Privy Council Appeals Nos. 37 & 38 of 1979

Ong Ah Chuan – – – – – – – *Appellant*

v.

The Public Prosecutor – – – – – – *Respondent*

and

Koh Chai Cheng – – – – – – – *Appellant*

v.

The Public Prosecutor – – – – – – *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF THE REPUBLIC OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER 1980

Present at the Hearing:

LORD DIPLOCK
LORD KEITH OF KINKEL
LORD SCARMAN
LORD ROSKILL

[*Delivered by* LORD DIPLOCK]

These two appeals are against convictions for offences of trafficking in heroin contrary to section 3 of the Misuse of Drugs Act, 1973. As the amount of heroin involved exceeded 15 grammes in each case sentence of death was imposed on both appellants. Sentence of death is mandatory under section 29 of that Act and the revised Second Schedule to it that was substituted for the original Second Schedule by section 13 of the Misuse of Drugs (Amendment) Act, 1975. Their Lordships will call the 1973 Act, as so amended, "The Drugs Act". The appeals are also against the imposition of the death sentence, upon the ground that the statutory provision under which it was imposed is inconsistent with the Constitution and accordingly is void under Article 4.

It is not necessary for the purpose of dealing with the only matters argued before their Lordships to state the facts in either of the two cases in more than the barest outline. They are set out in detail in the Grounds of Judgment of the High Court judges by whom the appellants respectively were tried.

Ong Ah Chuan was observed by two narcotics officers to leave his flat carrying a plastic bag which he put into his car which was parked nearby. He got into the car and drove some twenty miles to a spot in Bukit Timah Road where he stopped the car, alighted and locked the car behind him. He was arrested by the narcotics officers who had followed him throughout his journey. He was searched and the car was searched in his presence. There was found a plastic packet on his person containing impure heroin which on analysis was proved to contain 3.84 grammes of diamorphine, and in the plastic bag which he had been seen to put into the car, impure heroin was found with what was proved to be a content of 206.0 grammes of diamorphine. His explanation that he was carrying it for his own consumption only and the reasons that he gave why it was necessary for him to transport so large a quantity from his own dwelling to another place were unsupported by any corroborative testimony, defied credulity and were disbelieved by the trial judges.

Koh Chai Cheng had brought into Singapore from Malaysia a quantity of heroin for which an acquaintance, who was in fact a police informer, had pretended to him that a buyer had been found at a price of $20,000. The heroin was hidden in a concealed compartment at the back of the boot of his car and was found there when he was arrested as he got into it to drive away from a parking place where he had parked it for his meeting with the police informer. In the concealed compartment there were eleven packets of impure heroin with a total content of 1,256 grammes of diamorphine. His denial of all knowledge of it and his explanation that it must have been planted there by the police informers after his arrival in Singapore were disbelieved by the trial judges who gave cogent reasons for their disbelief.

From their convictions each appellant appealed to the Court of Criminal Appeal. Of the various grounds of appeal that were advanced in that court only one has survived to be relied upon at the hearing before this Board. It is a point of law that turns upon the true construction of the Drugs Act. In the Court of Criminal Appeal no attack was launched upon the constitutionality of any of the provisions of the Drugs Act; but leave was sought to raise before this Board two fresh contentions: the first was that the provision in section 15 of the Drugs Act, that proof of possession of controlled drugs in excess of the minimum quantities stated in the section gives rise to a rebuttable presumption that such possession is for the purpose of trafficking, is inconsistent with the Constitution; and the second was that the provision in section 29 and the Second Schedule for a mandatory death penalty for trafficking in controlled drugs in excess of the higher minimum quantities stated in that Schedule, is likewise inconsistent with the Constitution.

It is only most exceptionally that their Lordships would permit a question of the constitutionality of an Act of the Singapore Parliament to be raised for the first time in the course of the hearing of an appeal by their Lordships' Board. Such a question is eminently one on which their Lordships would wish to have the benefit of the opinions of members of the judiciary of Singapore who are resident in the Republic and more familiar than their Lordships with local conditions there. But these are capital cases and their Lordships would be reluctant to dispose finally of the appeals so long as any plausible argument against the convictions or sentences remained unheard, even though the argument was not thought of until the eleventh hour. Nevertheless, if at the close of the arguments on either of these constitutional points their Lordships had entertained any doubt as to the validity of provisions of the Drugs Act that relate to the

convictions of the appellants, they would, before arriving at their judgment, have remitted the cases to the Court of Criminal Appeal to hear argument on the constitutional points and to express their opinion on them for the benefit of this Board. However, as will appear, their Lordships have no such doubts; so this course is unnecessary.

Their Lordships will deal first with the question of construction of the Drugs Act that was argued before the Court of Criminal Appeal. In each of the instant cases that Court followed its previous ruling on the same question in *Wong Kee Chin v. Public Prosecutor* [1979] 1 M.L.J. 157; so the instant appeals are, in effect, appeals against that ruling. In *Wong Kee Chin* and in the instant appeals before this Board the appellants prayed in aid certain decisions of Canadian Courts under the Canadian Narcotic Control Act, 1960–61. While the Canadian Act contains a definition of " trafficking " that is virtually identical with the definition in the Drugs Act, the structure of the Acts is quite different. In particular, the Canadian Act creates a specific offence of having drugs in one's possession for the purpose of trafficking, but it contains no provisions corresponding to those contained in sections 10 and 3(*c*) of the Drugs Act. This makes it helpful to set out rather more extensively than would otherwise be necessary provisions of the Drugs Act to which reference will be made.

" 2. In this Act, unless the context otherwise requires—

. . . . . .

' controlled drug ' means any substance or product which is for the time being specified in Part I, II or III of the First Schedule to this Act or anything that contains any such substance or product;

. . . . . .

' 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."

" 3. Except as authorized 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."

" 6. Except as authorized by this Act or the regulations made thereunder, it shall be an offence for a person to—

(*a*) have in his possession a controlled drug; or

(*b*) smoke, administer to himself or otherwise consume a controlled drug."

" 10. Any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any offence under this Act shall be guilty of such offence and shall be liable on conviction to the punishment provided for such offence."

" 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."

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

(*a*) anything containing a controlled drug;

(*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

(*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.

(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."

" 19. 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."

The exceptions in the offence-creating sections 3 and 6 for things done that are " authorized by this Act or the regulations made thereunder " refer to those provisions of the Act which provide for a scheme for compulsory treatment in approved institutions and re-habilitation of drug addicts and contain what is the other part of a two-pronged attack upon the drug problem in Singapore. But no question of authorized dealings in drugs arises in either of these appeals.

The Drugs Act, unlike its Canadian counterpart, does not create *eo nomine* an offence of having a controlled drug in one's possession for the purpose of trafficking therein. If nothing more is proved against an accused than the mere fact that he had the controlled drug in his possession, then an offence under section 6 is established but the graver offence under section 3 of trafficking is not, however large may be the quantity of the controlled drug involved. The Court of Criminal Appeal so held in *Poon Soh Har v. Public Prosecutor* [1977] 2 M.L.J. 126 and *Seow Koon Guan v. Public Prosecutor* [1978] 2 M.L.J. 45. This holding, in their Lordships' view, was clearly right.

To " traffic " in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (*a*) of the definition of " traffic " and " trafficking " in section 2. Even apart from any statutory definition, the ordinary meaning of the verb " to traffic ", in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at

least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking " transport " is sandwiched between " sell, give, administer " which precede it and " send, deliver or distribute " which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. " Transport ", although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb " transport ", to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to " traffic ", of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that " transport " is not used 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 drug to another. Supplying or distributing addictive drugs to others is the evil against which section 3 with its draconian penalties is directed.

The Court of Appeal of British Columbia in *R. v. McDonald* (1963) 43 W.W.R. 337, at p. 342, interpreted " transport " in the virtually identical definition of " traffic " in the Canadian Narcotic Control Act, 1960–61, as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R. v. Greene* (1977) 74 D.L.R. (3d) 354. Acceptance of it is implicit in the *ratio decidendi* of the Court of Criminal Appeal of Singapore in *Wong Kee Chin* (*ubi sup.*).

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under section 6 but does not amount to the offence of trafficking under section 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of section 10 of the Drugs Act and section 3(*c*) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under section 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under section 29 and the Second Schedule.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession

of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(*c*) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, *in the absence of any plausible alternative explanation by him,* be irresistible—even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:

(1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether that purpose was achieved or not. This is the effect of the provisions of section 3(*c*) and section 10.

(2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in section 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon

the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.

So, in their Lordships' view, the effect of the Drugs Act was stated with clarity and accuracy in the following passage of the judgment of the Court of Criminal Appeal in *Wong Kee Chin v. Public Prosecutor* (at p.161). The reference in this passage to the dictionary sense of the term transporting is to be understood as a reference to its meaning as conveying from one point to another.

> " When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under section 15 (2) that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under section 15 (2) would constitute a *prima facie* case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the type of ' transporting ', the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court."

The appeals so far as they are based on the construction of the Drugs Act must therefore fail.

Their Lordships now turn to the eleventh hour attack by the appellants on the constitutional validity of the presumption for which section 15 provides. Although sections 15 to 19 inclusive of the Drugs Act create a series of rebuttable presumptions that upon proof of the existence of certain facts the existence of other facts shall be treated as established, unless the contrary is proved, in the instant cases their Lordships are concerned only with the presumption under section 15 that arises from *proved* possession; there was no need for the prosecution to rely on any *presume*d possession for which sections 16 and 19 provide.

The appellants' argument may be stated shortly. This statutory presumption, it is said, is in conflict with what their Counsel termed the " presumption of innocence "; this is a fundamental human right protected by the Constitution and cannot be limited or diminished by any Act of Parliament which has not been passed by the majority of votes necessary under Article 5 for an amendment to the Constitution. The " presumption of innocence ", it is contended, although nowhere expressly referred to in the Constitution, is imported into it by Article 9(1) which provides

> " 9(1) No person shall be deprived of his life or personal liberty save in accordance with law."

and by Article 12(1) which provides

> " 12(1) All persons are equal before the law and entitled to the equal protection of the law."

These Articles are among eight Articles contained in Part IV of the Constitution under the heading " Fundamental Liberties". The eight Articles are identical with similar provisions in the Constitution of

Malaysia, but differ considerably in their language from and are much less compendious and detailed than those to be found in Part III of the Constitution of India under the heading " Fundamental Rights". They differ even more widely from those amendments to the Constitution of the United States of America which are often referred to as its Bill of Rights. In view of these differences their Lordships are of opinion that decisions of Indian Courts on Part III of the Indian Constitution should be approached with caution as guides to the interpretation of individual articles in Part IV of the Singapore Constitution; and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.

This said, however, their Lordships would repeat what this Board has said on many previous occasions and most recently through Lord Wilberforce in *Minister of Home Affairs and another v. Fisher and another* [1980] A.C. 319 at p. 329: that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but " as *sui generis,* calling for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law ". As in that case, which concerned fundamental rights and freedoms of the individual guaranteed by the Bermuda Constitution, their Lordships would give to Part IV of the Singapore Constitution " a generous interpretation, avoiding what has been called ' the austerity of tabulated legalism ', suitable to give to individuals the full measure of the [fundamental liberties] referred to ".

Accordingly their Lordships are unable to accept the narrow view of the effect of Articles 9(1) and 12(1) for which counsel for the Public Prosecutor contended. This was that since " written law " is defined in Article 2(1) to mean " this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore " and " law " is defined as including " written law ", the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides, must be of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of Article 12(1).

Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of *petitio principii.* The definition of " written law " includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are " for the time being *in force* in Singapore "; and Article 4 provides that " 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 ". So the use of the expression " law " in Articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after 16 September 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.

In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.

One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. To describe this fundamental rule as the "presumption of innocence" may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged.

In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.

In the case of the Drugs Act any act done by the accused, which raises the presumption that it was done for the purpose of trafficking, is *per se* unlawful, for it involves unauthorised possession of a controlled drug, which is an offence under section 6. No wholly innocent explanation of the purpose for which the drug was being transported is possible. Their Lordships would see no conflict with any fundamental

rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused), that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them. The Canadian Narcotic Control Act, 1960–61, so provides by section 10. In contrast to this the Drugs Act only raises the rebuttable presumption when the quantity of drugs in the possession of the accused exceeds the appropriate minimum specified in section 15. It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroin addicts in Singapore; so, as a matter of common sense, the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking. All that is suggested to the contrary is that there may be exceptional addicts whose daily consumption much exceeds the normal; but these abnormal addicts, if such there be, are protected by the fact that the inference that possession was for the purpose of trafficking is rebuttable.

In their Lordships' view there is no substance in the suggestion that section 15 is inconsistent with the Constitution, at any rate so far as it relates to proved possession, with which alone the instant cases are concerned.

Finally their Lordships will deal with the contention that the mandatory sentence of death upon conviction for trafficking in more than 15 grammes of diamorphine (heroin) is contrary to the Constitution. They can deal with it briefly. The death sentence was introduced by the amending Act of 1975. Prior to that, although heavy maximum and substantial minimum sentences were provided for, they were not made dependent on the quantity of drugs involved. In respect of three Class A drugs: opium and its derivatives morphine and diamorphine, and two Class B drugs, cannabis and cannabis resin, the amending Act substituted penalties for trafficking, importing and exporting that are graduated according to the quantity of the drug involved. Morphine and heroin alone attract the death penalty for manufacturing either of these drugs and for trafficking, importing or exporting them where the quantity involved in the case of morphine is 30 grammes or more and in the case of heroin is 15 grammes or more.

It was not suggested on behalf of the appellants that capital punishment is unconstitutional *per se*. Such an argument is foreclosed by the recognition in Article 9(1) of the Constitution that a person may be deprived of life " in accordance with law ". As their Lordships understood the argument presented to them on behalf of the appellants, it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by section 3 of the Drugs Act, rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. This, it was contended, was arbitrary and not " in accordance with law " as their Lordships have construed that phrase in Article 9(1); alternatively it offends against the principle of equality before the law entrenched in the Constitution by Article 12(1), since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15 grammes of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14·99 grammes.

Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as

trafficking in addictive drugs. Whether there should be capital punishment in Singapore and, if so, for what offences are questions for the legislature of Singapore which, in the case of drugs offences, it has answered by section 29 and the Second Schedule of the Drugs Act. A primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital—an extreme position which Counsel was anxious to disclaim.

In order to dispose of the appellants' argument their Lordships do not find it necessary to embark upon a broad analysis of what the constitutional requirements of "equality before the law" and "the equal protection of the law" involve in contexts other than that of criminal laws which provide for mandatory penalties or mandatory limits upon penalties to be imposed upon the offenders convicted of particular crimes.

All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances—the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

The discrimination that the appellants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence.

The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Article 12(1) of the Constitution.

The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary.

Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. But Article 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.

In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.

In the instant cases the law required that sentences of death should be imposed. There is no substance in the contention that this requirement of the law is inconsistent with the Constitution. The appeals must be dismissed.

312721—3 Dd 0074336 50 11/80

In the Privy Council

ONG AH CHUAN

v.

THE PUBLIC PROSECUTOR

and

KOH CHAI CHENG

v.

THE PUBLIC PROSECUTOR

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1980