B E T W E E N :

KOH CHAI CHENG Appellant

and

10 THE PUBLIC PROSECUTOR Respondent

CASE FOR THE APPELLANT

1. This is an appeal from the Judgment of the Court of Criminal Appeal, Singapore (Wee Chong Jin, C.J., Sinnathuray, J. and Chua, J.) dated the 25th day of July 1979 which dismissed the Appellant's appeal against conviction for unlawful trafficking in a controlled drug contrary to Section 3(a) of the Misuse of Drugs Act 1973 and sentence of death in the High Court, Singapore (Mr. Justice Choor Singh and Mr. Justice A.P. Rajah) on the 17th March 1977.

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pp. 1102 to 1 07

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p. 1066

2. The Appellant was charged as follows :-

p. 29

That on or about the 24th day of April 1976 at Park Road, Singapore, in furtherance of the common intention of both of you (the Appellant and another) and without any authorisation under the Misuse of Drugs Act 1973 (No. 5 of 1973) or the Regulations made thereunder, did traffic in a controlled drug specified

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in Class A of Part I of the First Schedule of the Misuse of Drugs Act 1973 to wit, 1256 grammes of diamorphine and you have thereby committed an offence under Section 3A punishable under Section 29 of the Misuse of Drugs Act 1973 read with Section 34 of the Penal Code (C.A.P.103).

3. One of the principal questions raised by this appeal is the meaning and construction of 'traffic' in the Misuse of Drugs Act 1973 (No. 5 of 1973) and in particular whether Your Petitioner was properly convicted of trafficking in a controlled drug. 10

4. The relevant statutory provisions are :-

Misuse of Drugs Act 1973:

2. ... "traffic" means -

(a) to sell, give, administer, transport, send, deliver or distribute; or

(b) to offer to do anything mentioned in paragraph (a) above, otherwise than under the authority of this Act or the regulations made thereunder: and "trafficking" has a corresponding meaning. 20

3. Except as authorised by this Act or the regulations made thereunder, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such other person is in Singapore, to -

(a) traffic in a controlled drug;

(b) offer to traffic in a controlled drug; or 20

(c) do or suffer to do any act preparatory to or for the purpose of trafficking in a controlled drug.

15. Any person who is proved or presumed to

have had in his possession more than -

- (a)
- (b)
- (c) 2 grammes of diamorphine (heroin)
contained in any controlled drug; or
- (d)

Shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.

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5. The nature of the case and the evidence appears from the judgment of the Court of Criminal Appeal, but the general nature can be summarised shortly as follows :

pp.1102 to 1107

On the 24th April 1976 the Appellant came from Johore Bahru to Singapore in his Datsun motor car, registration number JS 3705. In company with others, including two agents provocateurs who were the main prosecution witnesses, the Appellant went to a restaurant that evening where an ambush was laid for him. The Appellant was informed by one Tan Kai Ho (one of the agents provocateurs) that after eating at the restaurant it would be necessary for Tan Kai Ho and the other agent provocateur (Lee Chang Chuan) to go and fetch the deposit from the prospective buyers. After dinner both Tan Kai Ho and Lee Chang Chuan left the restaurant upon the pretext that they were going to obtain the deposit from the prospective buyers. They went to the police and informed them that the Appellant was in the restaurant and that the Datsun car was parked in the car park outside. They both returned to the vicinity of the restaurant, Lee Chang Chuan went inside and informed the Appellant and the others there, that they had not been able to obtain the deposit from the buyers that evening and that so far as that evening was concerned there was no more to be done. Lee

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Chang Chuan then went and joined Tan Kai Ho in a block of flats nearby and they waited to observe the departure of the Appellant. It was in the region of one hour later that the Appellant left. He entered his car and sat in the driver's seat. Before the car could move off, the police arrested him. The boot of the car which was locked was opened with one of the three keys on the key ring for the ignition, and concealed underneath a panel in the rear of the boot the police found eleven plastic and paper bags containing 1256 grammes of diamorphine.

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6. The Appellant gave evidence on oath. His account, in short, was that he had driven to Singapore earlier that day, but that in the course of the afternoon the car had been used by Tan Kai Ho and Lee Chang Chuan and that they must have placed the diamorphine in the boot of the car for he had no knowledge that it was there.

7. The learned trial Judges rejected the evidence of the Appellant and in the material part of their Grounds of Decision stated as follows :-

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p. 1090

"It was also proved that the First Accused's car JS 3705 arrived from Johore and entered Singapore through the Woodlands checkpoint between 10.30 a. m. and 2 p. m. on the day in question. The First Accused admitted this and claimed that he passed through the checkpoint before 11 a. m. on that day. There was also the evidence of Ah Yu which we accepted that the First Accused had told him at Batu Pahat on the night of the 23rd April, 1976 that the drug would be coming to Singapore on the morning of the 24th April, 1976 and when arrested in Park Road, Singapore at 7.10 p. m. on the 24th April, 1976 the First Accused was in charge of his car in which were found 1256 grammes of diamorphine concealed in the boot of the car. In the light of all this evidence it is clear that the First Accused had on the 24th April, 1976 transported 1256 grammes of diamorphine and thereby trafficked therein within the meaning of Section 2 of the Act and was guilty of an offence under Section 3(a) of the Act."

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8. In the Appellant's appeal to the Court of Criminal Appeal it was argued, largely by reference to Canadian cases and the parallel provisions of the Narcotics Control Act of Canada, that to traffic in a drug it was necessary for there to be proved conduct which was more than the mere transporting of the drug. The Court of Criminal Appeal followed their previous approach to the Canadian cases which had been established in Wong Kee Chin v The Public
10 Prosecutor (1979) 1 Malayan Law Journal 157 and held that there was ample evidence before the trial Judges for them to reach the conclusion that on this occasion the Appellant was trafficking. The Court of Criminal Appeal held : (1) that because the Appel-
lant was in the car and in control of the car at the time of his arrest he was thereby transporting the
drugs and therefore trafficking. (2) (Following Wong
20 Kee Chin) that the presumption, under Section 15(ii) of the Act (which arose in this case) that the Appellant had the controlled drug in his possession for the purpose of trafficking, when taken with the physical act of transporting constituted a prima facie case of trafficking which if unrebutted warranted a conviction. (3) That because the Appellant had admitted
on the material day driving the car from Johore to Singapore and because the learned trial Judges had rejected the explanation of the Appellant as to how the drug was in the car, there had been an admission of facts which amounted to trafficking.

p.1106
p.1106
p.1107

30 9. It is respectfully submitted the Canadian cases support the view that transport "must be read to mean the drug was carried from one point to another with the intention of furthering the distribution or giving of it to other persons" (Regina v Greene 74 D.L.R. (3rd) 354 and 357). It is submitted that the above construction is correct otherwise anyone merely in possession of drugs could move them about even a short distance and would be guilty of trafficking. (See R. v McDonald 1963 43 W.W.R. 337 and R. v Young 1971 3 W.W.R.
40 195).

10. It is respectfully submitted that upon the evidence led by the prosecution in this case there was no evidence to translate the act of possession, namely by being in control of the car, and the obvious intention of

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the Appellant to drive the car, into an act which was furthering the distribution or giving to another. On the contrary the evidence led by the prosecution was that there was no one available that evening with whom Your Petitioner could traffic. It is therefore submitted that the act of transporting proved in this case did not take the case for the prosecution beyond the stage which it reached by virtue of the statutory presumption that the Appellant was in possession for the purpose of trafficking.

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11. The offences involving controlled drugs are set out in Section 3 of the Misuse of Drugs Act 1973, as set out in paragraph 4 above. There is no offence of being in possession of a controlled drug for the purpose of trafficking and it is respectfully submitted that the approach of the Court in the criminal appeal in this case and in Wong Kee Chin ignores the careful distinction which Section 3 itself draws between the quality of act which may be an act preparatory to trafficking and an act which amounts to trafficking.

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12. Insofar as the Court of Criminal Appeal upheld the conviction on the grounds that the Appellant had admitted facts justifying a conviction for trafficking when he came through the Woodlands Customs point, it is submitted they erred. The Appellant was not charged with trafficking at that place and no proper inquiry took place as to what the Appellant was doing at that time, or what his intentions were. In this regard it is not without significance that the charge upon which he was convicted was an amended charge, made with leave of the Court after the change of the case for the prosecution.

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13. Further and additionally, the Appellant relies upon the arguments and submissions set out in the Appellant's case in the appeal to the Privy Council in the case of Ong Ah Chuan against The Public Prosecutor to support the proposition that the Misuse of Drugs Act 1973 is unconstitutional and null and void.

14. The Appellant therefore respectfully submits that this appeal should be allowed, and that the conviction and sentence dated the 17th March 1977 should be set

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aside, for the following amongst other

R E A S O N S

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1. BECAUSE the learned trial Judges mis-directed themselves as to the meaning of 'trafficking' in controlled drugs.
 2. BECAUSE there was no evidence that the Appellant had been trafficking in controlled drugs.
 3. BECAUSE the learned trial Judges mis-directed themselves as to the meaning of 'transport' in section 2(a) of the Misuse of Drugs Act 1973.
 4. BECAUSE there was no evidence that the Appellant had been transporting controlled drugs.
 5. BECAUSE the Misuse of Drugs Act 1973 is unconstitutional and null and void.

MERVYN HEALD

GEORGE NEWMAN

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF CRIMINAL APPEAL
OF THE REPUBLIC OF SINGAPORE

B E T W E E N

KOH CHAI CHENG Appellant

- and -

THE PUBLIC PROSECUTOR Respondent

CASE FOR THE APPELLANT

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No. 38 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF CRIMINAL APPEAL OF
SINGAPORE

B E T W E E N :KOH CHAI CHENG Appellant

- and -

THE PUBLIC PROSECUTOR Respondent

CASE FOR THE RESPONDENT

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Record

1. This is an appeal in forma pauperis by special leave from a Judgment of the Court of Criminal Appeal of Singapore (Wee Chong Jin, C. J., Sinnathuray and Chua, JJ.) dated the 25th July, 1979 which dismissed the Appellant's appeal against his conviction on the 15th August 1977 in the High Court, Singapore (Choor Singh and Rajah, JJ.) of unlawfully trafficking in 1,256 grammes of diamorphine, contrary to section 3(a) of the Misuse of Drugs Act, 1973 (as amended) and sentence of death.

pp. 1102-1107

pp. 1068-1098

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2. The relevant provisions of the Misuse of Drugs Act 1973 (as amended) are :

Section 3 "Except as authorised by this Act or the regulations made thereunder, it shall be an

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offence for a person, on his own behalf or on behalf of any other person, whether or not such person is in Singapore to -

- (a) traffic in a controlled drug;
- (b) offer to traffic in a controlled drug; or
- (c) do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug.

Section 2 "traffic" means -

- (a) to sell, give, administer, transport, send, deliver or distribute; or 10
- (b) to offer to do anything mentioned in paragraph (a) above,

otherwise than under the authority of this Act or the regulations made thereunder, and trafficking has a corresponding meaning.

Section 15

Any person who is proved or presumed to have had in his possession more than -

- (a) 100 grammes of opium; 20
- (b) 3 grammes of morphine contained in any controlled drug;
- (c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or
- (d) 15 grammes of cannabis or cannabis resin,

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein. "

10 3. The expression "controlled drug" is defined as any product or substance which is for the time being specified in Parts I, II or III of the First Schedule to the Misuse of Drugs Act, 1973, or anything that contains such substance or product. Diamorphine (heroin) is so specified, so that
10 heroin and any substance containing heroin are controlled drugs.

4. The trial of the Appellant together with one Ooi See Hai took place in the High Court in Singapore (Choor Singh and Raja, JJ.) between the 28th February and 17th March 1977 upon the following amended charge :-

20 "That you, on or about the 24th day of April, 1976 at Park Road Singapore in furtherance of the common intention of both of you and without any authorisation under the Misuse of Drugs Act, 1973 (No. 5 of 1973) or the regulations made thereunder, did traffic in a controlled drug specified in Class A of Part I of the First Schedule of the Misuse of Drugs Act, 1973 (No. 5 of 1973) to wit, 1,256 grammes of diamorphine and you have thereby committed an offence under section 3(a) and punishable under section 29 of the Misuse of Drugs Act, 1973 read with section
30 34 of the Penal Code (Cap. 103)."

p. 29

5. The prosecution called material evidence to the following effect. Two Police informers, Tan Kai Ho ("Kai Ho") and Lee Chang Chuan ("Ah Yu") gave evidence that Kai Ho had known the Appellant in Batu Pahat, Malaysia since about 1968. Kai Ho

p. 1068C

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p. 1069A had later moved to Singapore and in February, 1976 when
p. 1069B-C on holiday in Batu Pahat he met the Appellant again. The
Appellant sought his help in finding a buyer for a quantity
of heroin which the Appellant said he had in his
possession and Kai Ho agreed to try, although he in fact
p. 1070B had no intention of doing so. Ah Yu had met the
Appellant in 1975 and owed him a gambling debt: the
Appellant suggested that Ah Yu could repay the debt by
disposing of some heroin for the Appellant in Singapore
p. 1070D and Ah Yu agreed to do so. In March, 1976 Kai Ho and 10
Ah Yu met the Appellant and they discussed a possible
sale of heroin. Kai Ho said that he had found a buyer
p. 1070E and that he would buy up to 7 lbs. of heroin from the
p. 1071A-B Appellant. The agreement was that the Appellant would
bring the heroin into Singapore, whereupon Kai Ho would
p. 1071E pay the Appellant a deposit of £2,000. On the 17th April,
1976 Kai Ho and Ah Yu went to find out when the heroin
would reach Singapore and the Appellant told them that
p. 1072 B-C it would take a week. On the 18th April, 1976 Kai Ho
confided to Ah Yu that there was in fact no buyer and 20
that it was his intention to inform the Police at the
p. 1072D appropriate time. Ah Yu made a further trip to Batu
Pahat when on the 23rd April, 1976 he was finally told
by the Appellant that the heroin would be in Singapore
on the following day. Ah Yu then returned to Singapore.

6. On the following day, the 24th April, 1976 Kai Ho
p. 1073A together with Ah Yu went to see Police Constable Ong
See Hok at about 12 noon and informed him of the
p. 1073C imminent arrival of the heroin. They then went to Kai
Ho's flat. They there met the Appellant's co-accused, 30
Ooi See Hai, who had arrived in a Morris Minor car.
p. 1073D Ooi See Hai said that the heroin would arrive later. At
about 4.00 p.m. that same day, Kai Ho and Ah Yu
again spoke to P.C. Ong this time together with his
superior officer: they formulated a plan whereby the
Appellant would drive his car to a particular car park,
p. 1074D should the heroin arrive from Malaysia. At about

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5.00 p.m. the Appellant arrived at Kai Ho's flat,
driving his orange Datsun car JS 3705. Kai Ho
asked him if the heroin had arrived: the Appellant
turned to the back of the car, by which Kai Ho
understood that the Appellant had the heroin with
him in the back of the car. In cross-examination
both Kai Ho and Ah Yu denied that they borrowed the
Appellant's car at any time. Later that same day,
the Appellant and Kai Ho joined Ooi See Hai and
his party of friends at the Miramar Hotel: the
Appellant was asked : "Has it arrived?" and replied
that it had. Kai Ho Ah Yu, the Appellant with Ooi
See Hai and his three friends then went to the O.G.
Restaurant for dinner in two cars, namely the Morris
Minor and the orange Datsun car which was driven
by the Appellant. As soon as they had finished their
dinner, Kai Ho and Ah Yu left the restaurant
ostensibly to collect a deposit of \$2,000 for the
heroin from the buyer which they had told the
Appellant before dinner that they would be doing. In
fact, they met P. C. Ong nearby and told him that
the heroin had arrived in an orange Datsun car JS
3705 and that both the Datsun and the Morris Minor
were parked in the car park as previously arranged.
The police then waited in ambush. Having returned to
the restaurant to inform the Appellant that he and Kai
Ho had been unable to make contact with the buyer that
evening Ah Yu rejoined Kai Ho in a flat behind the
car park to await events. At about 6.30 p.m. two of
Ooi See Hai's friends emerged from the restaurant
and were arrested as they got into the Morris Minor.
At about 7.10 p.m. the Appellant with Ooi See Hai
and one of his friends approached the orange Datsun
car JS 3705: the Appellant seated himself in the
driver's seat, with the other two in the rear seats.
Before the car could move, the Police arrested all
three of them who were taken together with the Datsun
car to the Central Police Station. Immediately on
arrival and in their presence, the boot of the Datsun

p. 1075A

p. 188E
p. 538E

p. 1075B

p. 1075B

p. 1075C

p. 1075D

p. 1075E

p. 1076A

p. 1076C

p. 1076D-E

p. 1077A

p. 1077B

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- p. 1077C car was opened with one of the three keys on the key ring holding the ignition key to the car, taken from the Appellant. In the exposed part of the boot, nothing incriminating was found: however, upon removal of a panel in the rear of the boot a number of plastic and paper packets, eleven in all, were found, stacked on top of the car's petrol tank and containing a brownish substance. On analysis, the eleven packets were found to contain a total of 1,256 grammes of diamorphine. P. C. Ong confirmed the evidence of Kai Ho and Ah Yu in so far as it concerned him. 10
- p. 1077D-E
p. 1078A-B
- p. 1079B-C 7. At the close of the Prosecution's case it was submitted on behalf of the Appellant that there was no case to answer on the grounds, inter alia, that the quality of the evidence was insufficient to make out a prima facie case and, secondly, that the evidence of the two informers could not be mutually corroborated. The learned trial Judges rejected the submission. 20
- p. 1084A -B 8. The Appellant then gave evidence and called five witnesses who gave evidence on his behalf. The Appellant admitted that he had driven his orange Datsun car JS 3705 from Malaysia to Singapore on the 24th April, 1976 but said that he had done so for the purpose of buying a racing clock. He said that he had no knowledge of the heroin found in the boot of his Datsun car and alleged that it had been 'planted' there by Kai Ho and Ah Yu when, as he alleged they had borrowed his car on the afternoon of the 24th April. 30
- p. 1089B-C
p. 1090D-E
- p. 1098 9. On the 17th March 1977 the Court convicted the Appellant of unlawful trafficking in the terms of the amended charge and sentenced him to death.
- pp. 1068-98 10. On the 15th August, 1977, the learned trial

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Judges delivered their Grounds of Decision. After setting out the charge and summarizing the evidence called by the prosecution, the learned trial Judges referred to the amendment of the charge and to the submission of no case made on behalf of the Appellant. The learned trial Judges then summarized the evidence given by the Appellant and by the five witnesses called on his behalf. After referring to certain statutory presumptions as to possession and knowledge in sections 16 and 19 of the Misuse of Drugs Act, 1973 (as amended) the learned trial Judges said that the evidence clearly raised the inference that the heroin found in the boot of the Appellant's car was in his possession and that he had been transporting it by the use of his car. The Appellant's car JS 3705 had entered Singapore through Woodlands check point: the Appellant had admitted this. On the night of the 23rd April, 1976 the Appellant had told Ah Yu, evidence which the learned trial Judges accepted, that the heroin would be going to Singapore on the morning of the 24th April. And when arrested on the 24th April the Appellant was in charge of his car in which were found 1, 256 grammes of diamorphine concealed in its boot. In the light of all the evidence, the learned trial Judges said that it was clear that the Appellant had on the 24th April transported 1, 256 grammes of diamorphine and thereby trafficked therein so as to be guilty of an offence under section 3(a) of the Act. The learned trial Judges referred to the Appellant's account in detail and compared it with the evidence of Kai Ho and Ah Yu. After analysing certain parts of their evidence and that of the Appellant, they concluded that the Appellant had lied to the Court in giving his explanation as to why he visited Singapore on the 24th April and that he had done so for the purpose of escaping from the consequences of his crime. The learned trial Judges accepted

pp. 1068-1078

pp. 1078-1079

pp. 1080-1089

p. 1089D-E

p. 1090A

p. 1090A

p. 1090B

p. 1090C

p. 1090C-D

pp. 1090-1096

p. 1096E

p. 1097B-C

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- pp. 1097D-1098 the evidence of Kai Ho and Ah Yu and rejected the Appellant's evidence concerning the time of the Appellant's arrival at Kai Ho's flat and as to the allegation that Kai Ho and Ah Yu had borrowed the Appellant's car or planted the heroin therein. After warning themselves as to the danger of acting on the uncorroborated evidence of Kai Ho and Ah Yu as accomplices, the learned trial Judges said that having considered all the evidence in the case they were convinced that Kai Ho and Ah Yu were speaking the truth. They therefore accepted their evidence as true. The learned trial Judges concluded that they had no doubt at all that the Appellant was guilty of the charge on which he was tried. 10
- p. 1098
- pp. 1099-1100 11. The Appellant appealed to the Court of Criminal Appeal, Singapore. The grounds of appeal are set out in full in a Petition of Appeal dated the 2nd November, 1978.
- pp. 1102-1107 12. On the 25th July, 1979, the Court of Criminal Appeal, Singapore (Wee Chong Jin, C.J., Sinnathuray and Chua, JJ.) delivered their Judgment dismissing the Appellant's appeal. 20
- p. 1104 13. The Court of Criminal Appeal dismissed the appeal because:-
- (1) the learned trial Judges, being aware of the danger of acting on the uncorroborated evidence of Kai Ho and Ah Yu, were convinced that they were speaking the truth. No criticism could be made of the learned trial Judges approach to that evidence, the acceptability of it being a matter for them. 30
- p. 1103 (2) the learned trial Judges disbelieved the Appellant's account.

- (3) upon all the evidence, there was a clear inference, which the learned trial Judges were entitled to draw, that the Appellant had transported the 1, 256 grammes of diamorphine, in the dictionary sense of conveying from one place to another, and had therefore trafficked therein within the definition of trafficking in section 2 of the Act. p. 1105-1106
- 10 (4) upon the approach set out in the case of Wong Kee Chin v The Public Prosecutor (1979) 1 M. L. J. 157 the learned trial Judges had ample evidence before them to hold at the close of the prosecution case that a prima facie case had been made out against the Appellant which, if unrebutted, would warrant his conviction of unlawful trafficking. p. 1106
- 20 (5) the Appellant had admitted driving his Datsun car JS 3705 on the material day from Johore to Singapore and, once the learned trial Judges had rejected his allegation that Kai Ho and Ah Yu had borrowed the car and planted the heroin therein, there was no explanation as to how the heroin came to be concealed in the boot of his car. p. 1107

30 14. It is respectfully submitted that the presumption under section 15(c) was not used by the learned trial Judges, who found the Appellant guilty of unlawful trafficking without recourse to it. They were entitled, it is submitted, to draw the inference of trafficking from evidence of possession of a relatively large quantity of drugs. Accordingly, it is submitted that the reliance by the Court of Criminal Appeal upon that presumption was not essential to the result of the appeal.

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15. The same questions and matters arise for decision in this appeal as in Privy Council Appeal No. 37 of 1979 Ong Ah Chuan v The Public Prosecutor. Accordingly, the Respondent adopts and repeats the argument and submissions set out in paragraphs 17-28 inclusive of the Respondent's Case in the said Privy Council Appeal No. 37 of 1979.

16. The Respondent respectfully submits that this Appeal should be dismissed and the Judgment of the Court of Criminal Appeal, Singapore should be affirmed for the following, among other 10

R E A S O N S

The Respondent adopts and repeats the thirteen reasons set out in the Respondent's Case in the said Privy Council Appeal No. 37 of 1979 mutatis mutandis.

S. C. SILKIN, Q. C.

STUART MCKINNON, Q. C.

No. 38 of 1979

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Appellant

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Respondent

CASE FOR THE RESPONDENT

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