

*Nguyen Tuong Van v Public Prosecutor*

[2004] SGCA 47

Court of Appeal, Singapore

Yong Pung How CJ, Chao Hick Tin JA and Lai Kew Chai J

26 July, 20 October 2004

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**Lai Kew Chai J (delivering the judgment of the court):**

1. The appellant, an Australian national of Vietnamese origin, aged 24, was convicted of the capital charge of importing into Singapore on 12 December 2002 396.2g of diamorphine without authorisation under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA"). His appeal before us is against both the conviction and the sentence of death.

**The facts**

2. The evidence led by the Prosecution at the trial proved the following facts. At about 3.06pm on 12 December 2002, SilkAir Flight MI 622 from Phnom Penh, Cambodia, landed at Changi International Airport, Singapore. The appellant was a passenger on this flight. He was due to board Qantas Airways Flight QF 10 to Melbourne, which was to depart Singapore at 8.15pm the same day.
3. At about 7.45pm, the appellant reached Gate C22 at Terminal 1 and began the process of boarding the Qantas flight. When he walked through the metal detector, the alarm was triggered. An airport police officer searched him with a hand-held metal detector, but found nothing. When the officer tapped the appellant's back with her hand, she felt something bulky. She alerted the other airport police officers on duty. Together, they brought the appellant to the search room within Gate 22 for a thorough search. His haversack and business bag were taken along.
4. Inside the search room, the appellant voluntarily took off his jacket and shirt. He turned around and showed one of the airport police officers his back. A plastic packet was strapped to the appellant's lower back with yellow and white adhesive tapes. At this point, the airport police officer notified his superior, Sergeant Teh Kim Leng ("Sgt Teh"), of the find. The appellant became very distressed by this time. He cried and hit his head on the wall. When Sgt Teh arrived at the search room at about 7.55pm, he found the appellant sitting on the floor, holding his head in his hands.

5. Sgt Teh asked the appellant what was on his back. The appellant replied that it was heroin. Sgt Teh assisted the appellant in taking the packet off his back. The packet was placed on the table. When Sgt Teh asked the appellant to declare if there was anything in his luggage, he opened his haversack and took out a second packet, which he handed to Sgt Teh.

### **The oral statement**

6. At about 8.11pm, two narcotics officers from the Central Narcotics Bureau ("CNB") Changi Airport Team arrived at the search room. At about 9.10pm, CNB officers from CNB Headquarters arrived to take charge of the case. The appellant was escorted to an interview room at the West Wing Arrival Hall. In the interview room, and in the presence of three CNB officers, the appellant gave the following oral statement ("the oral statement"):

Q: What this?

A: I know it heroin although different colour

Q: Number 3 or 4?

A: I don't know.

Q: Who asked you to bring?

A: I know him by "Sun."

Q: To bring where?

A: Melbourne and someone [will] take from me or maybe Sydney.

Q: Who will receive the drug at Australia?

A: Someone will recognized me and told me he likes basketball.

7. At about 11.40pm, the party of CNB officers escorted the appellant from Changi Airport to CNB Headquarters at Police Cantonment Complex, taking with them the two packets and other case exhibits. They arrived at the headquarters at about 12.05am on 13 December 2002. The investigation officer was one Assistant Superintendent Toh Soon Teck ("ASP Toh"). ASP Toh was briefed. He took custody of the accused and the two packets and other case exhibits. The appellant was taken for a routine urine test. Photographs were taken of the appellant and of the various exhibits recovered from his person.

## Weight of drug exhibits

8. At about 1.50am, ASP Toh weighed the two packets in the presence of the appellant. He marked the packet taken off the appellant's back as "Exhibit A" and the packet taken from the haversack as "Exhibit B1". Both packets were placed in separate plastic "Ziploc" bags for weighing. ASP Toh used an uncalibrated weighing machine and found the approximate weight of each packet to be as follows:
- (a) Exhibit A (recovered from the appellant's back) 381.66g;
  - (b) Exhibit B1 (recovered from the haversack) 380.36g.
9. After weighing, ASP Toh locked up the two drug exhibits in his personal cabinet as the CNB store to keep exhibits was closed for the night. The steel cabinet was a four-drawer cabinet. It was double-locked by its own set of locks and by an iron bar which was placed in front of the drawers and locked from top to bottom to the frame of the cabinet. ASP Toh in cross-examination affirmed that there were no other drugs in the cabinet. He further testified that he had occasion to take out the two drug exhibits. He could not tell the court the reason for taking them out. According to him, it could be that he showed them to the accused before he took the cautioned statement from him. At about 5.30am, ASP Toh locked up the two drug exhibits in his personal cabinet, and left for home. He went back to sleep. In re-examination, ASP Toh said that from the moment he took over the drug exhibits, the two drug exhibits were in his custody until the moment he handed them to Dr Lee Tong Kooi of the Health Sciences Authority ("HSA"). No one else had access to the two drug exhibits. Only he had the key to the cabinet and the key to the padlock which padlocked the iron bar to the cabinet. The trial judge accepted his evidence.
10. At about 11.00am the same day, ASP Toh took the drug exhibits out of his personal cabinet. He then sealed them in their plastic "Ziploc" bags. At about 11.40am, he personally handed the sealed drug exhibits over to Dr Lee Tong Kooi of the HSA for analysis. Dr Lee reported the following findings of his analysis in relation to the drug exhibits:

	<b>Gross weight with packaging</b>	<b>Gross weight of powdery substance only</b>	<b>Pure diamorphine</b>
Exh A	361.64 grams	340.8 grams	151.5 grams
Exh B1	370.94 grams	349.6 grams	244.7 grams

11. The findings of Dr Lee were unchallenged. There was, however, a discrepancy between the gross weight of the drug exhibits as determined by Dr Lee, and as determined by ASP Toh. Comparing the gross weights of the drug exhibits (with their packaging), the discrepancy translated to a difference of about 20g in respect of Exhibit A and about 10g in respect of Exhibit B1. It should be noted that according to Dr Lee's weighing, Exhibit B1 had a higher gross weight.

### **The cautioned statement**

12. At about 4.09am, ASP Toh recorded a cautioned statement from the appellant under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"). The cautioned statement read:

I wish to say that I am sincerely sorry for the inconvenience to both your country and mine. What I intend to say would be the truth. However knowing the information would have been fabricated by the people who have organised this.

### **The investigation statements**

13. ASP Toh recorded a series of four statements from the appellant over the following few days. These are hereafter referred to as "investigation statements". They were recorded on 13, 15, 16 and 19 December 2002. The trial judge reproduced them in full in his Grounds of Decision (reported at [2004] 2 SLR 328).
14. The investigation statements may be briefly summarised as follows. The appellant described in fairly comprehensive detail how he had been in serious financial difficulties in October 2002. He was contacted by one "Tan" and one "Sun" in Melbourne, who asked him to transport a "package" from Cambodia to Melbourne or Sydney via Singapore. It was clear that he wanted to earn money by transporting drugs. He flew to Phnom Penh, where members of a drug syndicate provided him with the heroin for transportation via Singapore. He described how he strapped the packets of heroin to his person and how he brought them into Singapore on SilkAir Flight MI 622. Midway through the flight from Phnom Penh to Singapore, he had difficulty in breathing and he removed one of the packets and placed it in his haversack. As recited earlier, he was arrested at the Changi International Airport and the two packets of heroin were seized from him.

## **The trial**

15. At the trial in the High Court, several submissions were made. First, it was argued that none of the statements taken from the appellant were admissible. The submissions on their inadmissibility were based on arguments under the CPC and the Evidence Act (Cap 97, 1997 Rev Ed). It was further contended that the statements of the appellant were inadmissible because they were recorded in breach of Art 36(1) of the Vienna Convention on Consular Relations 1963 ("VCCR"). It should be noted that it was not asserted by the appellant that any of the statements was made by him involuntarily. Secondly, it was submitted that the integrity of the drug exhibits was compromised and that there was doubt if the two packets seized from the appellant were the same two packets delivered to and analysed by Dr Lee Tong Kooi. If there is any reasonable doubt, the conviction obviously cannot stand. The third major submission challenged the legality of the sentence of death. It was argued for the appellant that the sentence prescribed in the Act was not mandatory but a maximum sentence. Counsel for the appellant also sought to rely on Arts 9, 12 and 93 of the Constitution of the Republic of Singapore (1999 Reprint) to support the argument that the death sentence was unconstitutional and therefore illegal.
16. The trial judge rejected these submissions and convicted the appellant. We will not summarise the reasons of the trial judge as these, so far as they are material, would be referred to later at the appropriate juncture.

## **The appeal**

17. The same submissions on behalf of the appellant, which were advanced before the trial judge, were repeated before us.
18. Against the conviction, the following arguments were advanced. The appellant challenged the admissibility of the cautioned statement. Secondly, the appellant contended that it was inadmissible because of the breach of Art 36(1) of the VCCR. Thirdly, the appellant contended that the integrity of the drug exhibits had been undermined.
19. In attacking the legality of the death sentence, the appellant submitted that the sentence prescribed under s 7 of the MDA was a maximum and not a mandatory sentence. Secondly, if the death sentence was nevertheless mandatory, it was illegal and should not be administered because it violated Arts 9, 12 and/or 93 of the Constitution of Singapore.
20. We now address each of the submissions.

### **Admissibility of the appellant's cautioned statement**

21. We refer to the cautioned statement recited in [12] of this judgment. The admissibility provision for cautioned statements recorded by non-police officers is s 24 of the Evidence Act. The question is whether the contents of the cautioned statement is a confession. In the case of *Anandagoda v The Queen* [1962] 1 WLR 817 at 823–824, Lord Guest set out the test in this way:

The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. ... The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt?

22. We note that the appellant made the cautioned statement to ASP Toh in the usual way after the charge had been read to him. The appellant was therefore clearly referring to the discovery of the two packets of substance in his possession when he apologised for the "inconvenience". He also alluded to the fact that he did not act alone and that there were people who organised "this", referring to the transportation of heroin from Cambodia to Australia, which involved its unauthorised import into Singapore. He also impliedly referred to the dissembling disinformation those people must have fed him, so that the trail could not be traced to them. In our view, what the appellant had said in his cautioned statement connected him to the offence: see *Abdul Rashid v PP* [1994] 1 SLR 119. The cautioned statement is therefore admissible.

## The VCCR issue

23. Counsel for the appellant submitted that the trial judge had erred in law and in fact in ruling that Art 36(1) of the VCCR had not been breached and in admitting into evidence the oral statement of the appellant in which he admitted, *inter alia*, knowledge that the two packets contained heroin and that he was carrying them to someone in Australia. In this connection, counsel for the appellant made three points. Firstly, Art 36(1) of the VCCR bound Singapore. Secondly, Art 36(1) was breached because the appellant only met with a member of the Australian High Commission 20 hours after he was detained and the appellant was questioned before that time. Thirdly, the breach of Art 36(1) prejudiced the appellant. It was submitted that the breach operated unfairly against the accused as he was not advised of his rights and did not have the opportunity to consult a consular officer until 3.30pm on 13 December 2002, after the cautioned statement was recorded. We are of the view that these submissions are without merit. In the light of the evidence, the trial judge was right in finding that there was no breach of Art 36(1).
24. The VCCR is a key instrument in the regulation and conduct of consular activities. There is an established practice for a State which has arrested a national of another State to notify the consular officers of the State of the accused person. Although Singapore is not a party to the Convention, Singapore does conform with the prevailing norms of the conduct between States such as those set out under Art 36(1), to which we now turn.
25. Article 36(1) has two aspects. Under Art 36(1)(b), the authorities of the receiving State "shall, without delay, inform the consular post of the sending State if ... a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner". This will be done if the national "so requests". The other aspect to note is that under Art 36(1)(c) when the consular post is aware of such a case, its officers "shall have the right to visit ... [that national] to converse and correspond with him and to arrange for his legal representation".
26. Having found that Art 36(1) was not breached, the trial judge went further, as he acknowledged. He stated thus at [41]:
- Assuming that there was a breach, it does not necessarily follow that the [appellant's] statements are inadmissible in evidence. There must be some resultant prejudice that renders it wrong for the statements to be used, for example, that if he had timely consular advice, he would not have made the statements at all, or in the form or at the times he did.

We are of the view that the extension explicit in this obiter dicta is in principle and on authority unsustainable.

27. The trial judge did not have the benefit of considering the International Court of Justice ("ICJ") case of *Avena and other Mexican Nationals (Mexico v United States of America)* (31 March 2004, ICJ General List No 128) ("the Avena case"). The judgment was delivered 11 days after the Grounds of Decision of the trial judge were released. The Avena case dealt with the content of Art 36(1) in customary international law, the meaning of "without delay" within the meaning of Art 36(1)(b) and, more materially, the consequence of a breach of Art 36 on the admissibility of statements taken when the Article is breached.
28. In the Avena case, Mexico brought a case against the United States concerning 52 Mexican nationals who were arrested, detained, tried, convicted and sentenced to death for various offences in the US between 1979 and 2003. Mexico complained that the US breached Art 36(1) by not informing the Mexican authorities of the detention of the Mexican nationals without delay. In some cases, the Mexican authorities were only informed after the sentence had been passed. In some others, this was done from 40 hours to several years after detention. In arguments, Mexico took the view that under Art 36(1), access should have been granted *before* interrogation or any action potentially detrimental to the person's rights by the US.
29. The response of the US is noteworthy. The US argued that the ICJ did not have jurisdiction to hear the case for a number of reasons. Firstly, it would be an abuse of the ICJ's jurisdiction to make a finding concerning the US criminal justice system: see [27] and [28] of the Avena case. Secondly, Art 36(1) only related to notification, and not the detention, trial, conviction and sentence of a foreigner: see [29] and [30]. Thirdly, the remedy sought by Mexico would intrude into the independence of US courts: see [31] to [34]. Fourthly, the ICJ did not have jurisdiction to determine whether notification was a "human right" as alleged by Mexico: see [35].
30. The ICJ ruled that it had jurisdiction. It accepted that Art 36(1) only related to notification, but ruled that whether the arrest, detention, trial and conviction of a foreigner might be unlawful would depend on the facts of the case.
31. More prominently material to this case was ICJ's rejection of Mexico's contention that Art 36(1) provided for consular access before interrogation or any action potentially detrimental to the foreigner's rights was carried out: see [87]. This was not the object or purpose of Art 36, nor was this reflected anywhere in Art 36: see [85]. This was also not in the *travaux préparatoires* or pre-Convention discussions: see [86].
32. The ICJ also held that "without delay" did not necessarily mean "immediately upon arrest". It concluded that the arresting authorities had a duty to give that information to the consular post of the country of which an arrested person was a national as soon as they realised that the

person was a foreign national or once there were grounds to think that the person was probably a foreign national.

33. The ICJ also rejected the contention that there must be consular access before any statements were recorded. Accordingly, the appellant's submission that the statements in question are inadmissible is without basis.
34. We now turn to the question of the admissibility of the statements in the event that Art 36 is breached. The trial judge observed that if there was a "resultant prejudice", the court might exclude statements recorded from an accused person. This resembled Mexico's argument that consular notification must occur immediately upon detention and prior to any interrogation. The ruling of the ICJ is apposite. It ruled at [127] that the question of admissibility of a statement "is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration". We agree with the Prosecution that it bears reminding that Art 36(2) provides that the rights created under the Article are subject to domestic legislation, in the following terms:

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State.

35. In our criminal justice system, the fundamental procedural principle is that the nature of any violation and possible prejudice must be considered under and in the light of our rules governing admissibility to be found in s 122(5) of the CPC or s 24 of the Evidence Act. These rules ensure the voluntariness with which statements are made and the reliability of confessions and admissions.

### **The drug exhibits**

36. The principles relating to the chain of custody of exhibits in evidence are settled. The Prosecution bears the burden of proving beyond reasonable doubt that the drug exhibits analysed by Dr Lee Tong Kooi of the HSA were the same as those seized from the appellant's back and haversack. Where there is a break in the chain of custody, and a reasonable doubt arises as to the identity of the drug exhibits, then the Prosecution has not discharged its burden, and has failed to make out a prima facie case against the accused: *Abdul Rashid v PP* ([22] *supra*) at 127, [17].
37. The trial judge accepted the evidence of ASP Toh that he had sole possession of the drugs at all material times. ASP Toh testified that upon taking over the drug exhibits from one Senior Sergeant Christopher Chan, he immediately marked them "A" and "B1" respectively, which was a reliable method to ensure the integrity of the drug exhibits. It is noteworthy from the record of the trial that it was not put to any of the prosecution witnesses that the packets that were seized were not those

which the appellant had brought into Singapore. There was also no suggestion whatever that there was any break in the chain of custody of the drugs from the time ASP Toh handed them over to Dr Lee Tong Kooi of the HSA up to the time they were weighed by Dr Lee. The appellant in his own statement admitted that he had himself heat-sealed the two packets before bringing them into Singapore. On the evidence led, the contents of the two packets remained sealed until the analysis by Dr Lee.

38. In relation to the discrepancies in the weights of the two exhibits, the trial judge accepted that the discrepancies could be due to the purpose of the weighing by each officer and the different levels of their expertise. ASP Toh wanted the weight for inclusion in the holding charge. At that stage, scientifically acceptable accuracy was not required and evidence was not led that the weighing scale used by ASP Toh was calibrated to a high degree of accuracy. On the other hand, Dr Lee's equipment was accurate. In our judgment, what is crucially important is to ensure that there has been no mixing of the drug exhibits or the tampering of the contents. There was no suggestion of any mixing or tampering. The evidence led established that the drug exhibits were properly handed over from one officer to another.
39. Admittedly, ASP Toh said he could not remember the reason why he brought out the two packets of heroin from the steel cabinet. In our view, this lapse of memory, which was restricted only to the occasion, was not of any significance. The crucial fact is that the two packets remained in the custody and control of ASP Toh at all material times.
40. We therefore agree with the findings of the trial judge that the integrity and identity of the drug exhibits had not been compromised at any stage.

### **Whether the death sentence is a mandatory or maximum penalty**

41. Counsel for the appellant argued that the death penalty is the maximum rather than the mandatory penalty for the offence under s 7 of the MDA. In pressing for this interpretation of the statutory provision, counsel for the appellant relied on the Second Schedule of the MDA as well as ss 9A(1) and 41 of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"). It was further submitted that there is no provision in the MDA stating that death is the only penalty which may be imposed.

42. It is convenient to set out s 9A(1) and s 41 of the IA, including the heading of each section.

**Purposive interpretation of written law and use of extrinsic materials**

9A–(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

**Penalties prescribed to be deemed maximum penalties**

41 Whenever in any written law a penalty is provided for an offence, such provision shall imply that such offence shall be punishable upon conviction by a penalty not exceeding (except as may be otherwise expressly mentioned in the written law) the penalty provided.

43. In addition, counsel for the appellant referred to s 53 of the MDA which provides that a district court or a magistrate court shall have jurisdiction to hear and determine all proceedings under the MDA. It also provides that notwithstanding the provisions of the CPC which limit the powers of sentencing of those lower courts, the District Court and not the Magistrate's Court shall have the power to impose the full penalty or punishment in respect of any offence provided by the MDA except the punishment of death. It was argued that where the sentence of death was provided as the penalty it must be a maximum and not a mandatory penalty.
44. In the late 1960s and early 1970s the drug problem in Singapore assumed alarming proportions. The MDA, which was a consolidation of the Dangerous Drugs Act 1955 (Cap 151, 1970 Rev Ed) and the Drugs (Prevention of Misuse) Act 1969 (Cap 154, 1970 Rev Ed), was passed in 1973. It did not provide for the death penalty. Less than three years later, the death penalty was introduced.
45. The punishments for offences are prescribed in s 33 and the Second Schedule of the MDA. The first column of the Schedule specifies the "Section creating offence", the second column specifies the "General nature of offence;" and the third to seventh columns specify the "Punishment". One looks across the Schedule for the specific offence and the type and quantity of the drug involved under the second column, and finally the punishment prescribed under columns three to seven. When the Schedule is read in that way, the punishment for the offence of unauthorised import of more than 15g of diamorphine is stated in one word, "Death".

46. We reproduce below the relevant punishment prescribed for the unauthorised import of more than 15g of diamorphine in the Second Schedule of the MDA. As an aid to statutory interpretation and to provide the text by which lesser punishment is prescribed for the unauthorised import of controlled drugs containing a lesser quantity within a range of quantities of diamorphine, we also reproduce below the punishment prescribed for the import of not less than 10g and not more than 15g of diamorphine.

**Second Schedule: Offences Punishable on conviction**

Section creating offence	General nature of offence	Punishment				
		Class A drug involved	Class B drug involved	Class C drug involved	Specified drug or quantity thereof or drug with specified content involved	General
7	(4) Unauthorised import or export of controlled drug containing such quantity of diamorphine being —					
	(a) not less than 10 grammes and not more than 15 grammes	—	—	—	Maximum 30 years or imprisonment for life and 15 strokes  Minimum 20 years and 15 strokes	—
	(b) more than 15 grammes	—	—	—	Death	—
	(5) Unauthorised import or export of controlled drug containing such quantity of cocaine being —					
(a) not less than 20 grammes and not more than 35 grammes	—	—	—	Maximum 30 years or imprisonment for life and 15 strokes  Minimum 20 years and 15 strokes	—	
(b) more than 30 grammes	—	—	—	Death	—	

47. In the interpretation of the punishment for an offence falling under s 7(4)(b) of the first two columns of the MDA, a number of features of the Second Schedule of the MDA are immediately apparent and noteworthy. The punishment for the import of more than 15g of diamorphine is death, as provided for in the sixth column.

48. In relation to the import of diamorphine of lesser quantities within the range as mentioned above, the maximum and minimum punishments are prescribed. A sentencing court having convicted a person of this offence has no discretion to impose a sentence exceeding the maximum or falling short of the minimum. Both of them are expressly spelt out in the sixth column. The maximum is 30 years or imprisonment for life and 15 strokes. The minimum is 20 years and 15 strokes. If Parliament had intended to confer on the sentencing court a discretion to impose a range of punishments, it could have provided for it. Further, if a range of sentences is prescribed for the import of a range of diamorphine below 15g and not less than 10g, it is illogical to think that Parliament would in respect of any unauthorised import of diamorphine of more than 15g confer a discretion on the sentencing court to impose any sentence up to the maximum sentence of death.
49. We refer to the appellant's reference to s 9A(1) and reliance upon s 41 of the IA. As the DPP has submitted, it is beyond doubt that Parliament legislated the offence as punishable with the sentence of death. That is patently clear from a reading of the Hansard. When the mandatory death penalty was introduced for the unauthorised import of more than 15g of diamorphine in 1975, the then Minister for Home Affairs and Education, who tabled the Bill, said (see *Singapore Parliamentary Debates, Official Report* (20 November 1975 at col 1382)):
- The death penalty will ... be imposed for the unauthorised import, export or trafficking of more than 30 grammes of morphine or more than 15 grammes of heroin.
- ... It is not intended to sentence petty morphine and heroin pedlars to death. It is, therefore, necessary to specify the quantity by weight, exceeding which the death penalty will be imposed. ... For heroin any quantity in which the pure heroin [ie diamorphine] content is above 15 grammes will attract the death penalty. ... As a comparison, Iranian law provides for a mandatory death sentence where the trafficking only involves more than 10 grammes of heroin.
50. The object of the 1975 amendments to the MDA is therefore clear. An interpretation of the punishment for the offence under s 7(4)(b) and falling within the first and second columns of the Second Schedule of the MDA must promote that object, which is the imposition of the mandatory death penalty. In relation to the appellant's reliance on s 41 of the IA, we are of the view that such reliance is misplaced. It was argued that the punishment prescribed for the unauthorised import of more than 15g of diamorphine implied that the death penalty was deemed to be the maximum penalty. In other words, the appellant's counsel argued that the provision imposing the death penalty "shall imply that such offence shall be punishable upon conviction by a penalty not exceeding" the death penalty, "except as may be otherwise expressly mentioned in the written law". It was further pointed out there was no express provision to the

contrary. In our view, this submission ignores the ultimacy and finality of the death sentence. It is absurd to suggest that Parliament would contemplate any sentence beyond the death sentence. The death sentence is the final and terminal sentence which a convicted person can suffer. Any interpretation of the capital punishment prescribed, which asserts it is the maximum, implies that there is a more serious sentence beyond the death sentence and is manifestly untenable.

51. We finally refer to the arguments based on s 53 of the MDA where a lower court tries the offence of unauthorised import of diamorphine of more than 15g. This section, in our view, is solely applicable to the specific and particular situation where the Public Prosecutor, in his sole discretion, prefers such a charge before the lower court. In preferring the lower court as the trial court, it is then clear that the Public Prosecutor, in his sole discretion, has come to the view that the sentence of death is not appropriate. It is an exceptional situation. In fact, the Public Prosecutor has never invoked s 53 of the MDA. In the event, on any reasonable reading of the section, the District Court can lawfully impose a sentence on an offence under s 7(4)(a) of the MDA as set out in the Second Schedule. This approach would consistently promote the purpose and object of the MDA. Where the intent of Parliament is clear, s 9A(1) should apply to the exclusion of s 41 of the IA.
52. A similar interpretation was adopted in *PP v Loo Kun Long* [2003] 1 SLR 28, where the High Court had to interpret an ambiguous punishment provision in the Films Act (Cap 107, 1998 Rev Ed). The question was whether the fine of \$1,000 stipulated therein was the maximum or minimum fine. The statute was silent, but a ministerial speech given in Parliament made it clear that \$1,000 was intended to be the minimum fine. The High Court accepted this. We are therefore of the view that s 41 of the IA does not assist the appellant in the face of the clear statement of Parliamentary intent set out above.
53. The punishment for the unauthorised import of more than 15g of diamorphine is, in our view, prescribed expressly and in clear terms. There is but one sentence for the High Court to impose and that is the sentence of death.

### **Whether the death sentence is unconstitutional**

54. The appellant based his arguments on the unconstitutionality of the mandatory death penalty on Arts 9(1), 12(1) and 93 of the Constitution of Singapore. These Articles deal, respectively, with fundamental liberty of the person, equal protection of the law and the vesting of judicial power in the courts.
55. The appellant further contended that the Constitution imported customary international law into Singapore and argued that the prohibition against torture, cruel, inhuman or degrading treatment or punishment was a

norm of customary international law. The mandatory death penalty violated this prohibition on two counts, namely (a) the imposition of the death penalty would be grossly disproportionate in relation to the offence; and (b) the act of hanging as a method of execution was a cruel, inhuman and degrading punishment.

56. The challenge to the constitutionality of the mandatory death sentence is not a novel issue. This has been raised on several occasions in the Privy Council and in the Malaysian Federal Courts. The decision in *Ong Ah Chuan v PP* [1980–1981] SLR 48 (“Ong Ah Chuan”) was a Privy Council case on appeal from Singapore; the Malaysian Federal Courts in *PP v Lau Kee Hoo* [1983] 1 MLJ 157 and other cases followed the decision of Ong Ah Chuan.

57. The court’s power to strike down any legislation for inconsistency with the Constitution stems from Art 4 which provides:

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.

58. In *Taw Cheng Kong v PP* [1998] 1 SLR 943, the High Court struck down a provision of the Prevention of Corruption Act (Cap 241, 1993 Ed) in the exercise of its judicial review jurisdiction under Art 4 of the Constitution. On appeal, the decision was overturned on its facts (see *PP v Taw Cheng Kong* [1998] 2 SLR 410), but the Court of Appeal did not doubt the following statement of principle by the High Court at [14]:

This ‘supremacy clause’ (art 4), mated with the entrenchment provisions of art 5, guarantees and secures the prevalence of a person’s fundamental liberties over legislative and executive action which contravenes those rights. It is the duty of the court to uphold and preserve those rights, and to impugn any Act of Parliament or any course of executive action which injures, detracts from or infringes those rights. Thus, as Yong Pung How CJ noted in *Chan Hiang Leng Colin & Ors v PP* [1994] 3 SLR 662,

The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.

59. The appellant's arguments on unconstitutionality made reference to several very recent Privy Council decisions on the mandatory death penalty. These decisions, in turn, made reference to international jurisprudence dealing with "the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment": see *Watson v The Queen* [2004] UKPC 34 at [30].
60. We now turn to consider the arguments put forward by the appellant on the constitutionality of the mandatory death penalty.

### **Article 12 (equal protection)**

61. Article 12(1) provides as follows:

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

The argument that the mandatory death penalty in respect of the offence under s 7 of the MDA is a violation of Art 12(1) was considered and dismissed in *Ong Ah Chuan*. The appellant readily admitted this, but said that the argument sought to be raised now is different from the argument considered in *Ong Ah Chuan*.

62. Firstly, the appellant submitted that *Ong Ah Chuan* was either wrongly decided at the time, or alternatively, that the Privy Council would have decided the case differently today. The appellant cited a good number of very recent Privy Council decisions in support of the latter contention. They are: (a) *Watson v The Queen* ([59] supra); (b) *Boyce v The Queen* [2004] UKPC 32; (c) *Matthew v The State* [2004] UKPC 33; and (d) *Reyes v The Queen* [2002] 2 AC 235. The first three decisions were rendered on 7 July 2004 and only *Reyes v The Queen* was before the trial judge when he gave judgment in the High Court on 20 March 2004. Broadly, the significance of the first three decisions is in the Privy Council's reconsideration of *Ong Ah Chuan*, and its opinion that *Ong Ah Chuan* is now no longer good law.
63. Secondly, and in the alternative, the appellant submitted that the argument from Art 12(1) sought to be raised in this appeal was different from the argument that was considered and dismissed in *Ong Ah Chuan*. It was said that the trial judge "misconstrued the basis on which the submissions made to him were put" and had "not dealt with" the precise argument put forward.
64. The appellant's first argument dovetails with the Art 9(1) argument, since it requires consideration of what impact, if any, the new Privy Council decisions have on the authority of *Ong Ah Chuan*. We shall therefore consider this together with Art 9(1) below.

65. For the second argument, the appellant contended that the specific question not considered by the Privy Council in Ong Ah Chuan was whether the mandatory death penalty offended the second limb of Art 9(1), ie whether it removed “the equal protection of the law” afforded to individual convicted persons by way of the judicial sentencing process.
66. Ong Ah Chuan was an appeal from our Court of Appeal. One of the questions before the Privy Council was whether the mandatory sentence of death upon conviction for trafficking in more than 15g of diamorphine (heroin) was contrary to our Constitution. As evident from Lord Diplock’s speech at 63, [32], the argument presented to their Lordships was that “the mandatory nature of the sentence ... rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness”. The appellant relied on both Arts 9(1) and 12(1) in making the argument. The Art 12(1) argument was drawn in these terms (ibid):
- [I]t offends against the principle of equality ... since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15g 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 14.99g.
67. The Privy Council ruled that the mandatory death penalty for trafficking in 15g or more of diamorphine was not a violation of Art 12(1). Lord Diplock’s reasoning proceeded thus. First, Art 12(1) requires that like be compared with like. In other words, the individual is assured the right to equal treatment with other individuals in similar circumstances. Art 12(1) does not forbid discrimination in punitive treatment between classes of individuals in relation to which there is “some difference in the circumstances of the offence that has been committed” (at 64, [35]). Second, in Ong Ah Chuan, this difference was in the quantity of the drug involved in the offence. The discrimination that was challenged was that between the imposition of the death penalty upon that class of individuals trafficking in 15g or more, and the imposition of a lesser penalty upon that class of individuals trafficking in less than 15g.
68. Lord Diplock at 64, [37] held that:
- 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.
- ... 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 art 12(1) of the Constitution. [emphasis added]

69. The social object of the MDA was defined at 64, [38] as being “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”. Lord Diplock then held, at 64–65, [38]:

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 [p]yramid. 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 15g of heroin or more is so low as to be purely arbitrary.

70. This is the two-step “reasonable classification” test for validity under Art 12(1). A “differentiating measure” such as the 15g differentia is valid if:

- (a) the classification is founded on an *intelligible* differentia; and
- (b) the differentia bears a *rational relation* to the *object* sought to be achieved by the law in question.

The test has been applied locally numerous times: see, for example, *Kok Hoong Tan Dennis v PP* [1997] 1 SLR 123.

71. The appellant attacked the legislative judgment behind the 15g differentia. It was said that the equal protection guarantee under Art 12(1) was “afforded by the intervention of an independent judge,” and that the trial judge had incorrectly “presume[d] that the power of the legislature [had] been exercised properly”. It was further argued that he then “[used] that assumption as a basis for his conclusion”, and thus avoided the real issue, which was the constitutionality of s 7 read with the Second Schedule of the MDA.

72. The appellant cited *Mithu v State of Punjab AIR 1983 SC 473* (“Mithu”) as a general example of the way in which he wished us to address the Art 12(1) issue. In *Mithu*, the issue was whether s 303 of the Indian Penal Code (45 of 1860) infringed Art 21 of the Indian Constitution, which is substantially similar to our Art 9. Section 303 provided for a mandatory death sentence only in respect of murders committed by persons already serving a sentence of life imprisonment (“life convicts”). In ruling that s 303 did infringe Art 21, the Indian Supreme court gave extensive reasons

as to why it thought that there was “no rational justification” for treating life convicts differently from other offenders. These reasons included, inter alia, the lack of sociological data showing that life convicts had a greater propensity to commit murder.

73. It would have been wrong to decide the issue based on a blind acceptance of the legislative fiat. On the other hand, it is the court’s “duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides”: *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662 at 681, [60] per Yong Pung How CJ. As such, a fundamental question in every such case is the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation.
74. In the appeal before us, it is not as clear (as it was in *Mithu*) that there is no “rational justification” for the 15g differentia at all. The appellant asserted that it was “axiomatic” that the gravity of the offence could not be gauged by the quantity of the drug alone. Yet the appellant had not provided any material on which we may base such a conclusion.
75. In this respect, it is instructive to refer to the judgment of the Hong Kong Court of Final Appeal in *Lau Cheong v HKSAR* [2002] 2 HKLRD 612 (“*Lau Cheong*”). In *Lau Cheong*, the issue before the Hong Kong Court of Final Appeal was whether the mandatory sentence of life imprisonment for murder infringed the constitutional guarantees against arbitrary punishment and unequal treatment. The court addressed the legislative history of the sentence for murder in Hong Kong at great length, including the 1993 amendment ordinance that promulgated mandatory life imprisonment in place of the mandatory death penalty, and the relevant speeches in the Hong Kong Hansard. They concluded at [102] that the context of this particular case made it appropriate for the court to “give particular weight to the views and policies adopted by the legislature”. In the court’s judgment (at [105]), the legislative history showed that “the question of the appropriate punishment for what society regards as the most serious crime is a controversial matter of policy involving differing views on the moral and social issues involved”.
76. In its approach to the constitutional issues, the Hong Kong Court of Final Appeal therefore gave due weight to the history of the 1993 ordinance. In particular, it was noted that the legislative debates showed that it had only been possible to abolish the mandatory death penalty by introducing a mandatory life sentence in its place. The court also gave due regard to the fact that the mandatory life sentence was enacted in conjunction with a comprehensive statutory regime for the individualised review of each sentence imposed.

77. The appellant had not placed comparable material before us to properly decide whether the legislative judgment made in s 7 read with the Second Schedule of the MDA is insupportable. In the absence of full arguments on the issue, the 15g differentia is upheld, and the Art 12(1) argument is therefore dismissed.

### **Article 9 (due process guarantee)**

78. Article 9(1) provides as follows:

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

79. The appellant's argument was twofold. First, the mandatory death sentence amounted to arbitrary punishment, which was not deprivation of life "in accordance with law". It was contended that the mandatory death sentence was arbitrary for two reasons, (a) it flouted the equal protection guarantee in Art 12(1); and (b) it precluded proportional and individualised sentencing, which was protected by the prohibition against cruel and inhuman treatment or punishment. We have considered the first reason in the preceding paragraphs. As for the second reason, the appellant relied on recent Privy Council decisions to support his contention. These are considered below.

80. Second, it was argued that even if the mandatory death sentence was not arbitrary, execution by hanging amounted to cruel and inhuman treatment or punishment.

81. We will consider each argument in turn.

### **Arbitrary punishment**

82. It is well established that the phrase "in accordance with law" in Art 9(1) connotes more than just Parliament-sanctioned legislation. In *Ong Ah Chuan* at 62, [26], Lord Diplock held that the reference to "law" was 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".

83. We do not propose to examine each decision in detail. However, in both *Watson v The Queen* and *Reyes v The Queen*, the mandatory death penalty in respect of certain classes of murder was ruled unconstitutional as a violation of the prohibition against cruel or inhuman treatment or punishment. In *Matthew v The State* and *Boyce v The Queen*, the Privy Council would have ruled the same way but for certain "saving provisions" in the relevant national Constitutions which preserved pre-existing national laws.

84. *Reyes v The Queen*, an appeal from Belize, was considered and distinguished by the trial judge below. In this case, the Privy Council ruled that the mandatory death penalty for murder by shooting was unconstitutional, since “to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which s 7 [of the Constitution of Belize] exists to protect”. Section 7 of the Belize Constitution provides that “[n]o person shall be subjected to torture or to inhuman or degrading punishment or treatment”. There is no equivalent in our Constitution nor in any local Act of Parliament. This was a ground for distinguishing *Reyes v The Queen*.
85. The case was decided in the light of the various international norms that had been “accepted by Belize as consistent with the fundamental standards of humanity”: at [27]. The Privy Council considered the content of a plethora of international arrangements for the protection of human rights, including the *Universal Declaration of Human Rights* (“UDHR”), the *International Covenant on Civil and Political Rights*, the *American Declaration of the Rights and Duties of Man*, and the *American Convention on Human Rights*. These arrangements, together with a wealth of jurisprudence emanating from national, regional and international courts, showed that an integral part of the prohibition against cruel and inhuman treatment or punishment was proportionality and individualised sentencing. It was against this background that the Privy Council ruled s 102(3)(b) of the Belize Criminal Code, which referred to “any murder by shooting”, to be indiscriminate and therefore void.
86. The above observations equally apply to *Watson v The Queen*, which is the Privy Council decision of 7 July 2004 in which Ong Ah Chuan was said to be of doubtful authority. The relevant passages at [29] and [30] read:
- ... It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did on behalf of the Board in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674, that there is nothing unusual in a death sentence being mandatory. As Lord Bingham pointed out in *Reyes*, p 244, para 17, the mandatory penalty of death on conviction of murder long pre-dated any international arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary ...
- ... The history of these developments is fully set out in *Reyes*. It is as relevant to the position under the Constitution of Jamaica as it was in that case to Belize. There is a common heritage. In *Minister of Home Affairs v Fisher* [1980] AC 319, 328 Lord Wilberforce referred to the influence of the European Convention in the drafting of the constitutional instruments during the post-colonial period, including the

Constitutions of most Caribbean territories. That influence is clearly seen in Chapter III of the Constitution of Jamaica.

87. However, we are of the view that the mandatory death sentence prescribed under the MDA is sufficiently discriminating to obviate any inhumanity in its operation. It is therefore constitutional.
88. The common law of Singapore has to be developed by our Judiciary for the common good. We should make it abundantly clear that under the Constitution of our legal system, Parliament as the duly elected Legislature enacts the laws in accordance and consistent with the Constitution of Singapore. If there is any repugnancy between any legislation and the Constitution, the legislation shall be declared by the Judiciary to be invalid to the extent of the repugnancy. Any customary international law rule must be clearly and firmly established before its adoption by the courts. The Judiciary has the responsibility and duty to consider and give effect to any rule necessarily concomitant with the civil and civilised society which every citizen of Singapore must endeavour to preserve and protect.

### **Cruel and inhuman treatment or punishment**

89. We now turn to the appellant counsel's argument that the specific mode of execution is contrary to the prohibition in customary international law against cruel and inhuman treatment or punishment, which is part of the "in accordance with law" requirement in Art 9(1). The appellant relied on Art 5 of the UDHR in support of this proposition. Art 5 provides:
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
90. To succeed on this ground of appeal, the appellant must first show that the prohibition against cruel and inhuman treatment or punishment amounts to a customary international rule. Next, the appellant must show that a specific prohibition against hanging as a mode of execution is part of the content of that rule in customary international law.
91. There is no difficulty with the first part of the appellant's argument. It is quite widely accepted that the prohibition against cruel and inhuman treatment or punishment does amount to a rule in customary international law. The Prosecution also has not made any assertions to the contrary. The following is a useful summary of the position in customary international law; see *Restatement of the Law: Third Restatement of US Foreign Relations Law*, Vol 2 (1987) at 165, § 702, reproduced in D J Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 5th Ed, 1998) at 725 and 728:
- Capital punishment, imposed pursuant to conviction in accordance with due process of law, has not been recognised as a violation of the

customary law of human rights. It may, however, constitute cruel and inhuman punishment ... if grossly disproportionate to the crime. ...

Torture as well as other cruel, inhuman, or degrading treatment or punishment, when practiced as state policy, are violations of customary international law.

92. However, there is simply not sufficient State practice to justify the next part of the appellant counsel's argument as to the content of this customary international rule. The appellant was unable to show a specific customary international law prohibition against hanging as a mode of execution. Indeed, the passage quoted above shows that there is not enough evidence at this time to show a customary international law prohibition against the death penalty generally. According to a report from the UN Commission on Human Rights, *Question of the Death Penalty: Report of the Secretary-General* submitted pursuant to Commission resolution 2002/77 UN ESCOR, 59th Sess, UN Doc E/CN.4/2003/106 (2003), as at 1 December 2002, the status of the death penalty worldwide was as follows:

Number of retentionist countries 71

Number of completely abolitionist countries 77

Number of countries abolitionist for ordinary crimes only 15

Number of countries that can be considered de facto abolitionist 33

The number of States retaining the death penalty was almost equal to the number of States that had abolished it. In most States retaining the death penalty, the mode of execution is by hanging or shooting.

93. The appellant relied on the US Ninth Circuit Court of Appeals decision in *Campbell v Wood* 18 F 3d 662 (1994) for their information as to the risk of asphyxiation or decapitation inherent in the procedure of hanging. However, it is worth pointing out that the majority of the Court of Appeals convened *en banc* decided that hanging did not amount to cruel and inhuman treatment or punishment. The trial judge rightly observed this in his judgment.
94. We agree with the trial judge's reasoning on the effect of a conflict between a customary international law rule and a domestic statute. The trial judge held that even if there was a customary international law rule prohibiting execution by hanging, the domestic statute providing for such punishment, viz, the MDA, would prevail in the event of inconsistency. The trial judge cited *Chung Chi Cheung v The King* [1939] AC 160 and *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1 in support of this proposition. The appellant's submissions are therefore rejected.

### **Article 93 (separation of powers)**

95. The appellant further asserted that a mandatory death penalty breaches the principle of the separation of powers on which our system of government is based. The principle is evidenced in part by Art 93 of the Constitution, which reads:

The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

96. It was said that the mandatory death penalty breached the separation of powers principle because the Legislature did not have the discretionary power to determine the severity of the punishment to be inflicted on an individual member of a class of offenders. That power rightly falls within the province of the judicial branch.

97. The appellant abandoned his argument in respect of the unconstitutionality of the post-sentencing provisions of the CPC. Instead, the post-sentencing provisions were said to be a “statutory demonstration” of the breach of the separation of powers principle effected by the promulgation of a mandatory death penalty. Further, it was said that Art 22P (grant of pardon by the President) did not affect his argument, since it was inconsistent with Art 93.

98. These arguments overlap substantially with the grounds of appeal already considered above. As such, they will not be traversed again, save only to restate that the Privy Council in *Reyes v The Queen* did not pronounce mandatory death sentences absolutely unconstitutional, and to make the further point that their Lordships did allow that there might be circumstances in which the mandatory death sentence could be “sufficiently discriminating to obviate any inhumanity in its operation”.

### **Conclusion**

99. For the foregoing reasons, the appeal is dismissed.