

THE MANDATORY DEATH SENTENCE

K S RAJAH, SC
HARRY ELIAS PARTNERSHIP

Introduction

1. In this paper I will consider the decisions of the final Court of Appeal in Singapore on the death sentence in 3 cases.
2. In the first case of *Sia Ah Kew & Ors v PP* [1972-1974] SLR 208 decided in 1974, the Court of Appeal set aside the death sentence imposed by a 2-judge court and substituted it with life sentence plus strokes of the cane.
3. In *Ong Ah Chuan v PP* [1981] AC 648, the second case the Privy Council found the mandatory death sentence for drug offences in keeping with the constitutional provisions. The Privy Council has since described its decision in *Ong Ah Chuan* as being of limited value and the law on the mandatory death sentence as being rudimentary.
4. In the third case *Nguyen Tuong Van v PP* [2004] SGCA 47 an Australian national of Vietnamese origin, inter alia, challenged the legality of the death sentence in Singapore and relied on recent Privy Council decisions which had plainly, said that the law on the mandatory death in its earlier decision in *Ong Ah Chuan's* case decided in 1980 is not good law.
5. Article 9(1) of the Constitution of the Republic of Singapore which came into force in 1965 provides for the deprivation of life and liberty in accordance with law. The Constitution of Singapore therefore recognizes that there are crimes where capital punishment is the appropriate punishment for certain offences.
6. The question that has agitated some legal minds in Singapore is not whether capital punishment must be abolished but whether it is proper to have capital punishment as a mandatory sentence, which a single judge sitting alone must impose, regardless of the circumstances of the offence and the offender which may have a mitigating effect and justify a sentence other than death. It is further argued that not being mindful of mitigating factors may amount to cruel and inhuman punishment. The business of the legislature is to enact laws and not pass sentences which is an attribute of judicial power under Article 93 of the Constitution. A distinction is made between the legislature fixing mandatory sentences by way of fines, length of prison terms and a mandatory death sentence, which has a finality to it which other sentences do not have.

Limited Discretion

7. The Court of Criminal Appeal in *Sia Ah Kew & Ors v PP* [1972-1974] SLR 208 considered the principles applicable and the circumstances to be taken into account when imposing the death sentence in a case where five kidnappers had pleaded guilty to a charge under the Kidnapping Act (Cap. 101, 1970 Ed) and were all sentenced to death by a two-judge court.
8. The trial judges took the view that the alternative sentence of life imprisonment should be imposed only when there were exceptional circumstances which did not justify the imposition of the death sentence.
9. Section 3 of the Kidnapping Act (Cap. 101, 170 Ed) reads:

“Whoever, with intent to hold any person for ransom, abducts or wrongfully restrains or wrongfully confines such person shall be guilty of an offence and shall be punished on

conviction with death or imprisonment for life and shall, *if he is not sentenced to death, also be liable to caning.*"

10. The Court of Appeal was of the view that the legislature had given the courts a very limited discretion with regard to sentence, the discretion being limited to the imposition of one of three sentences, the maximum being death and the minimum being imprisonment for life. The third sentence being imprisonment for life with caning.

11. The presiding trial judge before passing the sentences, no doubt satisfied that kidnapping was a heinous crime, said:

"The crime of kidnapping for ransom is a detestable crime. It is motivated by avarice. It is carefully planned with great deliberation and executed with complete disregard for the anguish and suffering of not only the victim but also of all those who are near and dear to him. The mental torture which the victim's family undergoes while apprehensively awaiting his fate equals or even surpasses that undergone by the victim while in captivity. Kidnapping for ransom is a crime which no civilized society can tolerate and it should be firmly rooted out. It is therefore imperative that the courts should impose deterrent sentences on persons convicted of kidnapping so that it is brought home to all would-be kidnappers that it does not pay to commit this crime in Singapore."

12. On appeal the then Chief Justice Wee Chong Jin setting aside the sentences of death and substituting life imprisonment with strokes of the cane said:

"... Hard and fast rules cannot be laid down and the determination of the right measure of punishment must depend on the variety of considerations that apply in the case before the court.

... It is a long and well established principle of sentencing that the legislature in fixing the maximum penalty for a criminal offence intends it only for the worst cases. ... the maximum sentence prescribed by the legislature would be appropriate where the manner of the kidnapping or the acts or conduct of the kidnappers are such as to outrage the feelings of the community."

13. It is difficult to say that death is the maximum penalty in all cases where it is imposed. When Recorder Jeffreys delivered sentence of the twelve highest judges of England on Richard Langhorn and five other prisoners, he said:

"That you be conveyed from hence to the place from which you came, and from thence you be drawn to the place of execution, upon hurdles; That you be there severally hanged by the neck; That you be cut down alive; That your privy members be cut off; That your bowels be taken out, and burned in your view; That your heads be severed from your bodies; That your bodies be divided into four quarters, and your quarters to be at the king's dispose. And the God of infinite mercy be merciful to your souls." (The Bill of Rights: Irving Brant p 146)

14. Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys of The Bloody Assizes sent to their deaths in the pseudo trials that followed Monmouth's attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were awaiting the hangman in three countries. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, "a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters" along the highways.

The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments.

Irving Brant: The Bill of Rights pg 157 – 158

15. The Court of Appeal of Singapore in the kidnapping case found that the trial judges had erred when they took the view that life imprisonment should be imposed only when there are some very exceptional circumstances which do not justify the imposition of the death sentence and on this erroneous view concluded that the death sentence should not be imposed on all the accused.

16. The Court of Appeal ruled that the reverse was true. The facts and circumstances did not point to the case as being one where the maximum sentence of death would be the appropriate sentence proceeded to set aside the sentence.

17. Counsel for the appellants did not raise any constitutional law arguments. They were content to deal with the improper exercise of judicial discretion when the five men were sentenced to death. The improper exercise of discretion would not have arisen if the legislature had made death a mandatory death sentence. A mandatory death sentence would not only have taken away the sentencing power from the hands of judges but may also have prevented an erroneous view of the law, of the judges being discovered and put right.

18. Capital punishment is a discretionary sentence for a number of offences under the Singapore Penal Code:

- (a) waging war against the Government (S121) of the Penal Code;
- (b) abetting mutiny (S132);
- (c) giving or fabricating false evidence as a result of which an innocent person suffers death (S194);
- (d) abetting the suicide of a minor, an idiot, an insane or intoxicated person (S305);
- (e) gang robbery, in which a member of the gang commits murder, renders all the members of the gang liable to the death sentence (S396);
- (f) attempted murder by a person serving sentence of life imprisonment if hurt is caused (S307).

19. Discretion to the Judges is consistent with S53 (Cap. 224) of the Penal Code which provides that the punishments to which offenders are liable under the provisions of the Code are –

- (a) death etc.

This is reinforced by section 2 of the Penal Code which provides that every person shall be liable to punishment and not otherwise. Section 53 and section 2 of the Code are “existing laws” and must be read after 1965 with the guarantees provided by the Constitution before life is deprived and the power to modify laws given to the courts by Article 162. S302 of the Penal Code providing for a mandatory death sentence was not consistent with S2 and S53 of the Penal Code before 1965. It is inconsistent with S2 and S53 of the Penal Code and the Constitutional guarantees and the Doctrine of Separation of Powers after 1965 when the Constitution commenced and there is a crying need for it to be modified under Article 162.

20. If it is accepted that there will be no judicial impediment in the way judges can be depended upon to impose the death sentence in kidnapping cases and the above offences,

there are no valid grounds for believing that the Singapore judiciary will not impose the death sentence in a proper case of drug trafficking, or murder where there are no mitigating circumstances. The constitutional provisions will then be given due weight.

Mandatory Death

21. The mandatory nature of the death sentence was regarded as a troubling aspect in 1949 resulting in the appointment of a Royal Commission. "Rigidity is the outstanding defect of our law of murder". (Cmnd. 8932 para 22)

22. Sir John Beaumont suggested that the mandatory element of the death sentence be removed and the trial judge be given a discretion to substitute a lesser sentence. The Royal Commission however, noted that:

"Almost all our other witnesses, including all who were members of the English judiciary and the Lord Justice General of Scotland expressed strong opposition to any proposal to give such a discretion to the Judge." (para 540)

23. It was argued that the exercise of such a discretion would impose on the Judge a heavy, indeed an intolerable responsibility. The Commission agreed with this view. (para 549)

24. The decision in *Sia Ah Kew's* case suggests that Singapore judges are made of sterner stuff and can be depended upon to pronounce the death sentence in a proper case.

The Privy Council on Mandatory Death

25. The constitutional argument against the mandatory death sentence was raised for the first time in 1980 before the Privy Council in the case of *Ong Ah Chuan v PP* [1981] AC 648 when the Privy Council was Singapore's final court of appeal. It was submitted that the mandatory death sentence is unconstitutional because it deprives a convicted defendant of his life otherwise than "in accordance with the law" (see Article 9(1)) and contrary to the requirement of "equal protection of the law." (see Article 12(1))

26. The guarantee against depriving a person of life must be in the exercise of judicial discretion in the light of circumstances of the case. It would be wrong to exclude from the judicial function considerations peculiar to the defendant. Standardisation of the sentencing process leaves no room for judicial discretion. It ceases to be judicial, since the court cannot take into account the quantity of the drug, whether the defendant was emotionally distraught, whether there was potential for reformation or rehabilitation, age of defendant and other personal circumstances. The penalty under the Misuse of Drugs Act is determined by the amount of the drug rather than by the heinous nature of the crime. The equal protection provision is offended where there is no rational legislative purpose to explain or justify taking away the right to plead in mitigation.

27. Lord Diplock dealt with the mandatory sentence of death upon conviction briefly. He said:

"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 defendants 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 defendants' 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.

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."

28. Lord Diplock's decision was followed in Malaysia in *PP v Lau Kee Hoo* [1983] MLJ 157 when the mandatory sentence was challenged on constitutional grounds. The development of Constitutional criminal procedure in Singapore has been effectively frozen since 1980. The Privy Council however, has recognized the harm done by *Ong Ah Chuan's* case. In *Reyes v The Queen* 2002 AC 235, 257. The Board said:

"Limited assistance is to be gained from such decisions of the Board as ... *Ong Ah Chuan v PP* ... made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was."

29. The Privy Council has again, on 7 July 2004 in *Watson v The Queen* [2004] UKPC 34 stated in plain terms that it is no longer acceptable to say as Lord Diplock did that there is nothing unusual in a death sentence being mandatory.

30. 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*, p244, 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."

Existing Law

31. *Ong Ah Chuan's* case is of limited use for another reason. The Singapore Constitution under Article 162 empowers the courts to construe laws brought into force after the commencement of the Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Singapore Constitution.

Article 162 was not brought to the notice of the Board when it decided Ong Ah Chuan's case and the Singapore Court of Appeal when it decided the Australian's appeal in Tuong's case.

32. In *Worme and another v Commissioner of Police of Grenada* [2004] 2 AC 430 at 451 the Privy Council considered the question whether the Grenada Criminal Code was "existing" law for the purposes of the power to construe with modifications as provided for in the Grenada Constitution Order 1973 and said (p451):

"... But all these provisions are savings clauses of a familiar kind that are designed to protect the existing law, to a greater or lesser degree, from challenge on the basis of inconsistency with the human rights provisions in the Constitution. In the case of such an exception from the code of human rights a court could be expected to apply a restrictive interpretation to the phrase "existing law". The legislatures have forestalled that by expressly extending the definition in the savings clauses to cover re-enactments etc. The Constitution of Grenada, by contrast, contains no such provision to exclude existing laws from the impact of the human rights provisions in Chapter 1. In the present case, therefore, the phrase has to be construed solely within the, very different, context of paragraph 1(1) which is designed to help bring existing laws into conformity with all the provisions of the Constitution, including the human rights provisions ..."

33. Whether the Universal Declaration of Human Rights and the European Convention of Human Rights which existed when Singapore was a colony are existing laws within the meaning of Article 162 of the Singapore Constitution remains to be judicially determined.

34. Lord Diplock in Ong Ah Chuan's case emphasized the limits of judicial capacity and was overly generous to the legislature when the Constitution required the courts to construe existing laws and laws brought into force after the commencement of the Constitution with modifications, adaptations and qualifications to bring them into conformity with the Constitution and the guaranteed fundamental liberties. The question whether human rights law were "existing laws" of the colony of Singapore was not considered.

35. Lord Diplock, said there is nothing unusual in a capital sentence being mandatory and relied on the fact that at common law and under the Penal Code of Singapore capital sentences were mandatory. He ignored the fact that the Homicide Act 1957 abolished the death penalty for murder. The Murder (Abolition of the Death Penalty) Act 1965 temporarily abolished the death penalty for all categories of murders in the United Kingdom, substituting a sentence of life imprisonment. The abolition of the death penalty for murder was made permanent in 1969. Lord Diplock was obliged to construe the provisions of the Singapore Penal Code and the Misuse of Drugs Act having regard to, inter alia, Article 162 of the Constitution. He did not say that reference to Article 162 was unnecessary. The Privy Council has now put provisions similar to Article 162 to good use in its later decisions.

36. In *Fox v The Queen* [2002] AC 284, before the Privy Council, but not from Singapore, the defendant was sentenced to death on two counts of murder pursuant to section 2 of the Offences Against The Persons Act 1873, which prescribed a mandatory death sentence for murder in the following terms "*whosoever is convicted of murder shall suffer death as a felon.*"

37. The question before the Board was whether the mandatory death sentence violates the right to the life provision in the Constitution read alone or in conjunction with the protection of the law provision. The Constitution like the Singapore Constitution was based on the Westminster model.

38. The challenge to the death penalty contended first that section 2 in so far as it provides for a mandatory death sentence in the case of all murders is inconsistent with the right not to be subject to inhuman or degrading punishment or treatment under the Constitution and is therefore void, secondly that since section 2 is void, the death penalty imposed was unlawful and should be quashed.

39. The Privy Council held section 2 inconsistent with section 7 of the Constitution to the extent that it requires the Court to impose the death penalty whenever someone is convicted of murder. The sentence was quashed.

40. The Privy Council in this case then proceeded to exercise the powers provided by the provision which corresponds to Article 162 of the Singapore Constitution which dealt with existing laws:

“The existing laws shall, ... be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution ...”

and construed section 2 as providing:

“Whosoever is convicted of murder **may** suffer death as a felon” (p.290) instead of “shall suffer death as a felon”

41. The effect of the construction being whenever someone is convicted of murder he may be sentenced to death or else he may be sentenced to a lesser punishment. The selection of the appropriate sentence will be a matter for the judge having regard to all the circumstances of the case. Before sentence is imposed the judge may be asked to hear submissions and, if appropriate, evidence relevant to the choice of sentence.

The Invalidating Provision

42. In *Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 at 180 the Supreme Court of Ireland considered the invalidating article in the Constitution and demonstrated a use of the invalidating provision in the Constitution in a limited way which was open to Lord Diplock. The court said:

“The Constitution invalidates the section only to such extent as it is inconsistent with, or repugnant to, the Constitution, ie, to the extent that the selection of the penalty is committed to the Commissioners of Customs (now, the Revenue Commissioners). The section therefore remains intact but with the words, “at the election of the Commissioners of Customs” (now, Revenue Commissioners), deleted therefrom.”

43. The invalidating provision in the Singapore Constitution reads as follows:

“Supremacy of the Constitution

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.

The Privy Council in Ong Ah Chuan’s case and the Court of Appeal in Tuong’s case have not considered it appropriate to invoke this article.”

44. The Privy Council has for practical purposes discredited Ong Ah Chuan’s case as being of rudimentary value on the question of the mandatory death sentence. The question is whether the Board’s decision in Ong Ah Chuan’s case has been given a fresh lease of life after it has been declared not good law by the Privy Council in the recent decision of the Court of Appeal in the third case.

The Australian Challenge

45. In the third case an Australian challenged the legality of the mandated sentence of death, before the Singapore Court of Appeal, inter alia, on the ground that the death sentence

was unconstitutional and therefore illegal. The appellant relied on Articles 9, 12 and 93 of the Constitution of the Republic of Singapore (1999 Reprint).

46. Nguyen Tuong Van (Tuong) an Australian of Vietnamese origin, aged 24, was a passenger on Flight M162 from Cambodia which landed at Changi International Airport, Singapore on 12 December 2002 to board a Qantas flight to Melbourne the same day. When Tuong walked through the metal detector at the Singapore airport the alarm was triggered and Tuong was searched. The officer carrying out the search felt something bulky and Tuong was taken to the search room.

47. A plastic packet was strapped to his back with adhesive tapes. A second packet was found in his haversack. The two packets contained 151.5 grams of pure diamorphine.

48. Tuong was charged and convicted with importing 396.2 grams of diamorphine into Singapore without authorization under Section 2 of the Misuse of Drugs Act and sentenced to death. In Australia he would not be punished and sentenced to a death under a mandatory death sentence for importing or trafficking. If the accused had completed the offence he and his masters intended to commit, he would not have been seen sentenced to death.

49. At the trial in the High Court several submissions were made. It was contended, *inter alia*, that the statements made by Tuong were inadmissible because they were recorded in breach of Article 36(1) of the Vienna Convention on Consular Relations 1963 (VCCR).

50. In attacking the legality of the death sentence, it was submitted that the mandatory sentence of death prescribed under section 7 of the Misuse of Drugs Act was a maximum and not a mandatory sentence. If the sentence was mandatory it was illegal and should not be administered because it violated Articles 9, 12 and 93 of the Constitution of the Republic of Singapore. The relevant articles are as follows:

- “9. (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- (2)
- (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
- (4)
- (5)
- (6)”
- “12. (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
- (3)”

“93. 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.”

51. Kan Ting Chiu J ruled that there was no breach of the Convention as the Australian High Commission was notified within 20 hours of the arrest. Even if there was a breach the accused had failed to show that he had suffered prejudice which would make it wrong for the statements made during custody, without the benefit of legal advice to be admitted.

52. Dealing with the sentencing power, which is part and parcel of judicial power he said:

“84. The degree of moral blameworthiness of an offender and other mitigating and aggravating factors are taken into consideration for sentencing in the vast majority of the offences where the sentence is not fixed. The failure to do so could raise questions whether the sentencing power is properly exercised. But where the legislature has by the proper exercise of its powers prescribed that for offences involving large quantities of drugs the offenders shall be punished with death, the punishment will be imposed without hearing pleas in mitigation, and there is no denial of the equal protection of the law to the offenders.”

53. The question whether it is a proper exercise of legislative power to fix a mandatory death sentence or whether it is an interference with judicial power was considered by the trial judge. He said:

“93. The distinction between the judicial power and the legislative power on the punishment of offenders is very well set out by the Supreme Court of Ireland in *Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 at 182:

There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. ... The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts.

and at 183:

[T]he selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ...

94. On that basis, there can be nothing objectionable in s33 and the Second Schedule of the Misuse of Drugs Act.”

54. Deaton's case involved the Commissioners power to elect which of the two penalties prescribed the Court is to impose for a customs offence. The penalties did not involve a death sentence.

55. It is a matter of some regret that the learned judge was not invited to consider the application of Article 162 of the Constitution. It would appear that it was also not submitted or argued that a distinction should be made between a mandatory sentence, fixing a fine or a term of imprisonment and a death sentence.

The Appeal

56. Tuong appealed against both his conviction and the sentence of death passed on him. The legality of the death sentence was attacked. It was argued:

- (i) that the mandatory death sentence was merely a maximum sentence and not a mandatory sentence;
- (ii) that the mandatory sentence violated Article 12 of the Constitution;
- (iii) that the mandatory death sentence violated Article 9 of the Constitution as it amounted to arbitrary punishment and was not in “accordance with the law”;
- (iv) that death by hanging was a grossly disproportionate to the offence and was a cruel inhuman and degrading punishment constituting a breach of international law;
- (v) that the mandatory sentence violated the principle of separation of powers enshrined in Article 93 of the Constitution.

57. When the mandatory death penalty was introduced for the unauthorised import of more than 15g of diamorphine the Minister who tabled the Bill said:

“The death penalty will ... be imposed for the unauthorized 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.”

58. Singapore law requires “A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence ... if they fall into our mercy...” Magna Carta 1215 Article 20. Drug offences are not always trivial offences but the existence of a rational legislative purpose though a necessary condition for the constitutionality of a sentence does not stand alone. Where the punishment is a mandatory death sentence, the importance of proportionality must be considered.

“Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. No court would today uphold the constitutionality of a statute that makes the death sentence a competent sentence for the cutting down of trees or the killing of deer, which were capital offences in England in the 18th century. But murder is not to be equated with such “offences”. The wilful taking of an innocent life calls for a severe penalty, and there are many countries which still retain the death penalty as a sentencing option for such cases. Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue.”

South African case of SV Makwanyane 1995 (3) S.A. 391, p.433

59. The Court of Appeal was of the view that the interpretation of the punishment provision for the offence ... must promote the clear objective. 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 there is a more serious sentence beyond the death sentence and is manifestly untenable. There is only one sentence to impose and that is the sentence of death. It is a matter of regret that the sentence passed by Recorder Jeffreys referred to in para 13 was not cited.

The Concept of Equal Protection

60. The equal protection concept in Article 12(1) requires citizens be treated fairly when compared to each other. Racial and other unacceptable classifications in the law are referred to as “suspect” classifications and discrimination according to such classification is “invidious”. The court will find such classification unconstitutional unless there is justification for the government to uphold them (*Loring v Virginia* 388 US1 (1967)). It is the court’s duty to protect individuals against unfair and unreasonable classifications.

61. Constitutional protection under “equal protection of the laws” under Article 12(1) preserves individual liberty and is linked with the “due process of law” in Article 9(1). The scope of fair criminal procedure arises whenever the state seeks to intrude upon the liberty of the citizen e.g. by taking away as in this case the right to mitigate after conviction. Mitigation makes for a fair and reasonable criminal procedure, and humane punishment, which will protect individuals against unfair and unreasonable sentences in classifications created by law. Mitigation after conviction has existed in the law for many years before and after the commencement of the Constitution. It was “existing law” in 1980 when Ong Ah Chuan’s case was decided and in [2004] when Tuong’s case was decided.

62. American and Indian courts have explained two of the ways by which a legislative classification can offend against equal protection. Legislation can be “under inclusive” or “over inclusive” with respect to the relevant mischief class. The legislation is “under inclusive” if the classification of persons adopted fails to embrace within the mischief class persons which should be embraced in order to satisfy the legislative goal. Under inclusiveness results in the unequal treatment of equals. If the classification embraces persons who should not be embraced it is “over inclusive”. Tuong was on his way to Australia and landed in Singapore only because he had to change flights, he fell within the over inclusive class. It would not have been the intention of Parliament to send foreigners exporting drugs from Cambodia to Melbourne to the gallows. It would be “over inclusive”.

63. A facet of the equal protection clause ... is that while similar things must be treated similarly, dissimilar things should not be treated similarly. (David Pannick: *Judicial Review of Death Penalty* p 186-87).

64. A mandatory death penalty is equal treatment of unequals generally in that:

- (i) persons with distinct criminal records are given a mandatory death penalty as equal treatment;
- (ii) there is unequal treatment of those convicted of trafficking in more than 15 gm, because unlike other offenders convicted of offences where the sentence is not mandatory they are unable to plead in mitigation of sentence;
- (iii) those who traffic in less than 15 gm are not subjected to a mandatory or a discretionary death penalty even though they are offenders within the mischief class. The legislation is under inclusive;
- (iv) there is unequal treatment of equals in that whilst waging war against the government, which is a more serious offence carries a discretionary death sentence under S121 of the Penal Code drug trafficking in 16 gm of heroin carries a mandatory death sentence.

Reasonable Classification?

65. The Court of Appeal adopted Lord Diplock’s two-step “reasonable classification” test for validity under Article 12(1):

- (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.

66. Lord Diplock in *Ong Ah Chuan's* case said:

“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 15 gm of heroin or more is so low as to be purely arbitrary.”

67. It is for the court to decide whether a classification is invidious after the law has been enacted.

68. In *Woodson v North Carolina* 428 US 280 (1976) Justice Stewart said:

“While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting the penalty of death.” pg 112 of *Judicial Review of the Death Penalty*

69. Justice Palekar in *Jagmohan Singh v State of Uttar Pradesh* 1973 2 SCR 541 has ruled that the discretionary death sentence imposed for murder under S302 of the Indian Penal Code is not unconstitutional. He said:

“The court is primarily concerned with all the facts and circumstances in so far as they are relevant to the crime and how it was committed ... he and his counsel are at liberty to address the court not merely on the question of guilt but also on the question of sentence ... it is necessary to emphasise that the court is principally concerned with the facts and circumstances, whether aggravating or mitigating, which are connected with the particular crime under inquiry ... hence, the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21.” pg 112 of *Judicial Review of the Death Penalty*

70. Article 21 of the Indian Constitution which deals with the liberty of the individual is in substance similar to Article 9 of the Singapore Constitution.

71. Mandatory death sentences are seen as arbitrary for a variety of reasons:

- (i) The fundamental right to life and liberty requires the sentencing court to consider aggravating and mitigating facts to ensure that justice is done according to law.
- (ii) The mandatory sentence of death becomes a cruel instrument, where guilt is established with the aid of statutory presumptions and statements recorded whilst the accused is in custody without the benefit of legal advice.

- (iii) The mandatory death sentence does not have a safeguard against capricious imposition of death sentences. Trial by a single judge cannot remove the danger because claims to judicial superiority over human frailty is something that Viscount Dilhorne found difficulty in accepting in *AG v BBC* [1980] 3 NCR 109, 112. A doctrine of judicial fallibility is to be preferred as seen in the kidnapping case referred to in the first case of *Sim Ah Kew*.

A Differentiating Measure

72. The Singapore Court of Appeal after noting that the discrimination that was challenged in *Ong Ah Chuan's* case was that between imposition of the death penalty upon that class of individuals trafficking in more than 15 gm or more and the imposition of a death penalty upon that class of individuals trafficking in less than 15 gm ruled that a "differentiating measure" such as the 15 gm differentia is valid if:

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

73. Article 68 of the Constitution defines "differentiating measure" for purposes of Part VII of the Constitution and gives some guidance on the approach that should be taken when legislation is examined. Indirect consequences must also be considered. The definition of "differentiating measure" in the Constitution reads:

"differentiating measure" means any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community.

74. Mandatory death sentences cause prejudice by indirectly taking away humanity and the right to mitigate. It is a prejudicial "differentiating measure".

The Constitutional Issue

75. The constitutional issue in plain term was whether equal protection was denied to the accused by the MDA when it classified the offence as punishable by a mandatory death sentence. Legislative power cannot be exercised under our Constitution by interfering upon constitutionally defined and guaranteed personal liberties, and the doctrine of Separation of Powers. In this case the right to mitigate according to law, which existed under common law and the Criminal Procedure Code before the MDA was enacted, is part of the right of the accused in the sentencing phase of a criminal trial. Montesquieu not only wrote about the Separation of Powers he also said:

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."

Arbitrary Punishment

76. The Court of Appeal dealt with the appellant's argument that the mandatory death sentence amounted to arbitrary punishment because it flouted the equal protection guarantee in Article 12(1) and precluded proportional and individual sentencing by following Lord Diplock's ruling that reference to "law" was reference 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" when the articles can be traced to the Indian Constitution via the Malaysian Constitution.

77. Lord Diplock gave a very narrow interpretation to “law” by limiting it to the common law of England after a written Constitution had commenced at the hearing of Ong Ah Chuan's case. The Public Prosecutor had submitted that “the Public Prosecutor accepts the principle of reasonableness and fair and just procedure accorded by the Indian authorities to the words “in accordance with law” in Article 9(1) ([1981] AC p660).

78. The Court of Appeal said:

“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 civilized society which every citizen of Singapore must endeavour to preserve and protect.”

79. The Court of Appeal considered the later Privy Council decisions on which the appellant relied and said:

“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). These arrangements ... showed that an integral part of the prohibition against cruel and inhuman treatment or punishment was proportionality and individualized sentencing. It was against this background that the Privy Council ruled S102(3)(b) of the Belize Criminal Code to be indiscriminate and therefore void ...”.

“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.”

Conclusion

80. The Court of Appeal's decision in Tuong's case is a landmark decision not so much for its dependence on Ong Ah Chuan's case, which has limited use but for the way it dealt with the question raised by the appellant who relied on issues of international human rights law on capital punishment and the argument that a state's domestic laws on capital punishment should not be applied because it contravened international human rights law.

81. The potential use of international law to infuse meaning into domestic law on punishment that is rigid, cruel, inhuman or degrading to make it more flexible and human by the court's exercising discretionary powers when the mandatory sentence is prescribed is now an arguable case.

82. Dealing with the specific mode of execution as being contrary to the prohibition in customary international law against cruel and inhuman treatment in Article 5 of the UDHR which provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”

the Court said:

“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.”

83. Singapore cannot for long be a global city and player in the world’s affairs in every respect, except when it comes to punishing offenders for wrongs done.

84. It is now open to an accused to show through experts in international law that a mandatory death sentence is cruel and inhuman punishment under customary international law. There is light on the path.