

IN 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 :

ONG AH CHUAN Appellant

- and -

PUBLIC PROSECUTOR OF SINGAPORE Respondent

CASE FOR THE APPELLANT

- 10 1. This is an appeal in forma pauperis,
pursuant to leave granted by the Board (Lords
Edmund-Davies, Scarman and Lane) on 19th
December 1979, from the judgment dated 17th
January 1979 of the Court of Criminal Appeal of
the Republic of Singapore (Wee Chong Jin, C.J.,
Kulasekeram and Chua JJ.) dismissing the
Appellant's appeal from his conviction by the
High Court of Singapore (Choor Singh and Rajah
JJ.) for unlawfully trafficking in 209.84 grammes
20 of diamorphine hydrochloride (heroin) contrary to
Section 3(a) of the Misuse of Drugs Act 1973 (No.
5 of 1973). Since the unauthorised trafficking
in controlled drugs involved more than 15 grammes
of heroin, the Appellant was mandatorily sentenced
to death, pursuant to Section 29 of and the Second
Schedule to the Misuse of Drugs Act 1973 as
amended by Section 9 of and the Second Schedule to
the Misuse of Drugs (Amendment) Act 1975 (No. 49
of 1975).
- 30 2. The main issues on this appeal are:-
- (a) Whether Section 15 of the Misuse of Drugs
Act 1973 (as amended) and Section 16 thereof,

which together impose a double presumption of possession and of possession for the purpose of trafficking, are unconstitutional as not being "in accordance with law."

- (b) Whether Section 15 of the Misuse of Drugs Act 1973 (as amended) and Section 16 thereof, which together impose the said double presumption, are unconstitutional as a denial of "the equal protection of the law." 10
- (c) Whether proof of the act of transportation of drugs together with the statutory presumption of their possession for the purpose of trafficking constitutes the offence of trafficking within Section 3 of the Misuse of Drugs Act 1973; or whether proof of some act within the meaning of "traffic" within Section 2 of the Misuse of Drugs Act 1973 is additionally required.
- (d) Whether the mandatory death penalty for trafficking in more than 15 grammes of heroin is unconstitutional as not being "in accordance with law". 20
- (e) Whether the mandatory death penalty for trafficking in more than 15 grammes of heroin is unconstitutional as a denial of "the equal protection of the law".

3. FACTS

On 2nd June 1977, Narcotics Officers observed the Appellant coming out of his flat at No. 235-E Block, 26 Marsiling Drive, Singapore, and, after disappearing from sight momentarily, emerging from the block carrying a plastic bag. The Appellant went to his car and drove off, followed by the said officers. He completed the journey in front of No. 270 Burkit Timah Road, alighted from it and was immediately arrested. 30

4. From the Appellant's waist front trousers' pocket, the officers removed a plastic bag containing a light brownish powder suspected of being diamorphine hydrochloride. In the Appellant's car another plastic bag was discovered 40

containing brownish granular solids also suspected of being the same chemical substance. On analysis by the Government Chemist the contents of the two plastic bags were found respectively to contain 3.84 and 206 grammes of diamorphine hydrochloride.

10 5. At the close of the prosecution case the Appellant submitted that as he was merely carrying 209.84 grammes of diamorphine hydrochloride and that there was no evidence of delivery of the drugs to any person he was not trafficking in drugs within the meaning of the Misuse of Drugs Act 1973. The trial judge rejected the submission and called on the Appellant to rebut the presumption of trafficking established by the evidence of possession of more than 2 grammes of the said substance.

20 6. The Appellant gave evidence on his own behalf that he had the drugs in his possession for his own personal consumption and that the comparatively large amount was due to the fact that since he was going to Pulau Ubin to obtain employment it would be difficult for him to leave the island to obtain further supplies.

30 7. The High Court of Singapore found (1) that the Appellant had on 2nd June 1977 transported 209.84 grammes of diamorphine hydrochloride heroin without authorisation; (2) that the said substance was not for his personal consumption; and (3) he was therefore guilty of trafficking contrary to Section 3 of the Misuse of Drugs Act 1973.

8. PROCEEDINGS BEFORE THE COURT OF CRIMINAL APPEAL, SINGAPORE

The Appellant appealed to the Court of Criminal Appeal against his conviction and sentence of death on the following grounds:-

A. The Learned Trial Judges erred in law:-

40 (1) In rejecting the submissions of counsel for the Appellant that mere transportation of diamorphine without any evidence of corresponding activities for the purpose of distribution to others does not amount to trafficking.

- (2) In rejecting the Canadian Case of Regina v. MacDonald et al Regina v. Harrington & Scosky reported in (1963) 43 W.W.R. 337 on the ground that the decision in the Canadian case was based on the provisions of the Canadian Narcotic Control Act 1960 - 1961 (Cap. 35) which provisions do not find a place in our act and hence the case had no relevance in the construing of our act when the Canadian Narcotic Control Act is in most ways similar to our Misuse of Drugs Act, 1973 (No. 5 of 1973) if not more extensive especially the definition of 'traffic'. 10
- (3) In rejecting the Canadian case of Rex v. McMyn reported in (1941) 4 D.L.R. 268 on the ground that the Order referred to in this case is not set out in the case when the most pertinent provision of that Order regarding the violation was set out in the judgment of O'Halloran J.A. 20

B. The Learned Trial Judge erred in law:-

- (4) In failing to consider or sufficiently consider the defence of the Appellant which is consistent with innocence and therefore the Trial Judges must consider whether it might reasonably be true although not convinced of the truth of the Appellant's defence.
- (5) In drawing inappropriate inferences adverse to the Appellant and in rejecting his evidence. 30
- (6) In implicitly drawing an adverse inference against the Appellant for not calling his father in law from Pulau Ubin to be a witness for the defence when the defence is under no such duty so to call witnesses to testify on his behalf.

- C. (7) The Learned Trial Judges erred in law in failing to make a finding that the Appellant was transporting the diamorphine for the purpose of facilitating its promotion or promoting 40

distribution of the diamorphine to a
or any third party eventually.

- D. (8) The conviction on the charge is against the weight of the evidence and the probabilities of the case.
- E. (9) The sentence imposed is manifestly excessive and wrong in law.

10 9. In its judgment of 17th January 1979, delivered by Wee Chong Jin C.J. the Court of Criminal Appeal, following its earlier decision in Wong Kee Chin v. Public Prosecutor (1979) 1 M.L.J. 157, held that, once the prosecution had proved that 2 grammes or more of a controlled drug was being transported by the accused, there was a rebuttable presumption under Section 15(2) of the Misuse of Drugs Act 1973 that the accused had the controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting together with the presumption shifted the burden of proof to the accused to rebut the prima facie case of trafficking. If 20 unrebutted, the presumption of guilt, prevailed.

10. RELEVANT LAW

- (a) Misuse of Drugs Act 1973 (No. 5 of 1973) as amended by the Misuse of Drugs (Amendment) Act 1975 (No. 49 of 1975)

- (i) Section 2 (as amended) provides:

30 "In this Act, unless the context otherwise requires - '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."

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(ii) Section 3 provides:

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

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(iii) Section 15 (as amended) provides:

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

- (c) 2 grammes of diamorphine [heroin]; or

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

(iv) Section 16 provides:

"(1) Any person who is proved to have had in his possession or custody or under his control -

- (a) anything containing a controlled drug;

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(b) the keys of anything containing a controlled drug;

(c) the keys of any place or premises or any part thereof in which a controlled drug is found; or

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(d) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug

shall, until the contrary is proved, be presumed to have had such drug in his possession.

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"(2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

"(3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.

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"(4) Where one of two or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them".

(v) Section 19 provides:

"If any controlled drug is found in any vehicle it shall, until the contrary is proved, be presumed to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being."

(vi) Section 29 and the Second Schedule as amended prescribe death as the penalty for the unauthorised traffic in a controlled drug containing more than 15 grammes of diamorphine [heroin]. 10

(b) The Constitution of Singapore

Article 9(1) provides:-

"No person shall be deprived of his life or personal liberty save in accordance with law".

Article 12(1) provides:- 20

"All persons are equal before the law and entitled to the equal protection of the law."

11. SUBMISSIONS:

I - AGAINST CONVICTION

A. The status and effect of the Constitution of the Republic of Singapore

- 10 (1) On 31st March 1980 the Constitution of the Republic of Singapore was reprinted, with the authority of the President, incorporating all amendments to the Constitution of Singapore up to that date and the provisions of the Constitution of Malaysia applicable to Singapore on that date. For convenience the references herein to provisions of the Constitution will be to the provisions in this reprinted and consolidated version ("the Constitution") rather than to former Article numbers (whether from the Constitution of Singapore or from the Constitution of Malaysia).
- 20 (2) Article 156 of the Constitution provides that, subject to the provisions of Part XIV (which are immaterial to this case)
- "this Constitution shall come into operation immediately before the 16th day of September 1963."
- 30 (3) Article 4 of the Constitution provides that
- "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."
- (4) Article 5 of the Constitution provides as follows:-
- "(1) Subject to this Article and Article 8, the provisions of this Constitution may be amended by a law enacted by the Legislature.

"(2) Except as provided in Clause (3), a Bill seeking to amend any provisions in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.

"(3) Any amendment consequential on such a law as is mentioned in clause (1) of Article 39 shall be excepted from the provisions of clause (2). 10

"(4) In this Article 'amendment' includes addition and repeal".

(5) Neither of the fundamental liberties contained in Article 9(1) and 12(1) has been amended under Articles 5 in any relevant respect.

(6) Article 9(1) and Article 12(1) are part of the supreme law of the Republic of Singapore and if any of the relevant provisions of the Misuse of Drugs Act 1973 as amended is inconsistent with Article 9(1) or Article 12(1) it is, to the extent of the inconsistency, void. 20

B. The meaning of "in accordance with law"

Article 2(1) of the Constitution defines "law" to include:-

"written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore." 30

It is submitted that a deprivation of life or personal liberty cannot be "in accordance with law" unless it satisfies those fundamental principles of the rule of law or due process of law recognised by all developed legal systems founded upon the common law tradition. If the 40

phrase "in accordance with law" were restrictively interpreted to mean no more than "in accordance with an existing statute or judicial precedent", Article 9(1) would be denied its constitutional role as a guarantee of a fundamental liberty. It is submitted that to give a constitution a strictly positivistic interpretation, and to abrogate the natural law premises from which all fundamental rights are derived, is justified by
10 neither principle nor policy.

The concept of the rule of law may be traced historically to Chapter 39 of the Magna Carta of 1215 which proclaimed that:-

"No freeman shall be taken or imprisoned, or be disseised of his freehold, or free customs, or exiled, or any other wise destroyed; nor will we not pass upon him, nor deal with him but by lawful judgment of his peers, or by the law of the land."

20 The phrase "the law of the land" was a living embryo which was later to develop as the concept of "the rule of law" within the British constitutional system and as the concept of "due process of law" within the United States constitutional system. The Fourteenth Amendment to the United States Constitution provides, in part, that no State "shall deprive any person of life, liberty or property, without due process of law". This provision echoes the words enacted in
30 1354 in the Statute of 28 Edw.III Ch. 3: "That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law". The historical development of the supremacy of the "rule of law" as a recognised principle of the British Constitution was usefully summarised in the Report of the Committee on Ministers' Powers (Cmd. 4060, April 1932; Parliamentary Papers 1931-2, Volume 12) at pp.71-
40 72. The Report continued (at p.72) as follows:-

"the modern doctrine of the rule of law has come, as the result of this long historical development, to mean the supremacy of all parts of the law of England, both enacted

and unenacted. The best exposition of the modern doctrine and of its corollaries is that contained in Dicey's Law of the Constitution. He says: 'That "rule of law" ... which forms a fundamental principle of the Constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government ... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts The "rule of law", lastly may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the Courts.'

In countries such as Singapore and Malaysia, India or the United States, which have written constitutions guaranteeing fundamental rights and freedoms, the constitutional codes are the source of those rights and freedoms and are to be interpreted and applied so as to ensure the effective enjoyment of the rights and freedoms which they secure. For example, the Supreme Court of India has interpreted Article 21 of the Constitution of India in this manner. Article 21 states that:-

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 21 would therefore appear, upon a literal interpretation, to be narrower than Article 9(1) of the Constitution of Singapore. However, in Maneka Gandhi v Union of India (1978 1 S.C.C. 248), Bhagwati J., for himself, Untwalia and Fazal Ali, JJ, and with whom Chandrachud and Krishna Iyer, JJ, expressed agreement, stated (at p.281):-

"Is the prescription of some sort of procedure enough, or must the procedure comply with any particular requirements? Obviously the procedure cannot be arbitrary, unfair or unreasonable ... on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21".

10 Article 14 of the Indian Constitution, like Article 12(1) of the Constitution of Singapore, guarantees "equal protection of the laws". Bhagwati J. continued (at p.284):-

20 "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

30 Similarly Krishna Iyer J. at p.338, and Chandrachud J at p.323. Beg CJ (at p. 393) stated that in the interpretation of Article 21, the criterion of "due process of law" should be applied. The Supreme Court also distinguished Gopalan v State of Madras (1950) SCR 88 where an earlier Supreme Court had held that the freedoms guaranteed by the Constitution were mutually exclusive and had concluded that the principles of natural justice were not implied into the Constitution by the reference to "procedure established by law" in Article 21.

40 The decision in Maneka Gandhi has been followed by the Supreme Court in M.H. Hoskat v State of Maharashtra AIR (1978) S.C. 1548; and in Hussainara Khatoom v Home Secretary, State of Bihar, Patna (1979) 3 SCR 532. See also Singh v. State of Punjab (May 1980 unreported).

In these cases the Supreme Court of India have

interpreted Article 21 as requiring due process of law in both the procedural and the substantive sense. Their case law is of particular significance in view of the apparent narrowness of the language of Article 21 and the restrictive interpretation which was originally given in Gopalan's case.

The Privy Council has adopted a similar approach in interpreting the guarantees of the rule of law and due process of law in the constitutions of various Commonwealth countries so as to ensure the effective enjoyment of such guarantees: see e.g. Mootoo v Attorney-General / 1979 / 1 WLR 1334; Attorney-General v Ryan / 1980 / 2 WLR 143. 10

It is submitted that a similar approach should be adopted in interpreting the phrase "in accordance with law" in Article 9(1) of the Constitution of Singapore.

C. The Constitutional Guarantee of the Presumption of Innocence 20

The presumption of innocence of the defendant in a criminal trial is one element of the rule of law. See Declaration of Delhi on the Rule of Law, Report of the Committee on "The Criminal Process and the Rule of Law" Clause II (1959 Journal of Int'l Comm. of Jurists Vol. 2 No. 1):

"The application of the Rule of Law involves an acceptance of the principle that an accused person is assumed to be innocent until he has been proved to be guilty". 30

Similarly, Article 11(1) of the Universal Declaration of Human Rights (UN Document A/811), adopted by the General Assembly of the United Nations on 10th December 1948 (to which organisation Singapore has at all material times belonged) provides that:-

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defence." 40

In Public Prosecutor v Yuvaraj (1970) AC 913, 921
(PC) Lord Diplock referred to

10 "the historic distinction, fundamental to the
administration of justice under the common law,
between the burden which lies upon the
prosecution in criminal proceedings to prove
the facts which constitute an offence beyond
all reasonable doubt and the burden which lies
upon a party in a civil suit to prove the facts
which constitute his cause of action or defence
upon a balance of probabilities."

Hence, it is submitted, the presumption of innocence
is an essential element of any deprivation of life
done "in accordance with law".

D. The 'double presumption' stated in Sections 15
and 16 of the Misuse of Drugs Act 1973 (as
amended) infringes the principle of presumption
of innocence, and hence is unconstitutional.

20 1. It is conceded that it is not necessarily a
breach of the rule of law for a statute defining a
criminal offence to embrace a rebuttable presumption
against the defendant. See Declaration of Delhi
(supra). However, it is submitted that a presumption
against the defendant is only in accordance with the
rule of law if it satisfies certain criteria, designed
to protect the defendant from arbitrary state action. In
particular:-

30 (i) "a statutory presumption cannot be
sustained if there be no rational
connection between the fact proved and
the ultimate fact presumed, if the
inference of the one from proof of the
other is arbitrary because of lack of
connection between the two in common
experience."
Tot v. U.S. 319 US 462, at pp 467-8
(1943)

40 "a criminal statutory presumption must
be regarded as 'irrational' or
'arbitrary', and hence unconstitutional,
unless it can at least be said with
substantial assurance that the presumed
fact is more likely than not to flow

from the proved fact on which it is made to depend. And in the judicial assessment, the congressional determination favouring the particular presumption must, of course, weigh heavily."

Leary v. U.S. 395 U.S. 6 at p.36 (1969).
Similarly U.S. v. Romano 382 U.S. 136 (1965).

In Leary v U.S. (supra, at pp.37-8,) the Supreme Court of the United States held that in order to decide the constitutionality of the presumption, the court should look at all available data to assess whether the fact presumed does follow from the fact proved.

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The same test, that of a rational connection between the fact proved and the presumption made, was applied by the Indian Supreme Court in Collector of Customs v. Sampathu Chetty (AIR 1962 S.C. 316) and in Babula Amthalal Mehta v The Collector of Customs, Calcutta (1957 S.C.R. 1110).

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- (ii) The rebuttable presumption is only constitutional where special reasons of public policy justify its existence, and

"where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship".

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Tot v. U.S. (supra, at pp. 469-70).

- (iii) The rebuttable presumption against the defendant cannot remove the burden on the prosecution to prove the elements of the crime beyond a reasonable doubt. The State must have, and satisfy, the burden of proving every element of the crime charged beyond a reasonable doubt,

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otherwise the rule of law is violated:
Leland v Oregon 343 U.S. 790 (1951);
Holland v U.S. 348 U.S. 121 (1954).

10 A similar safeguard of the rule of law
was referred to in Collector of Customs
v Sampathu Chetty, supra. The Indian
Supreme Court, in upholding the
presumption against the defendant,
emphasised (at p.329) that, in that case,
it only operated where there was a
"reasonable belief" that the goods
seized were smuggled goods (the issue
presumed against the defendant).

20 The proposition that a rebuttable
presumption does not remove the State's
burden of proof in a criminal charge
was emphasised in U.S. v. Gainey 380 US
63 (1965). The statutory presumption
that presence at the site of an illegal
distillery evidences the crime of
carrying on an illegal distillery
business was upheld, the Supreme Court
finding a reasonable connection between
the fact and the crime presumed.
Stewart J., for the Court, noted (at
pp. 68-9) that "The statute does not
prevent the jury from being properly
instructed on the standards for
reasonable doubt : Holland v U.S. 348
30 U.S. 121 at p. 139."

He emphasised (at p. 70) that

40 "The jury was thus specifically
told that the statutory inference
was not conclusive. 'Presence'
was one circumstance to be
considered among many. Even if
it found that the defendant had
been present at the still, and
that his presence remained un-
explained, the jury could nonethe-
less acquit him if it found that
the Government had not proved his
guilt beyond a reasonable doubt."

(iv) Where there is a rebuttable presumption against the defendant, that presumption can be rebutted on a balance of probabilities. In R v Carr-Briant [1943] 1 K.B. 607 Humphreys, J., for the Court of Criminal Appeal, said

"In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved', the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

Similarly Morton v Confer [1963] 1 WLR 763 (DC). Further, in Public Prosecutor v Yuvaraj [1970] A.C. 913 at p.921 (PC) Lord Diplock said:-

"Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'."

In such a case the consequence of finding that that particular fact is disproved will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities."

2. It is conceded that in a charge of trafficking in a controlled drug within Section 3 of the Misuse of Drugs Act 1973 the prosecution is required to prove certain elements of the offence. In particular:-

- (a) In order to "presume" that the accused had a controlled drug in his possession "for the purpose of trafficking therein" - the second of the two presumptions - the prosecution must prove that the accused must have been in possession of a specified quantity of a specified drug; the quantity, type and the accused's possession of the drug will have to be proved, and some expert evidence from a qualified chemist will be needed.
- (b) Judicial interpretation of the phrase "for the purpose of trafficking" has meant that the presumption does not give rise to a finding that the possessor was committing the act of trafficking: Poon Soh Har v Public Prosecutor (1977) 2 M.L.J. 127 (Singapore Court of Criminal Appeal).
- (c) In Wong Kee Chin v Public Prosecutor (1979) 1 M.L.J. 157, it has been held in Singapore

that on a charge of trafficking the prosecution has to establish (i) the quantity of the specified controlled drug; (ii) that the accused had it in his possession so as to invoke the rebuttable presumption that it was "for the purpose of trafficking"; and (iii) the act of transporting the drug (or selling, giving, administering, sending, delivering or supplying it). The accused will then have to prove on a balance of probabilities that the drugs were for his own consumption or for some purpose other than trafficking. 10

3. It is submitted that the presumption of possession in Section 16 and the presumption of trafficking in Section 15 of the Misuse of Drugs Act 1973, or either presumption, are not "in accordance with law".

(a) In so far as there is a proved possession of controlled drugs, there is no rational connection between the fact proved and the fact of "trafficking" presumed therefrom. The amount of controlled drugs (in casu, 2 grammes of heroin) for the presumption to arise is so small that possession of such amount is as consistent with possession for personal use as with possession for the purpose of trafficking. If the quantity of drugs is small, courts have been disinclined to draw the inference of trafficking from the mere evidence of possession of such quantity: R. v. Wilson 1954 11 W.W.R. (N.S.) 282 (British Columbia Court of Appeal); R. v. Macdonald et al; R. v Harrington and Scosky 1963 43 W.W.R. 337 (British Columbia Court of Appeal.) It is therefore impermissible for the legislature to preempt a court finding of no inference of trafficking by establishing statutorily a presumption that possession of a small quantity of drugs is for the purpose of trafficking. The Appellant will refer to the affidavit evidence of Dr. Martin Mitcheson and Mr. Roger Lewis to the effect that possession of 2 grammes of heroin could properly be regarded as required for personal use. 20 30 40

(b) The existence of such presumptions subjects the accused to unfairness or hardship and is not justified by any special reasons of public policy.

(c) The presumptions purport to remove the burden of the prosecution to prove each limb of the offence beyond a reasonable doubt, and to avoid even the need for there to have been a reasonable belief that the offence had been committed.

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4. For these reasons it is submitted that the presumptions contained in Sections 15 and 16 of the Misuse of Drugs Act 1973, or either of them, are not "in accordance with law" within the meaning of Article 9(1) of the Constitution and are therefore unconstitutional. Accordingly, Sections 15 and 16 or either of them are void to the extent of such inconsistency with Article 9(1).

E. The Presumption of Trafficking as a Denial of The Equal Protection of the Law.

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Further or in the alternative, the Appellant submits that the presumption of trafficking contained in Section 15 of the Misuse of Drugs Act 1973 (as amended) constitutes a denial of "the equal protection of the law" guaranteed by Article 12(1) of the Constitution. Article 12(1) is similar in content and effect to the 14th Amendment to the American Constitution which provides, in part, that no State shall "deny to any person within its jurisdiction, the equal protection of the laws", and to Article 14 of the Indian constitution, which provides that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The unequal treatment of those in possession of 2 grammes or less of heroin (against whom there is no presumption of trafficking) and those in possession of more than 2 grammes (against whom Section 15 applies a presumption of trafficking) is not justified by any rational purpose. The classification made by Section 15 is not a reasonable classification because the mischief of trafficking in drugs at which it aims is not reasonably attained by the presumption that a person in possession of more than 2 grammes is

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guilty of trafficking. Section 15 is over-inclusive: that is, the legislative classification is wider in its ambit than the class which, on an independent review of the problem, could be described as reasonably related to the mischief: see e.g. Rinaldi v Yeager 384 U.S. 305 (1968) where the Supreme Court of the United States struck down a statute as a denial of equal protection because it was both under-inclusive (failing to include some of the "mischief class") and over-inclusive (including some who fell outside the "mischief class"). See also U.S. v. Robel 389 U.S. 258 (1967). 10

F. The Appellant's Rebuttal of the Presumption of Trafficking

Further or in the alternative, the Appellant submits that neither the High Court of Singapore nor the Court of Criminal Appeal of Singapore applied the correct test to the question of whether the appellant could rebut the presumption of trafficking under Section 15 of the Misuse of Drugs Act 1973. The presumption was (as stated above) rebuttable on the balance of probabilities. Although the Appellant might have been convicted even if the correct test had been applied, the Appellant submits that the conviction is unsafe and unsatisfactory and should not stand: see U.S. v Romano 382 U.S. 136 at p. 138 (1965) where the Court in holding that a presumption was unconstitutional, decided that although there was ample other evidence of the fact presumed, a conviction was nevertheless unsafe. 20 30

G. Mere transportation without evidence of delivery does not constitute 'trafficking'

1. The Court of Criminal Appeal construed the word "trafficking" in Section 3 of the Misuse of Drugs Act 1973 (as defined by Section 2 of the Act) as restricted to mere transportation of the controlled drugs. The Court held that it had been proved that the Appellant had transported the heroin found on him in the car he was driving and that the presumption under Section 15 of the Act that he had possession for the purpose of trafficking had not been rebutted. 40

2. The Court was wrong in disregarding as irrelevant the decisions of the Canadian courts under the Canadian Narcotic Control Act 1960-1961 which contained strikingly similar legislation dealing with drug offences. The Singapore offence under Section 3 of the Misuse of Drugs Act 1973 is "trafficking" in a controlled drug and not possessing the drug "for the purpose of trafficking" which in Section 15 gives rise to the rebuttable presumption that the possession is for such purpose. Bird J.A. in the British Columbia Court of Appeal in R v Macdonald et al; R. v. Harrington & Scosky (1963) 43 W.W.R. 337 said, at p.341, that the Canadian Parliament could never have intended "that transporting for mere personal purposes or use, as distinct from transporting for other purposes, should of itself afford sufficient evidence of an offence" of trafficking. He went on to hold (at p.342) that the word "transport" in the definition of "traffic" (the Singapore statute, in Section 2, has precisely the same definition) is not meant in the sense of mere conveying or carrying or moving from one place to another, but in the sense of doing so to promote the distribution of the narcotic to another. There must be something more extensive than mere conveying, or carrying or moving incidental to one's own use of the drug to warrant a conviction for trafficking. This decision has been followed in the Canadian Courts as follows:

- (a) R v Cushman (1968) 67 W.W.R. 137
(British Columbia Court of Appeal)
- (b) R v Young (1971) 2 W.W.R. 195
(British Columbia Court of Appeal)
- (c) R v Greene (1976) 74 D.L.R. (3d)
354, 360 (Newfoundland Court of Appeal)

3. It is submitted that the decision in Wong Kee Chin v Public Prosecutor [1979] 1 M.L.J. 157 - to the effect that proof of the act of transporting plus the presumption under Section 15 constituted a prima facie case of trafficking - was wrong and ought to be reversed.

4. On the findings of fact by the trial judges there was no evidence that the Appellant did any

more than transport the drugs. As a matter of law the High Court applied the presumption in Section 15 of the Misuse of Drugs Act as amended and therefore found the Appellant guilty of the offence of trafficking. In the absence of any evidence tending to prove a delivery of the drugs to another it is submitted that the prosecution had not made out a prima facie case for an offence under Section 3.

II - AGAINST SENTENCE

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H. The mandatory imposition of the death penalty for trafficking in more than 15 grammes of heroin is unconstitutional.

1. By section 29 and the Second Schedule of the Misuse of Drugs Act 1973 an accused person convicted of unauthorised trafficking in a Class A controlled drug was liable to a maximum penalty of 20 years' imprisonment or \$40,000 fine or both and 10 strokes and a minimum penalty of 3 years' imprisonment or \$5,000 fine or both and 2 strokes.

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2. By Section 9 of the Misuse of Drugs (Amendment) Act 1975, Section 29 of the principal Act and the Second Schedule thereto were amended so that the offence of trafficking in more than 15 grammes of heroin automatically carries the penalty of death.

3. For the reasons set out below it is submitted that the mandatory death penalty under Section 29 and the Second Schedule (as amended) is unconstitutional because it would deprive the Appellant of his life:-

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- (a) otherwise than "in accordance with law"; and
- (b) contrary to "the equal protection of the law".

IN ACCORDANCE WITH LAW

4. The rule of law does not require any particular penal theory, but it must necessarily condemn cruel, inhuman or excessive preventative

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measures or punishments: Declaration of Delhi, Report of the Committee on "The Criminal Process and the Rule of Law" Clause XI (1959 Journal of Int'l Comm. of Jurists Vol.2 No. 1). The rule of law and due process of law condemn cruel and unusual punishments. The Bill of Rights 1688 provides that

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"excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted".

Moreover, it is well-established in the case law of the Supreme Court of the United States that the requirement of due process of law condemns cruel and unusual punishments: see e.g., Louisiana ex rel. Francis v Resweber 329 U.S. 456 at pp. 463 and 473-74 (1946); Wilkerson v Utah 99 U.S. 130 at pp. 135-36 (1878) (disembowelling); In Re Kemmler 136 U.S. 436 at p.446 (1889) (Burning at the stake, crucifixion, breaking on the wheel); Chambers v Florida 309 U.S. 227 at p. 237 (1940) (the rack).

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5. It is conceded that the death penalty is not per se a breach of the rule of law: see e.g. Gregg v Georgia 428 U.S. 153 (1976); Proffitt v Florida 428 U.S. 242 (1976); Jurek v Texas 428 U.S. 262 (1976). See also Singh v State of Punjab (May 1980, unreported), a decision of the Indian Supreme Court. It is submitted that the death penalty is contrary to the rule of law, and hence unconstitutional as not "in accordance with law" in the following circumstances:-

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(i) wantonly and freakishly imposed where it is so wantonly and so freakishly imposed that its infliction is arbitrary and hence inconsistent with no theory of penology: Furman v Georgia 408 U.S. 238 at pp.309-10 (1971) per Stewart J;

(ii) imposed in a cruel and painful manner where it is imposed in a particularly cruel and painful manner that makes no contribution to acceptable goals of punishment: Wilkerson v Utah, (supra); In Re Kemmler, (supra);

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(iii) a mandatory death penalty

where it is mandatory for a defined offence:
Woodson v North Carolina 428 U.S. 280 (1976);
Roberts (Stanislaus) v Louisiana 428 U.S.325
(1976); Lockett v Ohio 98 S.Ct. 2954 (1978);
Roberts (Harry) v Louisiana 431 U.S. 633
(1978). See also the dissenting judgments
in Furman v Georgia 408 U.S. 238 (1971) at
pp. 400-03 per Burger C.J. and at p.413 per
Blackmun J. See also Singh v State of
Punjab (supra).

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It is submitted that a mandatory death
penalty is not "in accordance with law"
because:-

(a) There is a serious danger that the
judge or jury determining the guilt
of the defendant of the offence charged
will refuse to convict where the death
penalty is considered inappropriate in
the circumstances of that case:
Woodson v North Carolina 428 U.S. 280
at p. 303 (1976).

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(b) The death penalty should not be imposed
without consideration of the character
of the defendant, the nature of the
crime, and all relevant mitigating
factors: Woodson v North Carolina,
428 U.S. 280 at p.304 (1976); Lockett
v Ohio 98 S.Ct. 2954 at pp. 2964-65
(1978); Pennsylvania ex rel. Sullivan
v Ashe 302 U.S. 51 at p. 55 (1937);
Williams v New York 337 U.S. 241 at p.
247 (1948).

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(c) Irrebuttable presumptions are a denial
of the rule of law where the presumption
made against the defendant is not
necessarily or universally true in
fact, when individuals falling under
its provisions are not permitted to
demonstrate that the legislative
reasons for making the death penalty
mandatory do not or should not apply
in their case, and when the State has
reasonable alternative means of making
the crucial determination: cf., on the
unconstitutionability of irrebuttable

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presumptions: Vlandis v Kline 412 U.S. 441 (1973); Stanley v Illinois 405 U.S. 645 (1972); Cleveland Board of Education v La Fleur 414 U.S. 632 (1974).

10 It is conceded that a mandatory sentence is not, per se, a denial of the rule of law. See Rummel v Estelle 63 L.Ed. 2d 382, 100 S.Ct. 1133 (1980). But as the Supreme Court emphasised in that case, as it did in Woodson v. North Carolina (supra), the death penalty is distinct from all other sentences, and its constitutionality is to be judged by stricter criteria than those applied to lesser sentences.

(iv) death penalty grossly disproportionate to the offence
20 where the death penalty is grossly disproportionate to the crime committed: Coker v Georgia 433 U.S. 584 (1977); Lockett v Ohio 98 S.Ct. 2954 at p.2982 (1978) per White J; Rajendra Prasad v State of Uttar Pradesh (1979) 3 S.C.R. 78 at p. 110; cf. Weems v United States 217 U.S. 349 (1909); Trop v Dulles 356 U.S. 88 (1958); Robinson v California 370 U.S. 660 (1962). See also Singh v State of Punjab (supra).

6. It is submitted that Section 29 of and the Second Schedule to the Misuse of Drugs Act 1973 (as amended by Section 9 of and the Second Schedule to the Misuse of Drugs (Amendment) Act 1975) are
30 unconstitutional as being not "in accordance with law" within the meaning of Article 9(1) of the Constitution (a) because of the mandatory nature of the death penalty which they impose for the offence of trafficking in more than 15 grammes of heroin, and (b) because the death penalty is grossly disproportionate to the offence of trafficking in more than 15 grammes of heroin.

A DENIAL OF EQUAL PROTECTION OF THE LAW

40 7. A denial of "equal protection of the law" may arise not only where there is unequal treatment of equals but also where there is equal treatment of unequals. Equal protection requires that legislative classifications should neither be over-inclusive nor under-inclusive. Article 14 of the Indian Constitution like Article 12(1) of the Constitution of Singapore, guarantees "the equal

protection of the law". The constitutional guarantee has been consistently interpreted by the Supreme Court of India as prohibiting the equal treatment of substantially unequal things. Thus in State of Kerala v Haji K. Haji Kutty Naha (AIR 1969 S.C. 378), Shah J. observed (at p.380), that, in imposing a Building Tax Act:-

"... the Legislature has not taken into consideration in imposing tax the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself, in some cases, operate as denial of equality." 10 20

The Act was held unconstitutional for a breach of Article 14. In M. Match Works v Asst. Collector C.E. (AIR 1974 S.C. 497), the Supreme Court of India upheld another taxing statute against a complaint that it breached Article 14. However, the Court accepted (at p. 504) that:- 30

"One facet of the equal protection clause, upheld by the Indian Courts and relevant to the present case, is that while similar things must be treated similarly, dissimilar things should not be treated similarly. There can be hostile discrimination while maintaining a facade of equality".

Krishna Iyer J. said (at p.503), that

"the Court may only search for arbitrary and irrational classification and its obverse, namely, capricious uniformity of treatment where a crying dissimilarity exists in reality". 40

In Rajendra Prasad v State of Uttar Pradesh (1979) 3 S.C.R. 78 pp. 108-9) Krishna Iyer J. for the majority of the Indian Supreme Court stated that:-

10 "Article 14 surely ensures that principled sentences of death, not arbitrary or indignant capital penalty, shall be imposed. Equal protection emanates from equal principles in exercise of discretion. In other words, the constraint of consistency and the mandate against unreasoning disregard of material circumstances are implicit lest discretion attracts the acid epigram of judicial caprice.

"The dignity of the individual shall not be desecrated by infliction of atrocious death sentence merely because there is a murder proved although crying circumstances demand the lesser penalty ... equality is not to be confounded with flat uniformity."

20 Krishna Iyer J. also emphasised (at pp. 110-1, and at p.117), that Article 14 prohibits "unusually cruel and arbitrary" punishment.

30 Similarly, the Supreme Court of the United States has held to be a violation of "equal protection of the laws" (and hence to be unconstitutional under the 14th Amendment to the United States Constitution) a legislative classification that is "overinclusive", i.e. one that embraces, and treats equally with members of the relevant mischief class, persons not members of that mischief class: Rinaldi v Yeager 384 U.S. 305 (1968).

The Singapore Penal Code prescribes a mandatory death penalty for the following offences:

Section : "whoever compasses, imagines, invests, 121A devises, or intends the death of or hurt to or imprisonment or restraint of the President..."

Section : murder. 302

The Penal Code permits the death penalty (but does not make it mandatory) for the following offences:

Section : waging war against the Government. 121

- Section : Abetting mutiny by a member of the
132 armed forces.
- Section : Perjury resulting in the conviction
194 and execution of a person on a capital
charge.
- Section : Abetting the suicide of "any person
305 under eighteen years of age, any
insane person, any delirious person,
any idiot, or any person in a state
of intoxication."
- Section : Kidnapping in order to murder, or where 10
364 the victim is put in danger of being
murdered.
- Section : Murder committed in the course of a
396 gang-robbery renders any member of the
gang liable to the death penalty.

8. It is submitted that the mandatory death penalty for trafficking in more than 15 grammes of heroin is a denial of "equal protection of the law" because:-

- (i) It requires uniformity of treatment (i.e. 20
death) of offenders, each convicted of the
offence of trafficking in more than 15
grammes of heroin, but grossly dissimilar
in the individual circumstances of their
offence and in their individual mitigating
factors. A mandatory death sentence "treats
all persons convicted of a designated offence
not as uniquely individual human beings, but
as members of a faceless, undifferentiated
mass to be subjected to the blind infliction 30
of the penalty of death": Woodson v North
Carolina 428 U.S. 280 at p. 304 (1976).
cf. Pennsylvania ex rel. Sullivan v Ashe
302 U.S. 51 (1937). The mandatory death
penalty here demonstrates a capricious
uniformity of treatment of persons of
grossly dissimilar individual circumstances.
- (ii) The denial to those convicted of trafficking
in more than 15 grammes of heroin of the 40
right to plead in mitigation of sentence in
the knowledge that mitigating factors can
reduce the sentence (a right given on

conviction of offences other than those for which there is a mandatory death penalty or other mandatory sentence) is an unreasonable denial of equal protection justified by no legislative purpose. See Rajendra Prasad v. State of Uttar Pradesh (supra, at pp.108-9).

- 10 (iii) It requires uniformity of treatment (i.e. death) of the trafficker in more than 15 grammes of heroin and of the murderer despite the fact that there is "a crying dissimilarity" between the two offences.
- (iv) It is overinclusive with regard to the relevant mischief class aimed at by the legislature.
- (v) It is underinclusive with regard to that mischief class: those who traffic in 15 grammes or less of heroin are not subjected to a mandatory death sentence.
- 20 (vi) It is grossly disproportionate to the offence: Rajendra Prasad v State of Uttar Pradesh. (supra at p.110). See also Singh v. State of Punjab (supra).

CONCLUSIONS

The Appellant submits that the judgment and order of the Court of Criminal Appeal for Singapore was wrong and ought to be reversed, varied or altered for the following, among other

R E A S O N S

- 30 1. BECAUSE, the presumptions contained in Sections 15 and 16 of the Misuse of Drugs Act 1973 (as amended) are unconstitutional as being in violation of Article 9(1) and Article 12(1) of the Constitution of Singapore.
2. BECAUSE, the Court of Criminal Appeal for Singapore was wrong in law to conclude that the Appellant was guilty of trafficking in controlled drugs merely because he had possession of the said drugs.

3. BECAUSE, the mandatory death penalty imposed by Section 29 and the Second Schedule of the Misuse of Drugs Act 1973 (as amended) is unconstitutional as being in violation of Article 9(1) and Article 12(1) of the Constitution of Singapore.

ANTHONY LESTER

ALAN NEWMAN

DAVID PANNICK

IN 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 :

ONG AH CHUAN Appellant

- and -

PUBLIC PROSECUTOR OF
SINGAPORE Respondent

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