

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 :

ONG AH CHUAN Appellant

- and -

THE PUBLIC PROSECUTOR Respondent

CASE FOR THE RESPONDENT

Record

10 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., Kulasekaram and Chua, JJ.) dated the 17th January, 1979, which dismissed the Appellant's appeal against his conviction on the 5th April, 1978 in the High Court, Singapore (Choor Singh and Rajah, JJ.) of unlawfully trafficking in 209.84 grammes of diamorphine, contrary to section 3(a) of the Misuse of Drugs Act 1973 (as amended by the Misuse of Drugs Act 1975) and sentence of death.

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pp.1-12
pp.19-26

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

Annexure 1

Section 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 person is in Singapore to -

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- (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
- (b) to offer to do anything mentioned in paragraph (a) above,

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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;
- (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,

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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."

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,

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so that heroin and any substance containing heroin are controlled drugs.

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4. The trial of the Appellant took place in the High Court in Singapore (Choor Singh and Rajah, JJ.) between the 3rd and 5th days of April, 1978 upon the following charge:-

p.1

"That you, Ong Ah Chuan, on or about the 2nd day of June, 1977 at about 12.00 noon in front of No. 270 Bukit Timah Road, Singapore did traffic in a controlled drug specified in Class 'A' Part I of the First Schedule to the Misuse of Drugs Act, 1973 (No. 5 of 1973) to wit, 209.84 grammes of diamorphine without any authorisation under the said Act or the regulations made thereunder and you have thereby committed an offence under section 3(a) of the Misuse of Drugs Act, 1973 (No. 5 of 1973) and punishable under section 29 of the said Act."

p.1 C
p.13D
p.20B

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5. The prosecution called material evidence which disclosed the following undisputed facts. The Appellant was observed on the 2nd June, 1977 by two narcotics officers (Yeo Kiah Hee and Ramli) entering his flat at Block 26, Marsiling Drive, Singapore at about 9.15 a.m. Two further officers (Teo Ho Peng and Chua Swah Hai) had joined them when about two hours later the Appellant was seen to emerge from the building carrying a plastic bag in his right hand. He walked towards his car, unlocked the front passenger door, placed the plastic bag in the car, shut the door, walked towards the driver's door, unlocked it and got into the driver's seat. He then drove some 13 miles to Bukit Timah Road and stopped in front of No. 270. Throughout the half-hour journey the Appellant was followed by the four officers who did not lose sight of his car. On leaving his car at No. 270, he locked it and turned to walk away when he was detained by officer Yeo. A bunch of keys was seized from his hand and a small packet containing light brown powder was then recovered from his front trouser pocket. A subsequent search of the car revealed between

p.1 D

p.2 C

p.3 A

p.3 B

p.4 A

p.4 C

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p.5 B

the front seats a parcel, concealed in a plastic bag, which contained further powder. On analysis, the powder was found to contain 209.84 grammes of diamorphine (3.84 grammes and 206.0 grammes respectively).

p.p.5-6

6. 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 basis that 'transport' in section 2 of the said Act meant conveying for the purpose of distribution and that there was no evidence of distribution. In support of his contention the Appellant relied upon:-

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- (i) the Canadian cases of R v MacDonald and R. v Harrington and Scosky (1963) 43 W.W.R. 337 and R. v McMyn (1941) 4 D.L.R. 268.
- (ii) The Singapore case of Seow Koon Guan v Public Prosecutor (1978) 2 M.L.J. 45.

p.9 C

7. The Court rejected the submission, expressing the view that the prosecution had made out a case against the Appellant which if not rebutted would warrant his conviction.

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p.24A-B

Choor Singh, J. stated in the course of argument:

"....there is very strong evidence against him, carrying such a large amount, coming out of his flat, putting it in his car, driving it, over 30 kilometres, 20 miles. What was he going to do with it? Why was he taking it all the way from his flat? Surely commonsense says that he was going to distribute it or selling it or going to do something with it. Was he carrying it for his own consumption in his car? Why?"

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p.9C-D

8. The Appellant then gave evidence in his defence. He said that he left his flat in Marsiling Drive and drove to Bukit Timah Road to meet his friend Ah Ho from where the two of them were to go to Pulau Ubin to obtain employment with the help of the Appellant's father-in-law. The Appellant said that he carried with him the powder (found to contain 209.84 grammes of diamorphine) for his personal consumption. He

p.10A-B

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	He had bought that large quantity for \$2,000 a few days earlier as it was cheaper to buy it in bulk and was carrying it with him because it would have been difficult for him to come out of Pulau Ubin every now and then to obtain his supply of powder.	<u>Record</u>
	9. The Appellant did not call any witness on his behalf.	p.10C
10	10. On the 5th April, 1978, the Court convicted the Appellant of the charge of unlawful trafficking, stating that it had no doubt at all about his guilt, and sentenced him to death.	p.11C-D p.12A
20	11. On the 15th May, 1978, the Court delivered its written Grounds of Decision. After setting out the charge and summarizing the evidence called by the prosecution, the learned trial Judges referred to the submission of no case to answer made on behalf of the Appellant. They then set out their reasons for rejecting that submission. The <u>Seow</u> case did not help the Appellant as it concerned a charge under section 3(c) of the Act. The Canadian case of <u>MacDonald & Harrington</u> concerned different statutory provisions and neither of the accused there was found in possession of any heroin, nor was there any evidence that either of them had transported any heroin. The learned trial Judges then summarized the evidence of the Appellant and referred to a submission made on behalf of the Appellant at the conclusion of the evidence that to establish a case of trafficking the prosecution had to show that the Appellant had transported the heroin for the purpose of delivery or sale. The learned trial Judges rejected that submission.	pp.1-12 p.1C pp.1D-5B p.5C pp.6-9 p.6B p.8B pp.22-23
30	12. The learned trial Judges concluded that the Appellant was not speaking the truth and had invented his story to escape the consequences of his criminal act. After considering all the evidence, they concluded that:	p.9C-D p.10C-D
40	(1) the Appellant had on the 2nd June 1977 between the hours of 10.25 a.m. and 12 noon transported 209.84 grammes of diamorphine without authorisation;	p.11A p.11B-C p.11C-D

Record
p.11D

(2) the said heroin which he had so transported was not for his personal consumption; and

(3) he was guilty of the offence of trafficking as charged.

pp.13-15

13. 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 8th December, 1978.

pp.16-17

14. On the 17th January, 1979, the Court of Criminal Appeal, Singapore (Wee Chong Jin, C.J., Julasekaram and Chua, J.J.) delivered their Judgment dismissing the Appellant's appeal.

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p.16C

15. The Court of Criminal Appeal dismissed the appeal because:-

(1) it was proved, and the Appellant admitted, that he was in possession of the 209.84 grammes of diamorphine found on him and in the car he was driving;

(2) the learned trial Judges disbelieved the Appellant's evidence;

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p.16D

(3) the learned trial Judges found as a fact that the Appellant had not transported the drugs for his own consumption.

Annexure 2
p.17A-B

(4) the case of Wong Kee Chin v Public Prosecutor (1979) 1 M.L.J. 157 rightly held that proof of the act of conveying plus the presumption under section 15(c) of the Misuse of Drugs Act, 1973 (as amended) constituted a prima facie case of trafficking, which the Appellant had not rebutted.

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16. It is respectfully submitted that the presumption under section 15(c) was not used by the learned trial Judges, who found the Appellant guilty as charged without recourse to it. They were entitled, it is submitted, to draw the inference that the Appellant transported the drug for the purpose of trafficking from evidence of possession of a relatively large quantity of drugs, together with their disbelief in his

explanation for his transporting of it. 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.

10 17. If it is right to construe the word 'transport' as meaning only conveying for the purpose of distribution then section 15(c) of the Act becomes material in this case since it provides that where any person is proved to have had in his possession more than two grammes of diamorphine (heroin) contained in any controlled drug he shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein. It is respectfully submitted that the Court of Criminal Appeal correctly described the function of section 15(c). Once it had been proved that the Appellant had in his possession 20 209.84 grammes of heroin a presumption arose that such heroin was in his possession for the purpose of trafficking therein. He was therefore conveying, or transporting it, for the purpose of trafficking in it. It is respectfully submitted that there is no distinction to be drawn between

- 30 (A) conveying heroin for the proved purpose of distribution (which on any view must amount to transporting for the purpose of trafficking and hence to trafficking) and
- (B) conveying heroin the possession of which an accused person is presumed to have for the purpose of trafficking therein.

Thus, it follows that (B) above amounts to trafficking, subject to a rebuttal of the presumption by the accused person in question.

40 18. If and in so far as the case of Poon Soh Har v Public Prosecutor (1977) 2 M.L.J. 126 is inconsistent with the case of Wong Kee Chin (supra) or the instant case, then it is respectfully submitted that Poon's case can be distinguished on its facts or was wrongly decided.

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19. Alternatively, it is respectfully submitted that the word 'transport' in the definition of the word 'traffic' in section 2 of the Act is properly to be construed as meaning a mere conveying from one place to another. That is its ordinary literal meaning. The definition does not import any requirement that the conveying should be for the purpose of promoting the distribution of the drug to another. Such requirement (i.e. making 'transport' mean convey for the purpose of distribution) would be to make every case of trafficking by transporting fall within both ss. 3(a) and 3(c) of the Act. It is accordingly submitted that 'transport' means to convey from one place to another, irrespective of whether the conveyance is for personal or commercial use.

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20. It is respectfully submitted that upon a proper analysis the Canadian cases do not consistently construe the word 'transport' whether as it appears in the Narcotic Control Act 1960-61 (Canadian Statutes c.35) or otherwise to mean only conveying for the purpose of distribution. It is further submitted that the case of Wong Kee Chin (supra) correctly distinguishes between the Canadian legislation and the Misuse of Drugs Act 1973 (as amended).

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21. In his Supplemental Petition filed after the adjournment of the hearing of his Petition for special leave to appeal to the Privy Council, the Appellant sought for the first time to challenge the constitutionality of the presumption in section 15(c) of the Act by reference to Article 52 [47]*of the Constitution of Singapore which provides as follows:

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"52. Any law enacted by the Legislature after the coming into operation of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

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* The numbers in square brackets are the numbers of the corresponding Articles in the Reprint of The Constitution of the Republic of Singapore dated March 1980.

Annexure 4

The Appellant, in his Supplemental Petition relied on two grounds, namely:-

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(1) That section 15(c) of the Act was inconsistent with Article 5(1) ~~9(1)~~ of the Constitution which provides as follows:-

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

10 The Appellant asserted that the words 'save in accordance with law' in Article 5(1) ~~9(1)~~ implied both procedural and substantive due process and included general principles of law as recognised by civilised nations and/or internationally accepted standards of human rights. Section 15(c) of the Act was said to be inconsistent with such due process, principles and standards by abrogating the right to be presumed innocent until
20 proved guilty and by providing for a rebuttable presumption of guilt which had no cogent rational basis.

The Appellant contended that in providing for a "double presumption" and in linking the raising of the presumption to possession of two grammes of heroin (said to be equally consistent with possession for personal use) section 15(c) of the Act was inconsistent with the provisions as alleged above.

30 (2) That section 15(c) was inconsistent with Article 8(1) ~~12(1)~~ of the Constitution which provides as follows:-

"8.(1) All persons are equal before the law and entitled to the equal protection of the law".

The Appellant alleged that persons in possession of small quantities of drugs for personal use were, when accused of drug trafficking, not given equal protection of the law.

40 22. It is respectfully submitted that the Appellant's interpretation of the phrase "save

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in accordance with law" in Article 5(1)/9(1)7 is inconsistent with Article 91(1)/2(1)7 of the Constitution which defines "law" as follows:

"91(1) In this Constitution unless it is otherwise provided or the context otherwise requires -

..... 'law' includes 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;".....

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The definition of 'law' in Article 91(1)/2(1)7 is exhaustive. It is accordingly submitted that the provisions concerning due process, principles and standards which the Appellant contends are imported into the Constitution of Singapore by the phrase 'in accordance with law' in Article 5(1)/9(1)7 could only be so imported if they were either embodied in the common law or construed as being a custom or usage. It is respectfully submitted that such provisions are not part of the common law in operation in Singapore. Nor are they a custom or usage having the force of law in Singapore. Such customs or usages are, for example, defined in section 3(1)(c) of the Hindu Succession Act, 1956 (an Indian Statute) which provides:

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"the expressions 'custom' and usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe community, group or family..."

23. It is further submitted that unless the context otherwise requires (which is not here the case), the expression "in accordance with law" is to be construed in its natural meaning, that is to say, in accordance with the common law and the law as enacted by the legislature. In support of this proposition the Respondent will rely in particular on the cases of:

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Tinsa Mau Naing v. Commissioner of Police
Rangoon and Another (1950) Burma Law
Reports 17- and

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Annexure 5

Comptroller-General of Inland Revenue v.
N.P. (1973) 1 M.L.J. 165.

Annexure 6

10 24. It is further submitted that even if
(contrary to the Respondent's contention) the
definition of "law" contained in Article 91(1)
/2 (1)7 is not exhaustive, the expression "law"
nonetheless by virtue of Article 91(1) /2 (1)7
includes the law as enacted by the legislature.
Accordingly Section 15 (c) is a part of the law,
as so defined; therefore the presumption arising
from Section 15 (c) arises in accordance with law
and hence is not inconsistent with Article 5 (1)
/9 (1)7.

20 25. It is therefore respectfully submitted that
the phrase 'in accordance with law' in Article 5
(1) /9(1)7 is directed against arbitrary execution
or arrest at the discretion of the Executive. So
far as the Legislature is concerned, Article 5(1)
/9(1)7 requires no more than a properly passed
statute making provision for the deprivation of
life or personal liberty for the same to be 'in
accordance with law'.

30 26. It is further respectfully submitted that
there is no question of the presumption in section
15(c) offending against the right of an accused
person to be presumed innocent until proved guilty
according to law. The Respondent respectfully
adopts the logic of Lasking, J. in the Canadian
Supreme Court in R. v Appleby (1971) 3 C.C.C. (2nd)
354 at p. 365.

40 "The 'right to be presumed innocent'... is,
in popular terms, a way of expressing the
fact that the Crown has the ultimate burden
of establishing guilt; if there is any
reasonable doubt at the conclusion of the
case on any element of the offence charged,
an accused person must be acquitted. In a
more refined sense, the presumption of
innocence gives an accused the initial benefit
of a right of silence and the ultimate benefit

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(after the Crown's evidence is in, as well as any evidence tendered on behalf of the accused) of any reasonable doubt

What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply. This does not mean that the reply must necessarily be by the accused himself. However, if he alone can make it, he is competent to do so as a witness in his own behalf; and I see nothing in this that destroys the presumption of innocence. It would be strange, indeed, if the presumption of innocence was viewed as entitling an accused to refuse to make any answer to the evidence against him without accepting the consequences in a possible finding of guilt against him. The presumption does not preclude either any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of the evidence presented by the Crown. Hence, I do not regard s.2(f) of the Canadian Bill of Rights 1960 providing for the right to be presumed innocent as addressed to a burden of adducing evidence, arising upon proof of certain facts by the Crown, even though the result of a failure to adduce it would entitle the trier of fact to find the accused guilty." 10
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27. It is respectfully submitted that the question of inconsistency with the equality provisions in Article 8(1) [12(1)] of the Constitution could only arise if the presumption in section 15(c) of the Act was irrational or capricious. It is plain that section 15(c) has a rational basis, there being in all the circumstances a reasonable nexus between the fact proved and the fact presumed. Two grammes of heroin were at the material time in Singapore considered by persons with expert knowledge of the illegal drug trade there to be the equivalent of up to about 25 days' supply to an addict. There was therefore at least a fair inference of fact that a person having that quantity or more in his possession might very well have it not (or not only) 40

for his own personal use but for disposal in whole or in part to others. Such inference could be more easily drawn against the background of a rapidly extending illegal drug trade and of the fact that the offence of trafficking carried very heavy penalties, in the knowledge of which addicts would be likely to be deterred from having in their possession greater quantities of the drug than those required for their own immediate use.

10 Since the intention with which a person has in his possession an illegal drug such as heroin would in the great majority of cases be essentially a matter within his own knowledge, it was wholly reasonable for the legislature to provide that, once the prosecution had established the possession of such a quantity as could raise the fair inference of fact described above, it should fall to the person having possession thereof to explain the purpose of his possession.

20 The same principle applied to the other drugs comprehended in Section 15; the differences in the quantities prescribed by Section 15 as being sufficient to raise the inference of fact are indicative of the care and consideration given to the basis for the presumption. Thus it is submitted that the purpose of section 15 is merely to avoid the necessity of calling evidence in every case to establish the quantity of drugs the possession of which leads to a fair presumption

30 that they may be held otherwise than for personal consumption. The reason for the desirability of such a provision was that the drugs legislation in Singapore was passed under a severe threat of major drug infiltration. The near proximity of the major drug producing area of the 'Golden Triangle' and Singapore's status as a major port made the country especially vulnerable to such infiltration. Hence, drug trafficking cases became and were likely to become extremely numerous. In 1972 in

40 Singapore 4 persons were arrested on suspicion of "heroin abuse." In 1974 the number was 110. In 1975 it was 2,263. In 1976 the rate of such arrests had reached 475 per month. Heroin is almost exclusively sold in an adulterated state containing as much as 60% impurity: thus an appreciable quantity of the drug, probably of the order of five grammes, would have to be bought to arrive at the amount of two grammes of heroin.

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provided for in section 15(c) of the Act. Five grammes amounts to up to about 25 normal days' consumption of heroin by an addict. The Respondent will rely upon (1) an affidavit sworn herein by Martin Mitcheson on the 23rd November, 1979, (2) Parliamentary Debates, Singapore 1975 Vol. 34 No. 18 Columns, 1379-1390, (3) an Article entitled "Singapore Attacks its Drug Problem" by W. Clifford, Director, Australian Institute of Criminology in Justice of the Peace 1979 Vol. 143 Nos. 42 and 43, (4) an Affidavit sworn herein by Ng Ban Cheong dated 15th May, 1980, (5) an Affidavit sworn herein by Poh Geok Ek dated 15th May, 1980, and (6) an Affidavit sworn herein by Lim Han Yong dated 15th May, 1980, as providing some of the factual background against which the Act was passed, for the purpose of explaining the mischief which the Act was intended to remedy. The Respondent will further particularly refer to the special problem in Singapore of the 'ant-traffic' which involves an accumulation of a large supply of heroin by means of multiple movements of relatively small quantities of drugs.

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28. It is further submitted that the Appellant's contention fails to give adequate weight to the fact that in international instruments for the protection of human rights there is a balance to be struck between individual freedoms and community responsibility. Rights are not normally of an absolute character. They are subject to qualification. Article 29 of the Universal Declaration of Human Rights, for example, provides:

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"Article 29.

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society

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R E A S O N S

1. BECAUSE the learned trial Judges were entitled to find on the evidence that the Appellant was guilty of unlawful trafficking as charged:
2. BECAUSE the learned trial Judges were entitled to find on the evidence, as they did, that the Appellant was guilty of unlawful trafficking as charged, without reference to the presumption in section 15(c) of the Misuse of Drugs Act, 1973 (as amended): 10
3. BECAUSE if 'transport' in section 2 of the said Act means to convey from one place to another for the purpose of distribution, then the presumption in the said section 15(c) was available and properly arose on the evidence:
4. BECAUSE the learned trial Judges were entitled to find, as did the Court of Criminal Appeal and as was the fact, that the presumption in the said section 15(c) was not rebutted by the Appellant: 20
5. BECAUSE the Court of Criminal Appeal correctly followed the case of Wong Kee Chin (supra) and correctly described the function and operation of the presumption in the said section 15(c):
6. BECAUSE, alternatively to 3. above, the word 'transport' in the said section 2 means to convey from one place to another: 30
7. BECAUSE the presumption in the said section 15(c) does no more than place upon an accused person a secondary burden of adducing evidence to rebut the presumption on a balance of probabilities:
8. BECAUSE the presumption in the said section 15(c) in itself involves no finding of guilt, the burden of proving the guilt of the accused person remaining throughout upon the prosecution: 40

- 9. BECAUSE the presumption in the said section 15(c) does not offend against an accused person's right to be presumed innocent until proved guilty:

- 10. BECAUSE the doctrine of due process and the general principles of law as recognized by civilised nations do not form any part of the law of Singapore, save in so far as specific provision is made therefore in the law and Constitution of Singapore:

- 11. BECAUSE if, alternatively to 10. above, the doctrine of due process and the general principles of law as recognised by civilised nations do form part of the law of Singapore without qualification, then the presumption in the said section 15(c) does not offend against and/or is not inconsistent with, any relevant provision of the same:

- 12. BECAUSE the presumption in the said section 15(c) does not offend against, and/or is not inconsistent with, the provisions of Articles 5(1)/~~9(1)~~ and/or 8(1)/~~12(1)~~ of the Constitution of Singapore.

- 13. BECAUSE of the other reasons set out in the Grounds of Decision of the learned trial Judges and in the Judgment of the Court of Criminal Appeal.

S.C. SILKIN, Q.C.

STUART MCKINNON, Q.C.

No. 37 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF CRIMINAL APPEAL OF
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CASE FOR THE RESPONDENT

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Respondents Solicitors