IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE
Criminal Motion. of 2012

In the Matter of Criminal Case No. 26 of 2008 – Public Prosecutor-vs-Yong Vui Kong

And

In the matter of Criminal Appeal No. 13 of 2008 – Yong Vui Kong vs Public Prosecutor

And

In the matter of Yong Vui Kong vs Public Prosecutor [2010] SGCA 20

And

In the Matter of Article 9 and 12 of the Constitution of the Republic of Singapore

And

In the Matter of Supreme Court Judicature Act cap 322

And

In the Matter of Yong Vui Kong

(Fin No. G0623288X/Malaysian)

... *Applicant*

v

Public Prosecutor

... *Respondent*

AFFIDAVIT

I. **M. Ravi** (NRIC No. S[redacted]I) c/o 101 Upper Cross Street #05-45 People's Park Centre Singapore 058357 do solemnly and sincerely affirm and say as follows:-

1. I am the counsel having conduct of this matter. I make this affidavit in support of the application filed herein.

2. Insofar as the matters deposed to herein are from my personal knowledge they are true. Insofar as they are from documents in my possession they are true to the best of my knowledge information and belief.

3. The Applicant was arrested on 13 June 2007 and convicted of trafficking in 47.27g of diamorphine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) and sentenced to death by the High Court on 14 November 2008 (***PP v Yong Vui Kong* [2009] SGHC 4).**

4. The Applicant's Criminal Appeal No 13 of 2010 was dismissed on 13th May 2010 by the Court of Appeal (***Yong Vui Kong v Attorney-General* [2010] SGCA 20).**

5. The Applicant's clemency petition was submitted to the President on 14 July 2011.

6. The Applicant, a Malaysian citizen, was charged with trafficking diamorphine and sentenced to death, while the mastermind (his "boss",Chia Choon Leng (Chia)), a Singaporean citizen, had the charges against him withdrawn and was only detained under executive action pursuant to the *Criminal Law (Temporary Provisions) Act* ('CLTPA'). Chia is currently still in detention, and is likely to be released in 1 to 2 years. At trial, the prosecution revealed that the charges were withdrawn because of the 'difficulty of the evidence' (refer to letter from Deputy Public Prosecutor Chua

Ying-Hong dated 25 October 2011, annexed herewith and marked ***"MR-1"*** and Notes of Evidence, Day 2 – Page 11-14 annexed herewith and marked ***"MR-2"***).

7. By virtue of the recent decision of the Court of Appeal in ***Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2** it is now possible for the first time in Singapore to definitively encapsulate the principles governing the situation where the issue before a court hearing an application for judicial review on constitutional grounds is whether there has been a breach of Article12(1) of the Constitution by virtue of a judicially reviewable differentiation in charges by the Attorney-General between two offenders arising out of the same enterprise as follows :

   a. it is contrary to any notion of justice that (all other things being equal) a less culpable offender should be charged with a more serious offence (and subjected to a more serious punishment) than a more culpable offender when both are involved in the same criminal enterprise, especially when one offence is a non-capital offence and the other is a capital offence, *(Ramalingam, supra, para.37)*

   b. the Attorney-General may not exercise his prosecutorial power under Art 35(8) of the Constitution in breach of Art 12(1) (or, for that matter, in breach of any other fundamental liberty set out in Part IV of the Constitution) – but, if the offender alleges such a breach has occurred in his case, the burden lies on him to produce evidence ***(Teh Cheng Poh v Public Prosecutor [1979] 1MLJ 50)***

   c. the Court will ask itself whether the evidence before it, including the very fact of differentiated charges is sufficient to raise a prima facie case of a possible infringement of Art 12(1). *(Ramalingam,supra,para.32.)*

d. once the offender shows, on the evidence before the court, that there is a prima facie breach of a fundamental liberty (ie that the Prosecution has a case to answer), the Prosecution will indeed be required to justify its prosecutorial discretion to the court but the offender must specifically produce prima facie evidence of bias or the taking into account of irrelevant considerations by the Attorney General and in the absence of prima facie evidence to the contrary, the inference would be that the Prosecution has based its differentiation on relevant considerations, ***(Ramalingam Ravinthran v Attorney-General*** **[2012] SGCA 2 paras. 28, 70, 71).**

e. in approaching the above issues the Court will conduct an analysis of the interaction between the right to equality before the law under Art 12(1) and the prosecutorial power in Art 35 (8); *(Ramalingaam,supra,para.32)*

8. Prior to Ramalingam the governing principles and in particular the manner in which a court would approach an article 12(1) differentiation issue were less well clarified and more ambiguous than they are now.

9. With the benefit of hindsight and having regard to the examination by the Court of Appeal in *Ramalingam* of the decision in ***Sim Min Teck v PP*** **(1987)SLR65** , it is now clear that an analysis of the interaction between the right to equality before the law under Article12(1) and the prosecutorial power under Article 35(8) is required. The Court should ask itself whether the evidence before it including the very fact of the differentiated charges is sufficient to raise a prima facie case of a possible infringement of Article 12(1) *(Ramalingam, para.32)*

10. It is submitted that applying this mode of analysis to the facts of this case, by asking whether the evidence before the Court including the very fact of not merely differentiated but wholly one-sided charges, there is raised a prima facie case of a possible infringement of Article 12(1). The evidence referred to in the previous sentence is to be found in the transcript of the trial and is more particularly identified in the Affidavit of the Applicant which accompanies this Notice of Motion. It includes evidence of the status of the Applicant as a mere courier and of the co-actor as the party who was a controller or supplier in relation to drugs.

11. *Ramalingam* has now also made clear that in a case involving two offenders, one of whom is less culpable, if all other things being equal between them, the Attorney-General should not exercise his prosecutorial power differentially as between them, for to do so would be prima facie either arbitrary or biased, and therefore contrary to Article12(1). This is especially so when one offence is a non-capital offence and another is a capital offence. Once the Court has found that one offender was less culpable then the other, if it sees no other legitimate reason for differentiation between the two of them it ought to find that a prima facie breach of Article 12(1) of the Constitution is made out with respect to the prosecution of the less culpable offender and it should require the prosecution to justify its decision or be found to be in breach of Article 12(1) (*Ramalingam*, para. 37)

12. The evidence in this case shows that Chia had instructed Yong to pay him the proceeds from the sale of the drugs upon the successful delivery of those drugs. Chia was thus either Yong's controller or supplier in relation to the latter's drug trafficking. As, in

this situation Chia occupied a higher or more significant position in the supply chain of illegal drugs, then his criminal activities would have been more significant in terms of the potential harm caused to society. In comparison, Yong was a mere courier. Thus, from a policy perspective, Chia could be said to have been more culpable an offender than Yong in the context of combating drug trafficking in Singapore. This mirrors the factual situation deduced by this Court in *Ramalingam* in relation to its analysis of *Thiruselvam* at para 37.

13. The evidence goes further than the above. As the transcript shows, Chia was a known person to the Prosecution and Police. The Applicant had cooperated with the investigators and identified Chia when shown his photo, but did not want this to be publicly known because he feared for his safety as well as that of his family (refer to the Applicant's Statement given to Police on 16 June 2007, page 195[Annexed herewith and marked **"MR-6"**]). Even though Chia was in custody during the time of the Applicant's trial, Chia was not called as a witness by the Prosecution. The Applicant's defence counsel at trial also did not call Chia as a witness because of his fears of repercussions for his family. The Applicant referred to Chia as his 'boss' in his statements to the Police, and stated that Chia was the one who asked him to deliver goods into Singapore, without telling the Applicant the contents. The goods turned out to be diamorphine.

14. The Singapore Government had reason to believe that Chia was involved in criminal activities, and charges were laid against him but these were later withdrawn (see transcript in **"MR-2"**). The then Deputy Prime Minister and Minister for Home Affairs Mr Wong Kan Seng subsequently mentioned in a written answer to the Singapore

Parliament, in response to Ms Sylvia Lim's question raised on 15 September 2010, that other members of the "syndicate" were detained and several had been prosecuted for trafficking (see attached letter sent to Ministry of Home Affairs dated 18 October 2011, annexed herewith and marked ***"MR-5"***). He also pointed out that one of them was detained under the CLTPA, referring to Chia Choon Leng (see letter from Deputy Public Prosecutor Chua Ying-Hong dated 25 October 2011, ***Exhibit "MR-1"***).

15. Unlike the situation in *Teh* and *Thiruselvam*, where both actors were charged one with a more serious offence then the other, in this case the less culpable offender has been charged with a capital offence while the more culpable controller, albeit initially charged, has not been prosecuted at all-though (in witness to his culpabilty in the eyes of the Attorney-General), he has been and remains detained executively.

16. In the above circumstances, and applying the newly enunciated mode of analysis and approach of the Court in Ramalingam, it is submitted that the Applicant is able to raise a prima facie case of a breach of Article 12(1) .

17. The evidence on record is sufficient to rebut the presumption of constitutionality with regards to the Attorney-General's decision to prosecute the Applicant for a capital offence while not prosecuting a more culpable party at all. The presumption is rebutted by

    a. the fact that it is contrary to any notion of justice that (all other things being equal) a less culpable offender should be charged with a more serious offence (and subjected to a more serious punishment) while a more culpable offender

is not prosecuted at all when both are involved in the same criminal enterprise, especially when the punishment of a less culpable offender is death;

b. the lack of any apparent reason for the Attorney-General's decision other then a difficulty of evidence which is itself difficult to follow given the evidence against Chia;

c. the de facto grant of a pardon to Chia by the Attorney – General when such a power is vested exclusively in the President;

d. the fact that Chia was not a prosecution witness in the trial of the Applicant nor is there any evidence of him being willing to do so. On the contrary the Applicant was willing to give evidence and did give evidence against Chia.

e. Although it is true that the applicant now stands convicted of the offence of trafficking drugs, it cannot be asserted with any degree of certainty what would have been an outcome of a trial in which both the Applicant and Chia were charged since the prosecutor might have been inclined perhaps even at the suggestion of the court to consider reducing the charge against the applicant, he being the less culpable party .

f. The fact that this case fits precisely within the category of unlawful discrimination described by the Court of Appeal in *Ramalingam* when it observed ;

"This conclusion does not mean that an aggrieved offender can never prove a case of unlawful discrimination. Such a case may be self evident on the facts of a particular case (for example, where a less culpable offender is charged with a more serious offence whilst his more culpable co-offender is charged with a less serious offence when there are no other facts to show a lawful differentiation between their respective charges).

18. This case is stronger because Chia is not charged with a less serious offence but with no offence at all. As the accompanying affidavit of Yong Vui Kong shows the mere assertion by the Attorney-General that the charges against Chia were withdrawn because of a difficulty of evidence". does not withstand analysis.

19. The Applicant submits that there has been a violation of his right to equality before the law under Article 12(1). This arises because of the different treatment on the same facts of himself and Chia notwithstanding that (if the facts are as appears from what is now known) there is no relevant differentiation between them as regards the ingredients of the offence. Indeed, if the situation is as now appears, the Applicant could be described as a mere courier while Chia whom the Applicant refers to in his evidence as his boss and was according to his evidence his controller and his supplier appears to have been let off with a mere detention.

20. The violation of equality before the law is sufficient in and of itself to warrant intervention by this Honourable Court. Such intervention would serve an additional purpose in this case by reminding the Attorney-General of the legislative priority intended to be given as between categories of offenders under the Act.. As noted by KS Rajah SC in the Law Gazette article 'Inside the Bar – the Mandatory Death Sentence', the purpose of the mandatory death penalty is 'not intended to sentence petty morphine and heroin pedlars to death.' (annexed herewith and marked ***"MR-3"***). It is to target the masterminds behind the drug trafficking enterprises, not the low-level 'pedlars' recruited, forced or misled to traffic the drugs. This is quoted from the

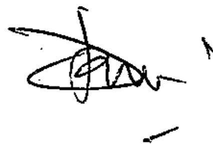
relevant second reading speech on 20 November 1975 by the then Minister for Home Affairs and Education, Mr Chua Sian Chin (annexed herewith and marked *"MR-4"*):

> *'The death penalty will also 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.**' (emphasis added).*

21. In light of the above, the Court should quash the conviction and send the matter back to the Attorney General to consider how to proceed in a manner that complies with Article 12 against joint actors in relation to a joint course of conduct on the same date giving rise to the same character of alleged criminal activity under the Misuse of Drugs Act notwithstanding a difficulty of evidence

22. For all these reasons, I pray that this Honourable Court grant the Applicant's application.

AFFIRMED by the abovenamed }
M. RAVI }
On this day of January 2012 }



Before me,

A COMMISSIONER FOR OATHS

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE
Criminal Motion No. of 2012

In the Matter of Criminal Case No. 26 of 2008 – Public Prosecutor-vs-Yong Vui Kong

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... *Applicant*

v

Public Prosecutor

... *Respondent*

****

AFFIDAVIT

M. Ravi
Messrs L. F. Violet Netto
101 Upper Cross Street
#05-45 People's Park Centre
Singapore 058357
Tel: 6533-7433
Fax: 6532-4301
Ref: MR 6049.09

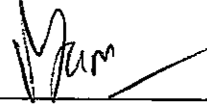
Dated this day of January 2012

THIS IS THE EXHIBIT MARKED **"MR-1"**

REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF **JANUARY 2012**

BEFORE ME,



A COMMISSIONER FOR OATHS

Telephone: 6336 1411
Telegraphic Address: PROSECUTOR
Fax:
Civil Division : 6332 5984
Criminal Justice Division : 6339 0286
International Affairs Division : 6338 2979
Law Reform & Revision Division : 6332 4700
Legislation Division : 6332 5965
Corporate Services Division : 6332 5276

ATTORNEY-GENERAL'S CHAMBERS
1 COLEMAN STREET #10-00
SINGAPORE 179803

In reply, please quote our reference number :

Our Ref: AG/CJD/CAB/ODS/2009/2
Your Ref: MR.6049.09

25 October 2011

M/s L.F. Violet Netto
101 Upper Cross Street
#05-45 People's Park Centre
Singapore 058357

Attn: Mr M Ravi

Dear Sir,

YONG VUI KONG V PUBLIC PROSECUTOR
CRIMINAL APPEAL NO. 13 OF 2008

I refer to your letter dated 19 October 2011.

2. Your client, Mr Yong Vui Kong, had, in his statement recorded on 3 July 2007 (Exhibit P92), identified the alleged mastermind to be one Chia Choon Leng ("Chia"). However, your client also made it clear in the same statement that he did not wish to identify Chia in court. Your client had further requested that Chia not be informed that your client had identified him.

3. The Prosecution did not call Chia as a witness because his evidence was not necessary for the Prosecution's case. Nevertheless, the Prosecution had, on two separate occasions in the course of the trial, informed the court and the defence that Chia had been detained under the Criminal Law (Temporary Provisions) Act. The relevant extracts from the Notes of Evidence are annexed hereto for your reference.

4. Your client was represented by Mr Kelvin Lim and Mr Peter Dendroff at the trial, and Chia's detention under the Criminal Law (Temporary Provisions) Act was disclosed to them before the Defence's case was called, as is evident from the Notes of Evidence. However, Mr Kelvin Lim and Mr Peter Dendroff chose not to call Chia as a witness. Chia was therefore not produced at the trial.

Yours faithfully

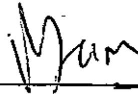
CHUA YING-HONG
DEPUTY PUBLIC PROSECUTOR
SINGAPORE

THIS IS THE EXHIBIT MARKED **"MR-2"**

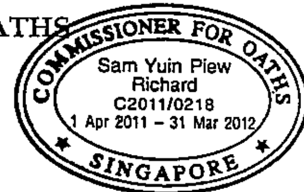
REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF JANUARY **2012**

BEFORE ME,



A COMMISSIONER FOR OATHS



1	Witness:	Para 92.
2		(P93 read by witness, continued)
3	Witness:	Para 93.
4		(P93 read by witness, continued)
5	Witness:	Para 94.
6		(P93 read by witness, continued)
7	Tan:	Your Honour, as we are moving on to the identification and the
8		marking of the exhibits, can we ask for a 5 minutes'
9		adjournment to prepare the exhibits?
10	Court:	Yes, all right. By the way, what's happened to this Chia Choon
11		Leng?
12	Tan:	Yes, your Honour.
13	Koy:	He has been detained under the Criminal Law Temporary
14		Provisions Act.
15	Court:	So he's not facing any charges at the moment?
16	Koy:	Initially, he was but due to the difficulty of the evidence, we
17		decided that we would withdraw the charges against him and
18		executive action was taken against him..
19	Court:	Yes, all right. We will stand for a short while.
20	Koy:	Obliged.
21		**(Adjourned at 11.46am)**
22		**(Resumed at 12.02pm)**
23	Tan:	Thank you, your Honour, for the adjournment.
24	Court:	Yes.
25	Q	ASP Tay, you are reminded you are still on oath.
26	Court:	Yes.
27	Q	ASP Tay, please refer to paragraph 82 of your statement marked as PS52A.
28		PS53A. Paragraph 82 of your statement, you referred to the various exhibits
29		at paragraph 82. I'm going to show you the exhibit one by one.
30	Tan:	Your Honour, we have also a list of exhibits.
31	Court:	Yes.
32	Tan:	We will start from number 36.

11.45am

1 Q Okay. Now, well, you have clarified regarding the mixed race person. Now,
2 would you turn to page 403, paragraph 20? Here you said:
3 [Reads] "I wish to add that before I parted with the male at Taman Sentosa, I
4 was made to swear that I will not open the gifts and I will not let the
5 driver"---know anything---"know about what I am doing."
6 A Yes.
7 Q So you were made to swear that you will not open the gifts?
8 A Yes.
9 Q You were not suspicious when he asked you to swear that you will not open
10 the gifts?
11 A I did not suspect.
12 Q All right. Okay. Looking at your---referring you now to the third long
13 statement that you made on the 15th of June 2007 at page 404 to 410 of the
14 agreed bundle.
15 Court: Just a minute, Mr Lim. Mr Koy, this person known as Ah
16 Hiang, is he been apprehended or not?
17 Koy: This---this is the person who was arrested, initially charged but
18 unfortunately, the evidence is not sufficient against him.
19 Court: It's the one in---under the criminal law detention.
20 Koy: That's correct, your Honour.
21 Court: Do you have his full name again?
22 Koy: Chia, C-H-I-A---
23 Court: Yes.
24 Koy: Choon, C-H-O-O-N, Leng, L-E-N-G.
25 Court: Thank you.
26 Q Yes. Would you look at the statement at 404 to 410 and confirm that this is
27 your statement? Your signatures are at the bottom and also at every other
28 pages where there are amendments.
29 A Yes.
30 Q Now, would you look at paragraph 28---No, sorry, paragraph 25. Sorry,
31 paragraph 25. Okay Now, the seventh line at paragraph 25. Now, here you
32 said that:

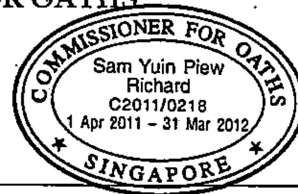
THIS IS THE EXHIBIT MARKED **"MR-3"**

REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF **JANUARY 2012**

BEFORE ME,

A COMMISSIONER FOR OATHS



Inside the Bar

The Mandatory Death Sentence

In 1965 the Constitution of Singapore enhanced and entrenched the right and dignity to life by requiring the deprivation of life to be according to law. In 1974 the Court of Appeal set aside death sentences imposed in the exercise of judicial discretion. In 1981 the Privy Council ruled that there is nothing unusual in a mandatory death sentence under the Constitution. In 2002 and 2004 the Privy Council of nine judges has said that the statement made in 1981 is not acceptable. It is not good law. In 2004 the Singapore Court of Appeal has followed the 1981 decision of the Privy Council. This article discusses the cases and the need for penal policy changes to protect and preserve a sentencing court's discretion in capital cases.

In this paper I will consider the decisions of the final Court Appeal in Singapore on the death sentence in three cases.

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 two-judge court and substituted it with life sentence plus strokes of the cane.

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.

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.

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 ('Constitution') therefore recognises that there are crimes where capital punishment is the appropriate punishment for certain offences.

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

The Court of Criminal Appeal in *Sia Ah Kew & Ors v PP* 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.

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.

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.

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.

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 civilised 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.

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, inter alia:

> 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. (T)he 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.

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 12 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 page 146)

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 page 157–158*

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.

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.

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.

Capital punishment is a discretionary sentence for a number of offences under the Singapore Penal Code ('Code'):

(a) waging war against the Government (s 121);
(b) abetting mutiny (s 132);
(c) giving or fabricating false evidence as a result of which an innocent person suffers death (s 194);
(d) abetting the suicide of a minor, an idiot, an insane or intoxicated person (s 305);
(e) gang robbery, in which a member of the gang commits murder, renders all the members of the gang liable to the death sentence (s 396); and
(f) attempted murder by a person serving sentence of life imprisonment if hurt is caused (s 307).

Discretion to the judges is consistent with s 53 of the 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 s 2 of the Penal Code which provides that every person shall be liable to punishment and not otherwise. Section 53 and s 2 are 'existing laws' and must be read with the guarantees provided by the post-1965 Constitution and the powers given to the courts to modify laws (Article 162) before life is deprived. Section 302 of the Code providing for a mandatory death sentence is inconsistent with s 2 and s 53 of the pre-1965 Code. It is also inconsistent with the Constitutional guarantees and the Doctrine of Separation of Powers after the Constitution commenced in 1965. There is a crying need for s 302 of the Code to be solidified under Article 162 of the Constitution.

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

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)

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)

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)
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

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* 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)).

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 (Cap 185) ('MDA') 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.

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.

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 recognised 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.

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.

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

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 its commencement with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with it. 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.

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 (page 451):

> 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 ...

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 Constitution remains to be judicially determined.

Lord Diplock *in Ong Ah Chuan's* case emphasised 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.

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 UK, 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 Code and the MDA 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.

In *Fox v The Queen* [2002] AC 284, an appeal to the Privy Council from another commonwealth jurisdication, the defendant was sentenced to death on two counts of murder pursuant to s 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.'*

The question before the Board was whether the mandatory death sentence violates the right to the life provision in the Constitution of that state read alone or in conjunction with the protection of the law provision. The Constitution of that state like the Singapore Constitution is based on the Westminster model.
The challenge to the death penalty is two-fold. Firstly, that s 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 of that state, is consequently void. And secondly, since s 2 is void, the death penalty imposed was unlawful and should be quashed.

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

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 s 2 as providing:

> Whosoever is convicted of murder may suffer death as a felon' (page 290) instead of 'shall suffer death as a felon

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

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 Irish 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.

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.

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

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 (1999 Reprint).

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.

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

Tuong was charged and convicted with importing 396.2g of diamorphine into Singapore without authorisation under s 2 of the MDA and sentenced to death. In Australia he would not be sentenced to 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 sentenced to death.

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').

In attacking the legality of the death sentence, it was submitted that the mandatory sentence of death prescribed under s 7 of the MDA 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. The relevant articles are as follows:

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

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.

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.

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.

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.

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 s 33 and the Second Schedule of the Misuse of Drugs Act.

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

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

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; and
(v) that the mandatory sentence violated the principle of separation of powers enshrined in Article 93 of the Constitution.

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 unauthorised import, export or trafficking of more than 30 grammes of morphine or more thtan 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.

Singapore law requires that '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...' (Article 20, Magna Carta, 1215). 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) SA 391, page 433)

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

The equal protection concept in Article 12(1) of the Constitution 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 USI (1967)). It is the court's duty to protect individuals against unfair and unreasonable classifications.

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 eg 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.

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'.

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*, page 186–87).

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 15g, 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 15g 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; and
(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 s 121 of the Penal Code, drug trafficking in 16g of heroin carries a mandatory death sentence.

Reasonable Classification?

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.

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 15g of heroin or more is so low as to be purely arbitrary.

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

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

> While the prevailing practice of individualising 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. (*Judicial Review of the Death Penalty*, page 112)

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 s 302 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. (*Judicial Review of the Death Penalty*, page 112)

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.

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

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 15g or more and the imposition of a death penalty upon that class of individuals trafficking in less than 15g ruled that a 'differentiating measure' such as the 15g 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.

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

The Constitutional Issue

The constitutional issue in plain terms 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 civilisation of any country.

Arbitrary Punishment

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.

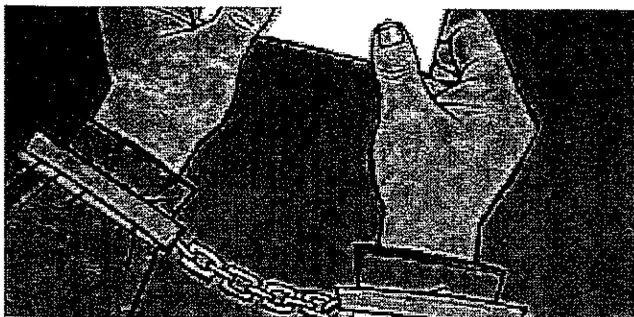
Lord Diplock gave a very narrow interpretation to 'law' by limiting it to the common law of England after a written Constitution had commenced at the hearing of *Ong Ah Chuan's* case. The Public Prosecutor had submitted that 'the Public Prosecutor accepts the principle of reasonableness and fair and just procedure accorded by the Indian authorities to the words 'in accordance with law' in Article 9(1) ([1981] AC 660).

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 civilised society which every citizen of Singapore must endeavour to preserve and protect.

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 individualised 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

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 questions, raised by the appellant. The Appellant 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.

The US Supreme Court in 1988 ruled that capital punishment for offenders under the age of 16 was unconstitutional. It has now abolished the death penalty for all offenders whose crimes were committed when they were older juveniles.

In 2002, the Supreme Court prohibited the execution of mentally retarded offences as 'cruel and unusual punishment' banned under the 8th Amendment.

The Supreme Court referring to 'evolving standards of decency' as justification said society today regards all juveniles under the age of 18 as 'categorically less culpable than the average criminal.'

It also admitted that its reinterpretation of the Constitution was influenced at least in part by foreign laws and attitudes. [Justice A Kennedy wrote, 'The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation [of the Court's ruling]' (*Economist,* Vol 374 No 8416 page 35)].

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.

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

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The Court of Appeal in Singapore 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.

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.

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.

KS Rajah, SC
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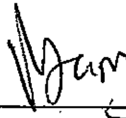
THIS IS THE EXHIBIT MARKED **"MR-4"**

REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF **JANUARY 2012**

BEFORE ME,



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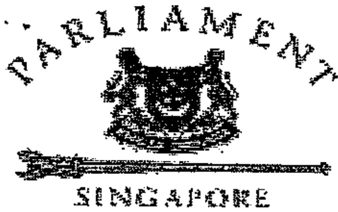

PARLIAMENT OF SINGAPORE

Singapore Parliament Reports (Hansard)

www.parliament.gov.sg

Parliament No:	3
Session No:	2
Volume No:	34
Sitting No:	18
Sitting Date:	1975-11-20
Section Name:	BILLS
Title:	MISUSE OF DRUGS (AMENDMENT) BILL
MPs Speaking:	Mr Chua Sian Chin (Minister for Home Affairs and Education); Mr Ivan Baptist; Mr Ng Kah Ting; Mr P. Govindaswamy; Dr Yeoh Ghim Seng (Mr Speaker);

Column: 1379

Sitting resumed at 6.00 p.m.

[Mr Speaker in the Chair]

MISUSE OF DRUGS (AMENDMENT) BILL

Order for Second Reading read.

The Minister for Home Affairs and Education (Mr Chua Sian Chin): Mr Speaker, Sir, I beg to move, "That the Bill be now read a Second time."

Sir, the tragedy of drug abuse has been presented in terms of the individual drug abuser and his family. The irreparable damage caused by drug addiction to the health and career of the drug abuser and the sorrow, anxiety and the shame caused to the family has often been emphasised. This, therefore, need not be elaborated upon here.

But what is not sufficiently appreciated is the threat that drug addiction poses to national security and viability. If drug abuse were to be allowed to grow unchecked, particularly among our youths, we would eventually be faced with a dangerous national security problem. In no time we would find that it had penetrated right into the vital and sensitive institutions of the

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State, like the Police and the Armed Forces.

This, in fact, happened in South Vietnam during those tortuous years of undeclared war and was a major factor leading to its eventual collapse. Drug addiction became rampant and uncontrollable there. It not only sapped the spirit of the soldiers to fight but also undermined their fitness to act out what little spirit that was left in them. Thus from the very onset they had no chance at all despite their superiority in firepower, military hardware and sophisticated gadgetry.

We have some indications that there is a Communist plan to use narcotics to corrupt and soften the population of the various states in South-East Asia for the purposes of subversion and eventual take-over. It is, therefore, vital that we take the severest of action now to forestall it and stop the supply of narcotics into the country and check the spread of drug addiction.

Rampant drug addiction among our young men and women will also strike at the very foundations of our social fabric and undermine our economy. Once ensnared by drug dependence they will no longer be productive digits contributing to our economic and social progress. They will not be able to carry on with their regular jobs. Usually for the young men, they turn to all sorts of crime, and for the girls, to prostitution to get money to buy their badly needed supply of drugs. Thus, as a developing country, our progress and very survival will be seriously threatened.

Singapore, as it is situated, is in a rather vulnerable position. The "Golden Triangle" straddling Thailand, Laos and Burma, which is the source of supply of narcotics, is not far from Singapore. Being a busy port, an important air communication centre and an open coastline easily accessible from neighbouring countries, it makes

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detection of supplies of narcotics coming in difficult. Further, the manufacture of morphine and heroin is not a complicated process and can be done in as small a space as a toilet. Our Central Narcotics Bureau has intelligence information that much of the heroin brought into Singapore has been manufactured in illicit laboratories clandestinely established in a neighbouring country. The Central Narcotics Bureau also reported that there was an abortive attempt to set up an illicit heroin laboratory in Singapore itself.

Heroin is one of the most potent and dangerous drugs. In the first half of 1974 only nine out of 1,793 drug abusers arrested consumed heroin. In the corresponding period this year 1,007 out of 1,921 drug abusers arrested consumed heroin. Thus the number of heroin abusers arrested increased by almost 112 times in 12 months. This is an explosive increase by any reckoning. Equally significant is the fact that the number of traffickers arrested for dealing in heroin had also increased from six in the first half of 1974 to 26 in the corresponding period this year.

These statistics show clearly that existing penalties under the Misuse of Drugs Act, 1973, have not been a sufficient deterrence to traffickers. In 1974 the Criminal Law (Temporary Provisions) Act was invoked to detain traffickers and financiers, and 31 major traffickers and financiers have been detained so far. Despite this threat of indefinite detention, trafficking is still rife. This is because it is lucrative and syndicates are prepared to look after the interests of traffickers and their dependants whenever they are caught and imprisoned.

Clause 13 of this Bill, therefore, seeks to amend the Second Schedule of the Misuse of Drugs Act, 1973, so that the death penalty will be imposed for the unauthorised manufacture of morphine and heroin irrespective of amounts

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involved. The death penalty will also be imposed for the unauthorised import, export or trafficking of more than 30 grammes of morphine or more than 15 grammes of heroin.

A number of countries, including Malaysia, Thailand, Philippines, Burma, Egypt, Nigeria, Turkey and Iran, have imposed the death penalty for the unauthorised manufacturing, importing, exporting and trafficking of hard drugs such as morphine and heroin. The death penalty provided in the Second Schedule of the Bill is a close parallel to the provisions in the Iranian law in that the death penalty is imposed for the unauthorised manufacture of morphine and heroin irrespective of amounts involved, but in the case of unauthorised trafficking, importing and exporting of those drugs the death penalty is imposed only when the quantities exceed a specified weight.

Under the Misuse of Drugs Act, 1973, trafficking is defined as selling, giving, administering, transporting, sending, delivering and distributing drugs. 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. The weights refer to the pure substance. For heroin any quantity in which the pure heroin content is above 15 grammes will attract the death penalty. Such an amount when mixed with adulterants is sufficient to spike some 500 heroin cigarettes. One heroin-spiked cigarette is usually shared by a few beginners. Thus 15 grammes of pure heroin can

do considerable damage and ruin a very large number of our youths. As a comparison, Iranian law provides for a mandatory death sentence where the trafficking only involves more than 10 grammes of heroin.

Let me also allay the fear of those who may have the impression that drug addicts might inadvertently be hanged as

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a result of their having in their possession a controlled drug which contains more than 15 grammes of pure heroin. The heroin that is commonly used by drug abusers and addicts in Singapore is referred to as Heroin No. 3. This is currently sold in little plastic phials, at $32 per phial. It is usually mixed with other substances in the proportions of about 40% pure heroin and 60% adulterants. Each phial contains about 0.8 grammes of the mixed substance. Therefore, a person will only be in danger of receiving the death penalty if he has in his possession some 37.5 grammes of adulterated heroin which contains 40% of pure heroin. This works out to 47 phials. And it costs about $1,500 to buy this amount at the current retail price.

It is, therefore, most unlikely for a person who is in possession of so much heroin to be only a drug addict and not a trafficker. An addict uses between half to one phial of heroin a day. Even if he is rich and can afford it, he does not buy more than two or three phials at a time for fear of being arrested and convicted as a trafficker.

It is not possible to determine the addictive dosage of heroin and morphine to equate the weights of these two drugs for the purpose of imposing the death sentence. This is because the addictive dosage varies from one addict to another depending on the individual's physiology and psychological make-up. Therefore, medicinal dosage is used to differentiate the weights. Since every gramme of heroin is equivalent in medicinal doses to two grammes of morphine, it is provided that trafficking, importing and exporting of a controlled drug containing more than 30 grammes of pure morphine will attract the death penalty.

Although traffickers of morphine and Clause 4 of the Bill makes statutory heroin dealing in quantities up to but not provision for the appointment of the

Column: 1384

exceeding the specified weights will not be hanged, the Bill provides for heavier sentences for them than those in existence. Similarly, the maximum sentence for the unauthorised trafficking, importing and exporting of opium, cannabis and cannabis resin above a specified quantity is enhanced. For example, the unauthorised trafficking of heroin from 10 grammes to 15 grammes, morphine from 20 grammes to 30 grammes, opium exceeding 6 kilogrammes, cannabis exceeding 10 kilogrammes and cannabis resin exceeding 4 kilogrammes carries the maximum sentence of 30 years imprisonment and 15 strokes of the rotan. Without the amendment such offences would at most be punishable with 20 years imprisonment or a fine of $40,000 or both and 10 strokes of the rotan. The minimum sentence for such offences after the amendment will he 20 years imprisonment and 15 strokes of the rotan. The existing minimum sentence is three years imprisonment or a fine of $5,000 or both and two strokes of the rotan. These stiffer penalties for the lesser offences are introduced to harmonise with the imposition of the death penalty.

Opportunity is also taken to include other amendments in this Bill. I need mention only the more important of these amendments. Clause 5 reduces the quantity of morphine from 5 grammes to 3 grammes and diamorphine (heroin) from 5 grammes to 2 grammes for invoking the presumption of trafficking in these drugs provided in section 15 of the Act. . The morphine and heroin retailed in Singapore contain an average of 40% adulterants and 60% adulterants respectively. Taking this into consideration, the weights are lowered so that the weight of the pure substance is used consistently in defining the offence as well as for specifying the penalties.

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Director and other officers of the Central Narcotics Bureau, and clause 8 confers on them all the powers of a police officer under the Criminal Procedure Code in relation to an investigation into a

seizable offence. Clause 6 introduces a presumption that a person whose urine is found to contain a controlled drug as a result of a urine test has consumed a controlled drug unless the contrary is proved. Further, clause 11 provides the Director of Central Narcotics Bureau with the power to require a person to attend an approved institution for treatment or rehabilitation if, as a result of a urine test, he deems such a course of action necessary. Clause 7 amends section 22 of the Act to make clear that a person arrested by an officer of the Bureau may be taken to the Bureau. All these provisions are to strengthen the hand and facilitate the work of CNB officers in dealing with drug addicts with a view to treatment and rehabilitation.

Although the more severe penalties and some of the other provisions in the Bill are meant to provide the necessary deterrence to drug traffickers and pushers, there will be no slackening in the Government's programme to deal with the drug problem on other fronts. On the one hand, there will be greater deterrence to traffickers to cut off the supply of narcotics, and on the other, every effort will be made to treat and rehabilitate those who have already been hooked on to the drug habit by improved rehabilitation facilities. The Drug Rehabilitation Centre at St John's Island has been enlarged and its facilities upgraded to take in a total number of 600 inmates at a cost of $900,000. The female section of the Centre has been completed and can accommodate 120 female addicts. Now that the Vietnamese refugees have left, the drug addicts are now back at the Centre.

Recently, the Government made available to the Singapore Anti-Narcotics Association a former police

post at Rumah Miskin to be used as a half-way house. This half-way house will be used as temporary abode for drug addicts who are unable or not ready to go back to their home environment upon discharge from the Drug Rehabilitation Centre. A comprehensive programme covering enforcement, penalties, treatment and rehabilitation is being built up to combat our drug problem.

Sir, I beg to move.

Question proposed.

6.20 p.m.

Mr Ivan Baptist: Mr Speaker, Sir, the shocking statistics the Minister has just quoted prove that this Bill needs to be passed. However, I am rather surprised, in fact, shocked, that "this Bill will not involve the Government in any extra financial expenditure."

"Clause 4 makes statutory provision for the appointment of the Director of Central Narcotics Bureau and other officers of the Bureau." This will necessitate an increase in staff to ensure that this drug problem is solved. Certainly, with the present staff that the CNB has, it will be impossible for a solution to be arrived at.

Again, "clause 11 extends the power of the Director of the Central Narcotics Bureau to send any person to an approved institution for treatment and rehabilitation." With this amendment, the Director will most certainly send as many people as deserved to be rehabilitated and treated to the approved institutions. This will cost money.

It is therefore surprising that the Minister has not taken this extra financial expenditure into consideration to ensure that this problem is solved.

Mr P. Govindaswamy (Anson): Mr Speaker, Sir, I rise in support of this Bill on the misuse of drugs where the maximum penalty for this offence carries a death sentence.

The Bill is being introduced at a very timely and apt moment when drug offences in the Republic

have increased greatly in the last few months. It has become a common offence. If this lucrative business of drug trafficking is not nipped in the bud, our Republic may be accused of being a distribution centre of drugs in this region. This will affect the good name of our Republic.

In recent months there has been an increasing number of unauthorised trafficking of drugs in the Republic, and press reports confirm that more offenders have been brought' to book. One way of stopping this trade from spreading is to impose the death sentence. This will give second thoughts to anyone indulging in this unauthorised trade.

Sir, although I support this Bill, I would like to state that a situation may arise where as a result of surprise checks by officers of the Narcotics Bureau, innocent people without their knowledge may he found in possession of drugs. These innocent victims may have been fixed, and this might even cost them their lives. So the question of benefit of the doubt should be carefully considered.

Let me cite a few instances. Recently, I came across an article in the press that an apprentice in an electronics firm was charged and convicted to a jail sentence for possession of heroin. The accused was also reported to have put drops of heroin in his fiancee's bowl of mutton soup without her knowledge in order to get her sexually aroused. She was also nabbed by the narcotics officers. Fortunately, during the trial the accused admitted that he had put the drug in her bowl of soup without her knowledge, and the magistrate therefore acquitted the girl. If the accused had denied this fact, she could also have been jailed, though innocent.

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Another case involved a foreign architect who was fined by a magistrate's court after he was found guilty of possession of drugs in his flat. He denied that he had taken drugs or had allowed any guest to do so in his flat because of his status. He claimed that social parties had been held in his premises before it was raided and that drugs could have been left there by his guests, some of whom had overstayed on different occasions before he left Singapore for a short visit abroad.

Sir, these two cases leave room for doubt. The accused could be guilty or innocent. Therefore, when the death sentence is introduced, care must be taken to see that innocent people are not convicted. Genuine drug pedlars could fix innocent people by placing drugs in their possession without their knowledge and then tip off the Central Narcotics Bureau for an investigation. Arid if a victim is unable to prove his innocence, he is in for trouble.

Sir, I support this Bill for the sake of discipline in the country.

Mr Chua Sian Chin: Mr Speaker, Sir, I thank the two hon. Members for supporting this Bill. First of all, let me assure the Member for Anson that if a person is innocent and that he is being framed by someone who tries to fix him by putting controlled drugs in his premises, he need not have any fear. There will first be a thorough investigation and if he is found innocent he will not be prosecuted. Even if he were prosecuted, there is the second line, which is the court. A court will not convict any person if it has a reasonable doubt that the accused is not guilty of the offence charged. So I can assure the Member for Anson that persons found innocent will not be prosecuted and sentenced.

The Member for Potong Pasir raised the point that in the explanatory statement to the Bill it is stated that "it

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will not involve the Government in any extra financial expenditure.'.' May I explain to him that the introduction of the Bill itself does not involve any extra expenditure. It does not mean that the Government will not have to spend any money on employing more enforcement officers if we want to step up our enforcement action against traffickers. Even if this Bill had not been introduced, if we want to increase enforcement action more enforcement officers will have to be employed and the Government will have to spend more money. So he can be rest assured that there is no contradiction

in the statement at the end of the Bill.

Question put, and agreed to.

Bill accordingly read a Second time and committed to a Committee of the whole House.

The House immediately resolved itself into a Committee on the Bill - [Mr Chua Sian Chin]

Bill considered in Committee.

6.30 p.m.

Clauses I and 2 ordered to stand part of the Bill.

Clause 3 -

Mr Chua Sian Chin: Sir, I beg to move,

In page 2, line 9, to leave out the full-stop and insert -

`; and (c) by inserting immediately after the word "thereunder" at the end of the definition of "traffic" appearing therein the expression "; and "trafficking" has a corresponding meaning".'.

Sir, this is a formal drafting amendment.

Mr Ng Kah Ting: Mr Speaker, Sir, I just want to seek clarification here. I wonder whether this Bill has been thoroughly scrutinised during its drafting stage. I notice that the Minister has filed a series of amendments which are not only consequential but substantial in nature. I would just like to

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get an assurance from the Minister that the Bill has been carefully considered.

A Bill of this nature which introduces the death penalty should, in the first instance, be carefully thought out, planned, and drafted, and there should be no cause for subsequent amendments as we do now have. Surely there was ample time for all these subsequent amendments to be incorporated in the draft Bill itself.

Mr Chua Sian Chin: Sir, I shall explain the reasons for my amendments. The Member for Punggol has jumped the gun by asking for clarification so soon after I have moved the first amendment to clause 3. Some of the amendments are merely formal, as in the case of this amendment to clause 3. The amendments to clause 5, however, are not formal, and I will explain the reason at the proper time. Apart from the formal amendments, the other amendments are to make the provisions in the Bill very clear.

I agree with the Member for Punggol that since the Bill introduces the death penalty we have got to be very clear about its provisions. For this very reason careful thought has been given in looking over the Bill and we would like to make it still clearer. Hence, these amendments. So it does not mean that no careful thought has been given to the Bill. In fact, a great deal of thought has been given to it. If the Member will bear with me, I will explain the amendments as they are moved.

Amendment agreed to.

The Chairman: There is a consequential amendment to be made:

In page 2, line 3, to leave out "and".

This will be done.

Clause 3, as amended, ordered to stand part of the Bill.

Clause 4 ordered to stand part of the

Column: 1391

Clause 5 -

Mr Chua Sian Chin: Sir, I beg to move,

In page 2, to leave out lines 21 to 26 inclusive and insert-

'(a) by deleting paragraph (b) thereof and substituting thereof the following:-

"(b) 3 grammes of morphine contained in any controlled drug; and

(b) by deleting paragragh (c) thereof and substituting thereof the following:-

"(c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or".'.

Sir, this amendment is necessary to make it clear that the quantities of morphine and heroin which are specified for the presumption of trafficking in section 15 of the Act relate to the quantities of these substances contained in any controlled drug. Morphine and heroin are not dealt with in their pure state in practice.

Amendment agreed to.

Clause 5, as amended, ordered to stand part of the Bill.

Clause 6 -

Mr Chua Sian Chin: Sir, I beg to move,

In page 2, line 32, after "drug", to insert "in contravention of paragraph (b) of section 6".

Sir, this is a formal drafting amendment.

Amendment agreed to.

Clause 6, as amended, ordered to stand part of the Bill.

Clauses 7 and 8 ordered to stand part of the Bill.

Clause 9 -

Mr Chua Sian Chin: Sir, I beg to move,

In page 3, line 21, after "Class C drug", to insert ", except as otherwise provided in paragraph (b) of this subsection".

Sir, this is a formal drafting amendment.

Column: 1392

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 3, line 24, to leave out from "committed" to "and" in line 26 and insert--
"---- (i) in the case of unauthorized manufacture, in relation to such specified controlled drug as is mentioned in the second column; and (ii) in the case of unauthorized traffic or import or export, in relation to a specified quantity of such controlled drug or to a controlled drug (except opium) containing such quantity of morphine or diamorphine as is mentioned in the second column;".

Sir, this amendment is to make it clear that the quantities of morphine and heroin which are specified for the imposition of the death penalty and other enhanced penalties in the Second Schedule relate to the quantities of these substances contained in any controlled drug. Here again, morphine and heroin are not dealt with in their pure state in practice.

Amendment agreed to.

Clause 9, as amended, ordered to stand part of the Bill.

Clauses 10 to 12 inclusive ordered to stand part of the Bill.

Clause 13 -

Mr Chua Sian Chin: Sir, I beg to move,

In page 5, lines 4 to 6, to leave out the heading "Specified drug or specified quantity thereof involved" and insert "Specified drug or quantity thereof or drug with specified content involved".

Sir, this is an amendment consequential to the amendment to section 29(2) in clause 9.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 5, lines 16 to 18, to leave out "Unauthorized traffic" in morphine where the

quantity is -" and insert "Unauthorized traffic in controlled drug (except opium) containing such quantity of morphine being -".

Sir, the reason for this amendment is to make it clear that the quantities of morphine which are specified for the imposition of the death penalty and other enhanced penalties for unauthorised traffic in morphine relate to the quantities of this substance contained in any controlled drug. Morphine is not dealt with in the pure state in practice. In fact, it is not intended to impose the death penalty for unauthorised traffic in opium and as opium also contains morphine it is excluded. This is to make the provision clear.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 5, lines 25 to 27, to leave Out "Unauthorized traffic in diamorphine where the quantity is-" and insert "Unauthorized traffic in controlled drug containing such quantity of diamorphine being -".

Sir, the reason for this amendment is also to make it clear that the quantities of diamorphine

(which is, in fact, heroin) which are specified for the imposition of the death penalty and other enhanced penalties for unauthorised traffic in diamorphine relate to the quantities of this substance contained in any controlled drug. Heroin is not dealt with in the pure state in practice.

Amendment agreed to.

6.45 p.m.

Mr Chua Sian Chin: Sir, I beg to move,

In page 6, lines 4 to 6, to leave out the heading "Specified drug or specified quantity thereof involved" and insert "Specified drug or quantity thereof or drug with specified content involved".

This, Mr Speaker, Sir, is a consequential amendment.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 7, lines 4 to 6, to leave out the heading "Specified drug or specified quantity thereof involved" and insert "Specified drug or quantity thereof or drug with specified content involved".

Sir, this is also a consequential amendment.

Amendment agreed to

Mr Chua Sian Chin: Sir, I beg to move,

In page 7, lines 7 to 10, to leave out "Unauthorized import or export of morphine where the quantity is -`` and insert "Unauthorized import or export of controlled drug (except opium) containing such quantity of morphine being -".

Sir, here again, the amendment is to make it clear that the quantities of morphine which are specified for the imposition of the death penalty and other enhanced penalties for unauthorized import or export of morphine relate to the quantities of this substance contained in any controlled drug. Morphine is not dealt with in its pure state in practice. It is not intended to impose the death penalty for unauthorized import or export of opium, and as opium also contains morphine it is excluded.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 7, lines 17 to 20, to leave out "Unauthorized import or export of diamorphine where the quantity is -`` and insert "Unauthorized import or export of controlled drug containing such quantity of diamorphine being -".

Here again, Sir, the explanation is similar, i.e. to make it clear that the quantities of diamorphine (or heroin), which are specified for the imposition of the death penalty and other enhanced penalties for unauthorised import or export of diamorphine, relate to the quantities of this substance contained in any controlled drug. Heroin is not dealt with in its pure state in practice.

Amendment agreed to

Mr Chua Sian Chin: Sir, I beg to move,

In page 8, lines 4 to 6, to leave out the heading "Specified drug or specified quantity thereof involved" and insert "Specified drug or quantity thereof or drug with specified content involved".

Here again, Sir, this is an amendment consequential to clause 9 which amends subsection (2) of section 29.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 8, lines 28 to 31, to leave out -

"Maximum 20 years or $40,000 or both

Minimum 3 years or $5,000 or both"

and insert a dash.

Sir, this is a formal drafting amendment.

Mr Ng Kah Ting: Sir, may I seek clarification from the Hon. Minister regarding the insertion of a dash against the originally proposed punishment of a maximum of 20 years or $40,000 or both and a minimum of 3 years or $5,000 or both, in respect of an offence for the cultivation of cannabis, opium, coca plant. I ask this question because in this Misuse of Drugs (Amendment) Bill, heavy penalties are to be imposed for those who are involved in drug trafficking. This is rightly so. Therefore, I do not know why the Minister is proposing to leave out the punishment provisions. For myself I do not think it should be deleted, otherwise it destroys the spirit of the entire Bill because the person who cultivates cannabis, opium, coca plant is indirectly involved in drug trafficking. And as the Hon. Minister has rightly pointed out, it will undermine the moral fibre of our society, the very structure of it. This will help destroy our society. So I think if we are to leave out these punishment provisions, it would not do any good. In fact, it should stand as it is.

Mr Chua Sian Chin: Sir, it is not intended to delete it.

The Chairman: It is a transfer of the penalty provisions from one column to another.

Mr Chua Sian Chin: Yes. This is a formal amendment. It is not a deletion. It is a drafting error which is being corrected.

Mr Ng Kah Ting: Sir, if there is no intention to delete, then I am all for it. I am asking this question because, as I mentioned just now at the beginning of the Committee stage, there are so many amendments to this important Bill.

The Chairman: Amendments (9) and (10) are connected, Mr Ng.

Mr Chua Sian Chin: Sir, this is a formal amendment to correct a drafting error.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 8, line 28, to leave Out the dash in the seventh column and insert -

"Maximum 20 years or $40,000 or both Minimum 3 years or $5,000 or both".

Sir, as I have explained, this penalty provision is deleted in amendment (9) and transferred to the next column in amendment (10). So I can assure the Member for Punggol that it will be there.

Amendment agreed to.

Mr Chua Sian Chin: Sir, I beg to move,

In page 9, lines 4 to 6, to leave out the heading "Specified drug or specified quantity thereof involved" and insert "Specified drug or quantity thereof or drug with specified content involved".

This, Sir, is again a consequential amendment.

Mr Ivan Baptist: Sir, on page 9, line 10, I would like the Minister to tell me what "punisable" actually means.

The Chairman: It should be "punishable". This will be corrected.

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Mr Chua Sian Chin: It is obviously a typographical error and will be corrected.

Amendment agreed to.

Clause 13, as amended, ordered to stand part of the Bill.

Bill reported with amendments.

Third Reading

Mr Speaker: Third Reading, What day?

Mr Chua Sian Chin: Now, Sir,I beg to move, "That the Bill be now read a Third time."

Question proposed.

Mr Ng Kah Ting: Sir, I would like to seek clarification from the Hon. Minister on the matter of administering the punishment of the rotan on those convicted for drug trafficking. I would like to know whether the number of strokes of the rotan are administered at one and the same time or are they meted out over different periods.

I ask this question, Sir, because in a discussion with some hon. Members I got the impression that if a convicted person gets the rotan punishment all at one time, then the impact is felt. But if the punishment is given over a period of time, then even a penalty of 100 strokes of the rotan will not have any deterrent effect at all.

Mr Chua Sian Chin: Sir, may I explain that the strokes of the rotan when imposed by the court are administered in Prison under the authority of the Director of Prisons, under the Prison regulations. Usually they are administered at one session. But when the strokes are administered, a medical officer will be there to decide whether or not there should be any respite.

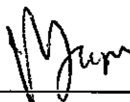
Question put, and agreed to.

THIS IS THE EXHIBIT MARKED **"MR-5"**

REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF **JANUARY 2012**

BEFORE ME,



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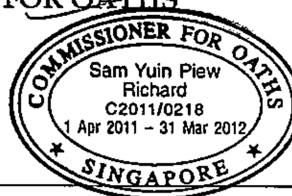

Full Hansard	By Related Section	By Related Title

Parliament No:	11
Session No:	2
Volume No:	87
Sitting No:	7
Sitting Date:	2010-09-15
Section Name:	WRITTEN ANSWERS TO QUESTIONS
Title:	DETENTION OF PERSON FOR DRUG TRAFFICKING ACTIVITIES (Related to case of **Yong Vui Kong**)
MPs Speaking:	Mr Wong Kan Seng;Ms Sylvia Lim

Column No : 1163

DETENTION OF PERSON FOR DRUG TRAFFICKING ACTIVITIES

(Related to case of Yong Vui Kong)

3. **Ms Sylvia Lim** asked the Deputy Prime Minister and Minister for Home Affairs whether the Government has detained under the Criminal Law (Temporary Provisions) Act any person believed to have been organising drug trafficking activities which involved **Yong Vui Kong**, an inmate on death row.

Mr Wong Kan Seng:

Drug syndicates are typically trans-national criminal organisations. **Yong Vui Kong** was a member of such a trafficking syndicate and was part of the chain of operations, specifically to smuggle the drugs he was caught with into Singapore. Apart from **Yong**, there were indeed others who were part of the syndicate. Several have been prosecuted for trafficking. One has been detained under the Criminal Law (Temporary Provisions) Act (CLTPA) for drug trafficking activities.

We will not hesitate to take action against every member of a drug syndicate regardless of the role he plays. Our preferred approach is to proceed by way of prosecution. However, in cases where there is a lack of evidence that can be adduced in court, typically because witnesses are unwilling to testify in court for fear of reprisal, but there is strong and reliable intelligence implicating an individual as a member of such a drug syndicate, we are prepared to use the CLTPA. We will not allow such a criminal to go free and continue to pose a threat to society through his activities. Preventive detention under the CLTPA ensures that the threat the individual poses to society is neutralised by his removal into custody.

The threat of a ready supply of drugs to Singapore is real. We are a regional transport hub and located near the Golden Triangle where narcotics are produced. There are also clandestine laboratories producing synthetic drugs in the region. Hence, a key pillar of our drug control strategy is to tackle the supply side by eradicating trafficking activities through tough laws and robust enforcement. While our operations aim to cripple syndicates as a whole, our immediate defence each day is always to stop the drugs from entering Singapore and directly threatening the well-being of our people.

THIS IS THE EXHIBIT MARKED **"MR-6"**

REFERRED TO IN THE AFFIDAVIT OF

M. RAVI AFFIRMED ON THE DAY OF **JANUARY 2012**

BEFORE ME,

A COMMISSIONER FOR OATHS

SUPREME COURT
EXHIBIT LABEL
Criminal Case NO. 26 of 2008
431 Exhibit P92
195
77/2007
P1-P92
17.6.08
Private Secretary
Date 3 0 SEP 2008 Court No. (6C)
SC 279

Further statement of Yong Vui Kong, G0623288X recorded by W/Insp Tay Siew Leng in English in the presence of Mandarin Interpreter Mr Kam Kan Hing on 3rd July 2007, at about 0910hrs in Queenstown Remand Prison Interview Room 3.

90 I affirmed my previous statement comprising of para 1 to para 89 to be true and correct and do not wish to make any more amendments or clarifications.

91 With regards to para 73, I am now shown a colored photograph of a male Chinese and I confirm that he the man whom I had met in Taman Sentosa on the 12th June 2007. I cannot remember how many times I had met him before prior to the 12th June 2007. He is the man that had sold me out to be arrested. He is the one who had asked me to deliver the gifts to Singapore and I was arrested. (Recorder's notes: Accused was shown the colored-photograph of one Chia Choon Leng of NRIC: S1719705C). His voice is hoarse. I do not wish to identify him in court because I am worried about my own safety as well as that of my family. I request that Chia Choon Leng would never knew that I had identify him in the photo.

(Interpreter)

(Interpreter)

3/7/07

The above statement was read over to the accused in mandarin by the interpreter. He affirm his statement to be true, correct and his. No threat, promise and inducement was made to him.

3/7/07 10:01AM

3/7/07