Public Prosecutor v Nguyen Tuong Van
[2004] SGHC 54

Case Number : CC 43/2003

Decision Date : 20 March 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Han Ming Kuang and Lee Cheow Han (Deputy Public Prosecutors) for prosecution; Joseph Theseira (Naidu Mohan and Theseira) and Tito Shane Isaac (Tito Isaac and Co) for accused

Parties : Public Prosecutor — Nguyen Tuong Van

Constitutional Law – Equal protection of the law – Whether mandatory death penalty under Misuse of Drugs Act (Cap 185) violation of equal protection accorded under Constitution – Article 12 Constitution of the Republic of Singapore (1999 Rev Ed), s 7 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

Constitutional Law – President – Discretionary powers – Whether President's powers under Criminal Procedure Code (Cap 68) relating to death sentence unconstitutional – Articles 22P, 93 Constitution of the Republic of Singapore (1999 Rev Ed), s 220 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Statements – Admissibility – Cautioned statement recorded by Central Narcotics Bureau officer – Whether admissible under s 122(5) of Criminal Procedure Code (Cap 68) – Section 122 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Statements – Admissibility – Defence alleging statements recorded in breach of Vienna Convention on Consular Relations 1963 – Whether there was breach of Convention – Whether statements admissible nonetheless

Criminal Procedure and Sentencing – Statements – Admissibility – Statements taken on separate occasions – Whether statements to be read separately or together for determining if statements amount to confession

International Law – Conventions – Vienna Convention on Consular Relations 1963 -Whether Singapore bound by Convention

International Law – Human rights – Whether death by hanging a breach of international law – Whether international law applicable where inconsistent with domestic law

Statutory Interpretation – Penal statutes – Whether death penalty under Misuse of Drugs Act (Cap 185) is maximum sentence or mandatory sentence – Section 7 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

20 March 2004

Judgment reserved.

Kan Ting Chiu J:

1 The accused, Nguyen Tuong Van, appeared before me charged that he:

> [O]n the 12th day of December 2002, at or about 3.06 pm, at Changi International Airport Terminal 2, Singapore, did import into Singapore, a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, 2 packets of powdery substance containing not less than 396.2 grams of diamorphine, without any authorisation under the said

Act or the Regulations made thereunder, and [he has] thereby committed an offence under section 7 of the Misuse of Drugs Act, Chapter 185 and punishable under section 33 of the Misuse of Drugs Act.

2 He is an Australian national aged 23 years. On 12 December 2002 he arrived in Singapore from Phnom Penh. At about 7.45pm he was at Boarding Gate C22 of the airport waiting to board a flight to Melbourne. During a routine check, a police officer felt something bulky on his lower back. He was brought to a search room for a thorough search, taking his haversack and business bag with him.

3 In the search room he was asked to remove his jacket and shirt. When that was done, a plastic packet was seen strapped to his lower back with masking tape. At that stage he started crying and tried to hit his head against a wall.

4 Sergeant Teh Kim Leng ("Sgt Teh"), the officer in charge of the security screening unit, was notified. He went to the search room and saw the accused, who appeared to be in distress, holding his head with his hands. When Sgt Teh asked him what was on his back, the accused replied that it was heroin. With the help of Sgt Teh the accused removed the packet from his body. When Sgt Teh asked him if there was anything to declare in his luggage, the accused opened the haversack, took out another packet, and handed it to him.

5 The two packets were subsequently sent for analysis. The packet from the body was found to contain not less than 151.5g of diamorphine and the other packet not less than 244.7g. The analysis results were not disputed.

6 The Central Narcotics Bureau ("CNB") was then informed of the matter. At 9.10pm CNB officers arrived at the airport and took over the case from the airport police. At about 10.05pm Station Inspector Ng Beng Chin ("SI Ng") spoke to the accused and recorded a statement from him. SI Ng and the accused appended their signatures to the statement after it was recorded and read back to the accused. The statement read:

Question: What [is] this?

Answer: I know it [is] heroin although different colour.

Question: Number 3 or 4?

Answer: I don't know.

Question: Who asked you to bring?

Answer: I know him by "Sun".

Question: To bring where?

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

Question: Who will receive the drug at Australia?

Answer: Someone will recognised [*sic*] me and [tell] me he likes basketball.

7 The CNB officers took the accused together with the two packets and other case exhibits back with them to the CNB Headquarters at Police Cantonment Complex at about 12.05am on

13 December.

8 At about 1.50am, the two packets were weighed. The packet recovered from the accused's back weighed 381.66g and the packet from his haversack weighed 380.36g.

9 At 4.12am the investigating officer Assistant Superintendent of Police Toh Soon Teck ("ASP Toh") recorded a cautioned statement from the accused. After the cautioned statement was recorded ASP Toh recorded further statements, which I shall refer to as investigation statements, from the accused. One was recorded on the same day, 13 December, and the others on 15, 16 and 19 December.

10 Defence counsel accepted that these statements were made voluntarily. Nevertheless, it was contended that they are not admissible in evidence.

Admissibility of the cautioned statement

11 This statement was recorded under s 122 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"). Sub-sections (6) and (8) thereof are of particular relevance:

> (6) Where any person is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, which shall be explained to him, to the following effect:
>
> "You have been charged with/informed that you may be prosecuted for —
>
> (set out the charge).
>
> Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done."
>
> (8) In subsection (6), "officially informed" means informed by a police officer or any other person charged with the duty of investigating offences or charging offenders.

12 Defence counsel's argument centred on the admissibility of confessions. Section 17 of the Evidence Act (Cap 97, 1997 Rev Ed) defines "admission" and "confession" as follows:

> (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.
>
> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

and s 24 provides that:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which

would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

This has been construed to mean that confessions not so afflicted are relevant and admissible in evidence.

13 Counsel argued that when the accused said in his cautioned statement:

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

he was not making a confession as defined by s 17 or by the test set out by Lord Guest in *Anandagoda v The Queen* [1962] 1 WLR 817 at 823–824 that:

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

14 In *Abdul Rashid v PP* [1994] 1 SLR 119 the Court of Criminal Appeal adopted Lord Guest's test and added at 129, [29]:

> We need only add that, for a statement to amount to a confession, it need not be of a plenary or unqualified nature and can also be of a non-plenary nature, so long as the statement connects the accused in some way with the offence.

15 Counsel went further, and argued that as ASP Toh is a CNB officer and not a police officer, the cautioned statement was not admissible under the CPC as s 122(5) of the CPC stipulates that:

> Where any person is charged with an offence any statement, whether it amounts to a confession or not or is oral or in writing, made at any time, whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any *police officer of or above the rank of sergeant* shall be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that the court shall refuse to admit such statement or allow it to be used as aforesaid if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient, in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> [emphasis added]

16 This argument overlooks the fact that the purpose of recording a cautioned statement is to

get an accused person to respond to a charge after being advised that if there is any fact that he intends to rely on in his defence in court, he should mention it in his cautioned statement, and that if he holds it back till he goes to court, his evidence may be less likely to be believed.

17 A cautioned statement is not intended to be taken with a view to obtain a confession. It is to inform the accused person of the charge he is facing and to get his response to it. The purpose of a cautioned statement is to enable the Prosecution to confront the accused at his trial with questions such as "If this is your defence, why didn't you disclose it in your cautioned statement?" or "Why did you not say this, but say that instead when you made your cautioned statement?" if the accused presents a defence different from or not disclosed in his cautioned statement. Conversely, the accused can rely on his cautioned statement to show that he has been consistent in his defence from the time he was first charged. It would be a departure from the purpose of recording cautioned statements if a cautioned statement is only admissible as a confession. If, however, the cautioned statement also happens to be a confession, it can be admitted and used as one.

18 The power to record cautioned statements is not limited to police officers. By sub-s (8), other officers charged with the duty of investigating offences or charging offenders also have the authority. Section 32(2)(a) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) provides that where the offence is seizable, an officer of the CNB shall have all the powers of a police officer under the CPC in relation to an investigation into a seizable offence. ASP Toh comes within s 122(8) as a person charged with the duty of investigating offences and charging offenders.

19 Consequently, while I agree with counsel that the accused's cautioned statement is not a confession, I held that it is admissible in evidence under s 122.

Admissibility of the investigation statements

20 The statements recorded on 13, 15, 16 and 19 December were not recorded under s 122(6) and (8), and as ASP Toh is not a police officer, the admissibility of the statements is not governed by s 122(5) of the CPC which governs the admission of statements made to police officers.

21 The Court of Criminal Appeal held in *Tan Boon Tat v PP* [1992] 2 SLR 1 at 9–10, [35], that a confession made to a narcotics officer is admissible if it complies with s 24 of the Evidence Act.

22 The recording of the statement of 13 December started at 4.05pm and ended two hours later. The statement reads:

> [1] I am known as "Van" to my friends and family members.
>
> 2 Sometime in October this year, I was in need of money. I had to pay a debt which I took to pay for my twin brother, Khoa Nguyen, lawyer fees. I owed about A$20,000 to A$25,000 in total to a friend. My friend is Jonathan Lim, Australia Chinese. He did not press me for payment but I knew he needed the money. There was also an A$12,000 loan which my twin brother took that I needed to repay on his behalf. He only had until the end of this year to pay up that loan. I did not intend to let my twin brother know that I am paying his debt. I had managed only to repay about A$4,000 for a period of 8 to 10 months already but that was just enough to cover for the interests incurred. The A$4,000 was my earnings from my job as a sales marketing executive. My brother's lawyer's fees were as a result of one drug case and one affray case he got into about 3 years ago. Since then my brother had been in debts. I had been helping him in the repayment of loans for the entire three years.

3 It was only until October 2002 that I was really desperate as I had been out of work for 4 months and I still have to repay those loans my twin brother incurred as well as paying for house rent and expenses. I rented a house at 66 Brandon Park drive Mulgrave 3150, Melbourne together with 5 other friends. However only "Sok" and I pay for the rent. I need to pay about A$580 a month.

4 As such I started looking around for help. I did not managed to obtain help from anyone. Sometime in the first week of November, a male Chinese known to me as "Tan" contacted me. He asked me whether I was sure I would do something. I told him yes. Then he told me to go to Sydney in one week's time. He did not tell me what was the purpose for the trip. He just instructed me to go to a hotel called Pacific International when I arrived at Sydney and someone would contact me there. I had earlier asked him for help and told him that I needed quick money. His response to me at that time was he would see what he could do.

5 Sometime in mid November this year, I made a trip to Sydney following "Tan's" instructions. When I arrived at Pacific International Hotel, one male Vietnamese "Sun" contacted me. He explained to me exactly what I am going to do and asked me if I am going to do it. He told me that I would be carrying a package from Cambodia to Singapore to Melbourne and possibly Sydney. He told me that the package contained "white". I understood that as heroin. It could have been cocaine. But I do not know if it is heroin or cocaine. However I was quite certain that it contained drugs. I told "Sun" that I would do it. "Sun" then told me to return to the same hotel to look for him before 2 Dec 2002 for the job. "Sun" told me that the deal was confirmed and I would definitely be making the trip to carrying that package. After that I returned to Melbourne.

5 On the 1 Dec 2002, I made the second trip for Sydney to go to hotel Pacific International where I met up with "Sun". He handed to me a return airfare from Melbourne to Singapore to Phnom Penh. He instructed me to go to Pacific Hotel when I reached Phnom Penh and to go to a restaurant across the road called "Lucky Burger" on the 4th and 5th of Dec 02. Someone was supposed to meet me there.

6 I stayed at Pacific International at Sydney until the 2 Dec 02 where I boarded a Qanta's Airline during the evening. I arrived in Singapore for transit at about 3.30 am to 4 am on the 3 Dec 02 for about 3 hours. Then I boarded a Silkair airline and arrived at Phnom Penh at about midday.

7 After I alighted from the plane, I took a taxi and checked in at Pacific Hotel. In the afternoon I went travelling around places near my hotel.

8 On the 4th Dec 2002, I went to the "Lucky Burger" restaurant at 3 pm as directed by "Sun" to wait for someone. I waited for about half an hour there and a male Cambodian approached me. He told me to follow him and I did so. He led me to his car and took me somewhere. A man who could speak Vietnamese showed up. He told me to smoke heroin. I refused. He yelled at me but I did not understand what he was shouting about. He then threatened me by saying, "smoke! Or else …". I was under fear and so I had to smoke heroin.

23 The statement of 15 December reads:

The statement recorded on 13.12.2002 @ 4.05 pm. Paragraph 1 to Paragraph 8 was read back to me in English and I affirmed it to be true and correct.

9 I am now referred to paragraph 8 of my earlier statement. I was then inside a garage shed. There were altogether 3 people there including the man who brought me there. I had never seen them before. The man who spoke Vietnamese did not tell me his name nor did he identify himself in any way. They already had the equipment for consuming heroin prepared on a table. There were an aluminium foil and a rolled-up Cambodian note. The man who brought me there took out from his pocket a plastic containing heroin and a lighter and placed them on the table. He then offered the heroin to me to consume. I hesitated and refused. I got aggressive and told him no. That was when the man who spoke Vietnamese stood up and told me in partial Vietnamese and partial Cambodian language, "f— your mother, smoke or die". That was when I realised he had a rod in his hand as he hit it hard on a bench. I then knew that I could be killed if I do not follow what they told me to do.

10 I asked the man who spoke Vietnamese how he wanted me to smoke. He then talked to the man who brought me there to prepare for me and he just told me to inhale the smoke using the roll-up note. The man who brought me there then poured the heroin onto the aluminium foil and by using a lighter, he heated the foil from below. When the heroin was heated, smoke was emitted and that was when he told me to inhale the smoke using the rolled-up note.

11 I inhaled the smoke for about 3 to 4 times and then I started to fall sick and vomited. After sometime, I vaguely remembered that I was brought back to the side street of my hotel and dropped off by these people. I went back to my room. I took a shower and fell asleep until the next day.

12 The next day, 5 Dec 2002, I woke up at around 6 am. I went around with a man who I had met on the day I arrived at Phnom Penh. I knew him as "Anh" and I cannot remember his contact number. We met him at the airport while I was walking out. I was then surrounded by illegal taxi drivers. I asked for a taxi driver and that was how I got to know "Anh" who was one of the illegal taxi-drivers. "Anh" had nothing to do with this case. During my stay at Phnom Penh he took good care of me.

13 At about 3 pm, I went back to "Lucky Burger" restaurant and the same thing happened again. The same Cambodia man came to pick me up and we went to the same garage and I was asked to smoke heroin again. This time I did not put up any resistant and I smoked the heroin as I was told. I only inhaled the heroin smoke three times. There was a lot of talking between the Cambodian man and the man who spoke some Vietnamese for some 30 minutes.

14 The Vietnamese speaking man told me to take off my shirt. I asked him why and he told me just take it off. I then took off my shirt. He then took out 2 blocks of substance wrapped in tapes. I did not know what they contained at that point in time. He then took the 2 blocks and placed them on my back. I asked him why he was doing that. He told me that someone would come to see me and prepare everything for me in that manner on the 10 Dec 02. He also told me that that was how the 2 blocks would be positioned and this is the way I was going to bring the package back to Melbourne. I was told to be at "Lucky Burger" at 4 pm on the 10 Dec 02. I then asked what were going to happen between then and the time that someone would meet me. He said, be quiet and keep out of trouble while you were in Phnom Penh. I was then escorted back to my hotel.

15 Back in my hotel room, I decided to go to Vietnam to get away from Phnom Penh. I was too stressed to remain at Phnom Penh. I then went on to make arrangements to travel to Ho Chi Ming City, Vietnam, on the 8 Dec 02. While waiting to leave for Ho Chi Ming, from 5 Dec 02 to 8 Dec 02. I travelled around the city, do some shopping. I also paid some prostitutes for their

companionship. I did not have sex with them.

16 On the 7 Dec 02 in the afternoon around 2 pm, I hired a car and it took me to Vietnam. I arrived at the border at about 6 pm. I could not cross over to Vietnam because I was late and the border was already closed. I stayed there at a casino hotel overnight. At about 6.30 am on the 8 Dec 02, I woke up and got ready. At about 7 am, I arrived at the border gate and this time, I managed to cross the border.

17 At about 9 am on the same day, I reached Ho Chi Ming. I spent the rest of the day sightseeing around the city. I checked in a hotel, I cannot recall the name, and stayed there over night.

18 On the 9 Dec 02, I spent the whole day in Ho Chi Ming again. On the 10 Dec 02, I returned to Phnom Penh and arrived at Pacific Hotel in the evening. I was late for the 4 pm appointment at "Lucky Burger". I decided not to go to "Lucky Burger" restaurant. I went back to my hotel room.

19 The next day, on the 11 Dec 02 at about 3 pm, I went to "Lucky Burger" restaurant. I went there hoping that they would be there. At about 4 pm, the same person who came to pick me up during the first 2 occasions appeared. Again, he asked me to follow him in his car. We arrived at the same garage.

20 At the garage, the man who spoke Vietnamese started scolding me. He asked me if I was a cop or a policeman. I was then stripped and searched. Again, they asked me to smoke heroin. I explained to them it was not a good idea to consume drug before travelling from countries to countries. They accepted that and did not force me any further. They then passed a bag containing a sealer, rolls of plastic, scissors, gloves, Velcro tapes, super glue, handy-knives and some other accessories. There was also an electric coffee blender.

21 The Vietnamese speaking man then instructed me to crush the 2 rocks of heroin using the coffee blender into fine powdery form. As he explained, the man who brought me there brought out 2 rocks of heroin. They are rectangular in shape and white in colour. Each rock was contained inside a plastic bag. The Vietnamese speaking man told me that the person who was supposed to help me strapped the package was gone somewhere else. I told him that he was supposed to solve that problem. That was when I was threatened not to mess things up. No more things were said. He then told me that I would have to strap the package on my own. He told me first to crush both the rock of heroin separately using the coffee blender. He also reminded me not to mix the 2 rocks of heroin at any time. Then I was to seal them inside 2 plastic bags using those things they gave me inside the bag. He then told me to strap the 2 plastic packets of powdered heroin onto my back. He then handed over the bag and warned me not to back out or chicken out again. I asked him if he were sure that the 2 plastic packets of heroin to be strapped to my back and he again warned me not to mess it up as someone would be watching over me.

22 After collecting the 2 rocks of heroin and the bag containing all the tools, I was sent back to my hotel room. When I reached my room, I went left everything inside my room and went to a shop nearby to buy a hammer and a power adapter. The hammer is for breaking the heroin rock into smaller bits so that they could be fitted into the coffee blender. The power adapter is to connect the sealer to a PowerPoint. Then I returned to my hotel room and started preparing the crushing of the rock heroin.

24 The statement of 16 December reads:

The statement recorded on 15.12.2002 @ 3.50 p.m. Paragraph 9 to Paragraph 22 was read back to me in English and I affirmed it to be true and correct.

23 At my hotel room, I took out everything from the bag. I planned in what process I would do to package the two rocks of heroin. I decided that some of the equipment could be used while some could not be used and I separate them apart. I took out one rock of heroin and placed it into a plastic bag and started to break it into smaller pieces using the hammer. It took about an hour or so. After that I placed all the smaller bits into the coffee blender portion by portion. That took about an hour also. Then I poured all the powderise heroin onto a plastic and sealed the plastic using the sealer. I repeated the same process for the second rock of heroin. At the end of that, I had 2 sealed plastic containing powderise heroin. I tried to packed the 2 plastic as slim as possible. But I did not really know how to go about doing that, so I just did what I thought would work. I also realized there were still some small rocks still not powderise. I did not bother to re-do as I was tired to repeat the process again.

24 I then rested and thought of how to strap the 2 plastic package onto my back. I realized that I needed sticky tapes to do it. There was no sticky tapes found inside the bag which the Vietnamese speaking man gave me. There was only a Velcro tape that I was not sure how they wanted me to do it. At about 10 am on the 12 Dec 02, I went to purchase sticky tapes from a shop around the corner near the hotel. I returned after buying 2 types of tapes. One roll is yellow in colour and the other roll is white in color. I am shown tapes seized from my back and I recognized them as the tapes which I bought from the shop near the hotel. (Recorder's note: Accused was shown Exhibit A1, tapes removed from the plastic packet of heroin used to strap to the accused back)

25 Then I returned to my hotel room and started to strap the 2 plastic packets onto my back. However, I could only managed to strap one plastic packet around my lower back using the yellow tapes that I just bought. The second plastic packet I was unable to reach my upper back on my own. I decided to strap it around my abdomen. I then used the remaining yellow tapes and the white color tapes to secure the 2 plastic packets around my lower back and my abdomen as tight as I could. I then wore my under-garment and also put on my clothing.

26 On the same day, 12 Dec 2002, at about 11 am, I carried my luggage and went downstairs and checked out of the hotel. I reached the airport at about 11.45 am. At the airport twice the security officers there checked me. However they did not discover the 2 packets of heroin strapped on my body. I boarded Silkair flight, MI 622, heading for Singapore at 12.20 pm.

27 During my flight, I started to have difficulties in breathing. I then went to the toilet and removed the package that was strapped to my abdomen. I then placed it into my pants and tugged out my shirt so that it was not obvious to be seen.

28 I went back to my seat and secretly stuffed the package that I took off in the toilet into my back pack. I am now shown a "Haglogs" backpack and I confirmed that this was the backpack which I put the package of heroin into. (Recorder's note: Accused was shown Exhibit B, a black "Haglogs" haversack).

29 On the same day at about 3.20 pm, I arrived at Changi International Airport Terminal 2 in Singapore. I went to the duty free shop at Terminal 2 and bought a carton of Marlboro Menthol Lights cigarettes. I then went to the smoking room and smoked a cigarette. Then I went took the

skytrain to Terminal 1 as I was instructed by the information counter that my flight back to Melbourne was at Terminal 1.

30 At Terminal 1, I bought a $10/- international calling card from the money exchange counter. Then I went to a counter where I collected my boarding pass. I then went straight to the Qantas business class lounge and called my girlfriend, Ameara. I used the phone in the lounge to call my calling card which will connect me to Australia. I spoke to her for about 25 minutes. I merely chit-chatted with her and I did not mention anything about this case to her. She was not aware anything pertaining to this trip which I made to courier heroin back to Melbourne. In fact I did not inform any of my friends or relatives about the purpose of this trip.

31 After I hanged the phone, I then went to the shower room to have a look at my packages. I removed the tapes that were still stuck on the plastic packet that was hidden inside my backpack. I threw the tapes into a rubbish bin inside the shower room. I then place this plastic packet of heroin into the back compartment of the backpack. I did not do anything to the plastic packet of heroin that was strapped to my lower back.

32 After that I went back to the lounge and slept. I woke up at about 7.30 pm and my flight was at 7.40 pm. My flight number was QF 10. I thought that I was late and so I run to gate C22 from the lounge. I took about 5 minutes to run to Gate C22.

33 At the gate C22, I took a good glance to see if anyone was watching. I was looking for the drug syndicate people to see if anyone was really watching over me. However I was not able to tell if I was being watched. So I decided that it was too late to turn back. I was also worried about the safety of my family members as the people in Phnom Penh warned me that the syndicate knew where I lived and warned me not to messed up. I knew that they were implying should I messed it up, they will be looking for me at my house or my family members in Melbourne. I had no choice but to deliver the 2 packets of heroin to someone in Australia.

34 At the metal detector, I placed my backpack and my business bag onto the x-ray machine. Then I walked through the metal detector and as I was crossing, it beeped. At that point in time, I knew I was going to be caught. A police woman told me stand one side so as not to obstruct traffic. She then used a metal detector wand to search me by going up and down my body. The metal detector wand did not beep. She then touched my back, either using her hand or the metal detector wand, and when she reached my lower back, she must have discovered the packet of heroin strapped there. She asked me, "what is this?" I shook my head and said, "No". She then asked a male colleague to bring me to a room to search me. I requested to bring the backpack and business bag to the room as well, which she allowed.

35 Inside the room, the male officer asked me to put my hands on the wall. I told him, "no need, I will get it for you." I lifted up my shirt and pulled out the strapped packet on my lower back and gave it to the officer. He asked me what that was and I replied to him, "It's heroin, sir". He asked me if I was sure. I told him of course. I also told him that there was more and I went on to retrieve the packet of heroin which I had hidden inside my backpack.

36 I waited inside the room. I was lost in thought at that time. Later a few plain clothes officers came questioned me. They also brought me to another room inside the airport and asked me more questions. One of the officers asked me how much I was being paid and I replied I did not know. He also asked me who I was working for and I said the person I was working for was "sun" and I met him in Sydney. I could not remember the other questions that were posed to me. Later I was brought to another place where I was subjected to a urine test. I was informed that

my urine was tested negative. I was surprised that the result was negative. I did not know how long the heroin would stay in my body. After that I was referred to the investigating officer.

37 There was a phone number which I could recall being used by the syndicate on the day that I left Sydney for Singapore. That was on the 3 Dec 02 while I was at Pacific International Hotel in Sydney. I called them at this number and they told me to listen to the message. Then I received a message on my handphone. I could not remember if it was the Nokia Handphone or the Siemens handphone. The message stated, "Checked out now." The number is 04-14135379. It is a handphone number as it starts with 04. I do not know who was the owner of that mobile number of handphone. However it must be connected to "Sun". Beside this number, all the other numbers stored inside the two handphones that were seized from me were my friends and they have nothing to do with this case.

38 The Sony laptop that was seized from me belonged to my good friend whom I knew as "Berri". He is an Indonesian, aged about 20 years old. He is currently studying in Melbourne. I do not know his real name as it was too long to remember and too complicated to pronounce. Berri has no criminal records. I borrowed the laptop from him on the 1 Dec 02 just before I left for Sydney to keep myself entertained while I was on this trip. I also wanted to use it to write letters. I did not use it to record any event that was connected to this case.

39 There were a total of 9 watches found in my luggage. Only one is genuine and that is the black-colour man "Rado" watch which I bought it at A$2,500 back in Melbourne. I used my savings to purchase it on my 21 birthday about 1 year and 3 months ago. The other 8 fake watches were bought in Phnom Penh on 6 Dec 02. I intended to give them to my friends in Australia as Christmas gifts. The 10 belts found inside my luggage were for the same purpose. They cost about A$500/- and I used my own savings to buy them.

40 The amount of cash that were recovered from me comprised of Cambodia, Vietnam, Australia, Singapore and US currency. The total value would not exceed A$100/-. These were left over from the US$1000/- given to me by "Sun". "Sun" gave me US$1000 for my hotel, food, transport and entertainment expenses for my trip. He handed the money together with the air tickets before I left Sydney for Singapore on the 2 Dec 2002.

41 I was born in Thailand, Sonkha, in a refugee camp in 1980. My mother was a Vietnamese refugee. I did not know who my father was until Nov this year. He came from America to look for my brother and I. I had a twin brother and no other sibling. Shortly after I was born, I followed my mother together with my twin brother and migrated to Australia. I cannot remember much about my childhood. My mother married in 1987 to a Vietnamese Australian. My step-father beat my brother and I quite often. I went to St Joseph Primary School in Springvale, Melbourne when I was about 6 years old. When I was 12 years old, I went to the Mt Waverly Secondary College. I completed secondary school education in 1998 when I was about 18 years old. Then I intended to proceed with my university education at Deakin University. However due to financial difficulties, I started working instead of studying. I worked as storeman, door to door salesman, computer sales and research marketing. Around end 1999, I also set up my own business in Melbourne dealing with computer sales. There was no need for any capital. Shortly after that my twin brother got into trouble with the law and I wind up my business to raise legal fees for him. So I found a sale, research and marketing job and I earned between A$1500 to A$2500 a month depending on how much commission I received. I took long leave since June this year as I was on medication for acne that required 4 months leave.

25 Finally, the statement of 19 December read:

The statement recorded on 16.12.2002 @ 2.22 pm. Paragraph 23 to Paragraph 41 was read back to me in English and I affirmed it to be true and correct.

42 I am now refer to paragraph 4 of my earlier statement. I wish to state that "Tan" were someone whom I often see him hanging around a café called "Puccini" located in the city of Melbourne. I had seen him around in that café since 2 years ago. However, we were mere acquaintance. I do not know his contact number or where he stayed. He knew I needed money urgently as I had spoken to him about. That was why he called me sometime in early November 2002. When "Tan" ask me if I am sure I would do something, he meant that if there was an opportunity would I go for it. At that time I was totally not aware of the nature of that opportunity. At hindsight, "Tan" is acquainted with "Sun". I am not sure if he knew about the assignment that "Sun" had in store for me.

43 I am referred to my statement recorded on the 13 Dec 2002 at 4.27 am. I wish to clarify that I mean that I would be telling all that I knew about what happened but the information would not be the truth as these were being fabricated by the people who had organized this.

44 During transit in Singapore on the day I flew from Sydney, I met up a friend from Singapore at about 4 am on 3 Dec 2002. I only knew him as "Golgan". I knew him in Australia where was studying in Melbourne. He can be contacted at 65-92388851. We met at Terminal Two at the exit of the arrival hall. We were together for about 2 hours until I had to check in again. I told him that I was on holidays around the world. I did not tell him anything about my assignment to courier heroin back to Australia. He had nothing to do with this case.

45 I am now referred to paragraph 33 of my earlier statement. I wish to add that I did not know what the syndicate would do to harm my family or myself. I knew for sure that they would be doing something nasty to my family member or myself. Under this circumstance, I really had no choice but to bring the heroin back to Australia to hand over to the syndicate people. If I did not do that, the syndicate people might think that I had chickened out or had cheated them of their goods. It is common that the syndicate would think that way.

46 That is all I had to say.

26 Counsel for the accused acknowledged that no inducement, threat or promise was employed or held out when the four statements were recorded. If the statements had been affected by inducement, threat or promise, they would be inadmissible whether or not they are confessions.

27 Moving on from there, the next issue is whether the statements should be read separately or together, to determine whether they are a confession. Where two statements, A and B, are recorded in the course of investigations, they may be taken to be one statement in two parts or two separate statements. They will be treated as one complete statement where statement B is a follow-up on statement A. Where they are not connected, and relate to different matters, *eg* where statement A relates to a charge of drug trafficking, and statement B relates to a charge of illegal entry into Singapore, they may be treated as separate statements.

28 Looking at the four investigation statements, it can be seen that they narrated the events from before the time the accused came to be in the possession of the two packets of heroin to the time of his arrest and each succeeding statement was recorded as a continuation of the preceding one, after the previous statement had been read back to him, with the paragraphs numbered serially.

29 The statements are to be treated as one whole statement for deciding whether it is a

confession under s 17(2) of the Evidence Act. On that basis, it is quite clear that it has all the ingredients of a confession, and is admissible under s 24.

Vienna Convention on Consular Relations

30 Defence counsel objected to the admission of the statements on a further ground, that the statements were taken in breach of Art 36(1) of the Vienna Convention on Consular Relations 1963 ("VCCR"). It was submitted that the breach amounted to an illegality and operated unfairly against the accused as he was not advised of his rights and did not have the opportunity to consult with a consular officer until 3.30pm on 13 December, after the cautioned statement was recorded, but before any of the investigation statements were taken. Article 36(1) reads:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

31 Although Singapore is not a signatory to the Convention, it was contended that the VCCR applies to Singapore because it is customary international law.

32 The Prosecution's reply can be summarised as:

(a) there was no breach of Art 36;

(b) even if there was, the breach does not entitle the Defence to challenge the admissibility of the statements; and

(c) Singapore is not a party to the VCCR.

It is silent on whether Art 36(1) is customary international law which applies to Singapore.

33 The VCCR is a key instrument in the regulation and conduct of consular activities. As at 1 January 2000, at least 167 countries were parties to the convention. Luke T Lee in his book *Consular Law and Practice* (2nd Ed, 1991) stated at 26:

> [T]he conclusion of the Vienna Convention on Consular Relations in 1963 was undoubtedly the single most important event in the entire history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaties or national legislation, without reference or recourse to the Vienna Convention.

34 There is an established practice for a state which has arrested a national of another state to notify the consular officers of the state of the accused person. Singapore subscribes to the practice. ASP Toh had notified the Australian High Commission of the arrest of the accused person in compliance with a directive.

35 The directive, which is a part of the standard operation procedures of the CNB, reads:

> 3 Where a foreign national (hereinafter referred to as the accused) is arrested for other drug offences, the following procedure should be followed:
>
> a The Investigation Officer (IO) is to verify the nationality of the accused and his current immigration status;
>
> b The IO is to carry out the preliminary investigation (ie, conducting instant urine test, statement taking, etc);
>
> c The Head Sector is to inform the resident or non-resident foreign mission concerned, (See sample at Annex B) giving details of the accused (full name, date of birth, passport number), date, place and time of arrest, charges preferred and trial date or place of remand (where applicable).

It is reasonable to infer that the other law enforcement agencies in Singapore would have similar directives.

36 Singapore holds herself out as a responsible member of the international community and conforms with the prevailing norms of the conduct between states. Specifically, the directive suggests the acceptance of the obligations set out in Art 36(1).

37 All this leads me to agree with the defence counsel that Art 36(1) applies in Singapore. The Prosecution, which is in a good position to have knowledge of Singapore's position on this issue, did not assert the contrary.

38 Was there a breach of Art 36(1)? It was established that a member of the Australian High Commission saw the accused at about 3.30pm on 13 December. The CNB took charge of the investigations at 9.10pm on 12 December, 18hrs 40min before the member of the High Commission met the accused. If one takes the effective starting time as 7.45pm, when the accused was detained by the airport police, the elapsed time was 20hrs 5min. The High Commission must have been notified before 3.30pm, for an official to be instructed, and for him or her to go and see the accused, but no evidence was led to the time of notification. For the present purpose, I will round off the time between arrest and notification to 20 hours.

39 Article 36(1) does not set a time period for notification; it is to be done without delay. Is 20 hours a delay? Reference to state practice can be helpful. By an Agreement on Consular Relations between Australia and the People's Republic of China which came into force on 15 September 2000, notification is to be made within three days. As Australia regards three days an appropriate period under the agreement, there is little basis to suppose that it would find the 20 hours in this case

unacceptable. It was not the defence case that the Australian government considers the notification to have been delayed in this case.

40 The Defence referred to the case of *LaGrand (Germany v USA)* (27 June 2001) ICJ General List No 104. This is a decision by the International Court of Justice where two accused persons were not informed of the right to consular access for almost 17 years after their arrest. This decision does not offer any assistance to the accused. The acceptable time was not considered by the Court as the United States accepted that there was a breach of Art 36(1).

41 The Defence has therefore failed to make out a case that there was a breach of Art 36(1) because of the 20-hour interval. But I will go one stage further. Assuming that there was a breach, it does not necessarily follow that the accused's statements are inadmissible in evidence. There must be some resultant prejudice that renders it wrong for the statements to be used, for example, that if he had timely consular advice, he would not have made the statements at all, or in the form or at the times he did.

42 No prejudice was disclosed. The issue relating to Art 36(1) was not raised when the admissibility of the statements was argued, but was only brought up in the closing submissions. The accused did not say anything about the making of the statements and the consular visit. There is no basis for excluding the statements as evidence.

Admissibility of the directive

43 Before concluding this part of my judgment, I should address an issue relating to the directive. ASP Toh's evidence was that he acted pursuant to the directive. When defence counsel applied for it to be produced and admitted in evidence, the prosecutor objected.

44 He relied on s 126(1) of the Evidence Act that:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

and argued that the directive was restricted information given to ASP Toh and other CNB officers.[1]

45 He had not given proper attention to the second element of the provision, that the public interest would suffer by the disclosure. ASP Toh had not said that the disclosure of the directive was inimical to the public interest, and I saw no reason to suppose that it would.

46 I therefore ruled that the directive be produced and admitted in evidence.

Chain of custody

47 Defence counsel raised an issue on the chain of custody of the two packets of heroin. This relates to the time when the packets came into ASP Toh's custody at 12.50am on 13 December up to the time that he submitted them to Dr Lee Tong Kooi of the Health Sciences Authority ("HSA") for analysis on 13 December at 11.40am.

48 ASP Toh's evidence in his conditioned statement was that he marked the packet that was strapped to the accused's back "A", and the other packet recovered from the haversack "B1". At 1.55am on 13 December he weighed the two packets and recorded their weights as 381.66g for packet A and 380.36g for packet B1, and at 5.30am he locked the two packets in his cabinet and left

for home. On the following day, 13 December, at 11.00am he took out the two packets again and sealed them before delivering them to the HSA for analysis.

49 When he was cross-examined by defence counsel, he agreed with counsel that the established practice is for drug exhibits to be sealed at the earliest possible time. He explained that he did not do that immediately after weighing the packets because there was to be a press conference. That explanation was corrected in re-examination when he said that there was no press conference, only a press release.

50 He also said that on the morning of 13 December after he locked the packets in his cabinet, he took them out, and locked them again before he left for home, but he cannot remember why he took them out.[2] He had kept the packets in his cabinet that night because the CNB store for drug exhibits is only open during office hours, and does not receive drugs during the night.

51 His evidence was that the previous occasion he had kept drugs in the cabinet was in July 2002, and those drugs were no longer kept there in December. After December no drugs were kept there till May 2003.[3]

52 ASP Toh was also asked about the discrepancy between the weights he recorded of the two packets (381.66g for packet A and 380.36g for packet B1) and that recorded by Dr Lee Tong Kooi (361.64g for packet A and 370.94g for packet B1). The significance was not only that different weights were recorded by ASP Toh and Dr Lee for the same packets, but that packet A was the heavier packet by ASP Toh's weighing, while packet B1 was heavier than packet A when Dr Lee weighed them.

53 No explanation was offered by ASP Toh. One can only look at the circumstances of the two weighings. ASP Toh weighed the packets in his office to obtain a weight of the suspected drugs to prefer a holding charge against the accused, and to carry on with his investigations.

54 When Dr Lee weighed the exhibits he was doing that as an analyst. The weighing was done under laboratory conditions to establish the diamorphine content of the suspected drugs. The levels of expertise between ASP Toh and Dr Lee, and the equipment they used, were different. The difference in the results may have arisen for these reasons. There was no suggestion that when ASP Toh opened the packets, he added to or removed anything from them before sending them to Dr Lee.

55 The Defence also complained that ASP Toh did not seal the drugs promptly. The two packets came into ASP Toh's possession at 12.50am on 13 December and he sealed them at 11.00am the same day. The lapse was 10hrs 10min. During that time ASP Toh was briefed by the officer who handed custody of the case exhibits to him, and he instructed the officer to list the exhibits, and he also weighed the packets and locked them in his cabinet.

56 The sealing could have been carried out earlier, perhaps immediately after the weighing at 1.55am, 9hrs 5min earlier than the actual time of weighing.

57 ASP Toh made reference to a press conference which did not take place. The Prosecution did not clarify with him whether he believed that there was going to be a press conference, and whether there is a practice that if there is a press conference, drug exhibits are not sealed until after that has taken place. There was no suggestion that anyone other than ASP Toh had possession of the packets during the 10hrs 10min.

58 Defence counsel submitted that:

> The procedure to ensure the integrity of the exhibits submitted for analysis would be rendered useless if investigators are allowed to keep unsealed drugs in their private cabinets, remove them for no apparent reason and then affixing a seal just minutes before submitting the drugs for analysis. The evidence adduced showed not only a disregard of established practice but also an unexplained discrepancy in the weight of the exhibits. We submit the Honourable Court is entitled to reject the drug exhibits and the consequential evidence of the drug analyst.[4]

59 I do not agree. For the reasons I have stated I find that the integrity of the exhibits was not compromised.

Finding on the accused's guilt

60 There was undisputed evidence that the two packets were in the possession of the accused. The airport officers gave clear evidence on the recovery of those packets from his body and his haversack. He had also admitted in his statements that he had those packets in his possession. There was also undisputed evidence from other prosecution witnesses that he had flown in from Phnom Penh. In his statement he admitted that he brought the two packets with him when he entered Singapore.

61 At the close of the Prosecution's case, defence counsel decided not to make any submissions. I found on the evidence before me that the Prosecution had proved a sufficient case for the accused to enter his defence.

62 When he was called to do that, he elected not to enter his defence. He did not give evidence himself, or call any one to give evidence as his witness.

63 I proceeded to hear closing submissions. I have reviewed the evidence and the submissions and my rulings and findings made during the trial since. I find that the Prosecution has proved its case against the accused beyond a reasonable doubt. I therefore find the accused guilty on the charge he faces, and convict him thereon.

Sentence to be imposed

64 I will now deal with the issues raised by the Defence on the sentence to be imposed.

Whether the death sentence is mandatory

65 The Defence contended that the sentence of death is not a mandatory sentence and that it is the maximum sentence.

66 The punishments for offences are referred to in s 33 and the Second Schedule of the Misuse of Drugs Act. The first column of the schedule relates to "Section creating offence", the second column relates to "General nature of offence" and the third to seventh columns relate to "Punishment".

67 To ascertain the punishment for the offence committed by the accused one looks under the first column for s 7. Then one looks across the schedule for the specific offence or type and quantity of drug involved under the second column, and finally one looks for the punishment under columns three to seven.

68 When the second schedule is read in this way, the punishment for an offence under s 7 for the unauthorised import of more than 15g of diamorphine is stated in one word, "Death".

69 It was submitted that this "as a matter of statutory interpretation, is open to be regarded as a maximum penalty not a death penalty". Reliance is placed on ss 9A(1) and 41 of the Interpretation Act (Cap 1, 2002 Rev Ed):

> 9A.—(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.
>
> 41. Whenever in any written law a penalty is provided for an offence, such provision shall imply that such offence shall be punishable upon conviction by a penalty not exceeding (except as may be otherwise expressly mentioned in the written law) the penalty provided.

70 I do not see any merit in this argument. The schedule provides specifically and clearly that the punishment is death. It does not say that the maximum sentence is death. The schedule provides for the maximum sentence in clear terms. It is replete with references to maximum and minimum sentences for other offences, for example, for the offence of unauthorised import of not less than 10g and not more than 15g of diamorphine, the punishment is maximum 30 years' imprisonment or imprisonment for life and 15 strokes, and minimum 20 years' imprisonment and 15 strokes.

71 When there is a range of punishment prescribed, there is a maximum and a minimum sentence. When a single punishment is prescribed, it is manifestly wrong to take it to be the maximum sentence.

Equal protection

72 A more substantial issue raised on behalf of the accused is that the mandatory death penalty is unconstitutional for contravening Art 12(1) of the Constitution (1999 Rev Ed) that "[a]ll persons are equal before the law and entitled to the equal protection of the law".

73 Counsel submitted that:

> Where persons require the equality of protection that is there referred to, it usually is from injustice at the hands of the State and usually within the criminal law. Any State has great resources which can be marshaled against an individual person. Every person is entitled to protection from the effect of those resources and in communities such as this, that protection comes from the criminal justice system. Justice in the criminal law in countries whose system derives from English law usually means fairness and equity. It may mean moral rightness. Justice is also usually required to conform to developing community standards. An entitlement to equal protection of the law is not concerned in comparative terms with the punishment which is imposed on a particular individual but rather an entitlement to be protected from injustice in the form of a disproportionate sentence.
>
> …
>
> A mandatory sentence of death, such as in this case, removes that protection. The person in the situation of the accused who falls into the 15 grams plus category loses the protection of a judicial sentence and the fact that everyone in that category is penalized with the death penalty

is no answer to the absence of protection from a disproportionate sentence.[5]

74 The constitutionality of the mandatory death sentence under the Misuse of Drugs Act was argued before and considered by the Privy Council two decades ago in *Ong Ah Chuan v PP* [1980–1981] SLR 48.

75 The argument made, as Lord Diplock put it in his judgment at 63, [32] was:

> [T]he mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by … the [Misuse of] Drugs Act, rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness.

and that it:

> … offends against the principle of equality before the law entrenched in the Constitution by art 12(1), since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15g of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99g.

76 That argument was rejected at 64, [35]–[37] on the ground that:

> All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others, it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.
>
> The discrimination that the appellants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15g of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15g of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence.
>
> The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. *Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1) of the Constitution*.

and Lord Diplock added at 65, [39]:

> [A]rt 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.
>
> [emphasis added]

This decision is binding on me.

77 The Court of Appeal ruled in *Jabar v PP* [1995] 1 SLR 617 at 631, [53], in connection with the requirement in Art 9(1) that no person shall be deprived of his life or personal liberty except according to procedure established by law, that:

> Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.

There is room for debate whether "so long as it is validly passed by Parliament" refers to the compliance with the processes for passing an Act or to its constitutional validity. I think it relates to both, as the court must be concerned that statutes be properly enacted and do not contravene the Constitution.

78 In *Kok Hoong Tan Dennis v PP* [1997] 1 SLR 123, Yong Pung How CJ adopted the test laid down by the Supreme Court of India in *Budhan Choudhry v State of Bihar* AIR (42) 1955 SC 191 at 193 for the equal protection of the law under Art 14 of the Constitution of India:

> In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

79 In their closing submissions defence counsel referred to *Ong Ah Chuan* and conceded that:

> There is no question that Lord Diplock is right when he says that the legislature can differentiate between offenders as to the punishment to be imposed. However in our submission what the legislature cannot do (under Article 12) is deprive any group of persons of the protection of the law by depriving them of the right to be heard on the question of sentence which is then decided by an independent judge.[6]

80 Counsel argued:

> It is instructive to deal with two hypothetical situations to illustrate our submissions. In the first case (similar to this) a young person is arrested in the transit section of Changi Airport in possession of 20 grams of heroin on his way home to New Zealand. The 20 grams of heroin are for his own consumption. He is without prior convictions, fully employed, of excellent character and supported in every way by his family. In the second case, a Singapore national is arrested at the same airport. His baggage is searched and a suitcase containing artefacts purchased in the Golden Triangle shows that a carefully planned scheme of importation of heroin had been devised. The artefacts have been carefully hollowed, filled with heroin and resealed, and in total he is in possession 1.5 kilograms of heroin. He is interviewed by the CNB and admits that the primary

purpose for the importation is the sale of the heroin after being cut on the streets of Singapore. He has prior convictions for non-capital drug offences, offences of violence, and immigration offences including forgery of travel documents. It is clear that he is part of a sophisticated drug network dealing in large quantities of drugs within Singapore.

To suggest that no differentiation in punishment between those two offenders does not violate the principles behind the equal protection of the law in Article 12 or the accepted principle of sentencing is fanciful.[7]

81 The argument is that the death sentence cannot be imposed without regard to the degree of moral blameworthiness of the convicted person, and that the court must treat an offender with little or no blameworthiness differently from a blameworthy offender when it imposes a sentence.

82 As Lord Diplock explained, equal protection does not require that everyone be dealt with equally. It requires that like be compared with like. Different bases of classification may be employed. In setting punishments for drug importation, for example, the criteria employed may be by the offence, the type of drugs, the quantity of the drugs, the value of the drugs, whether the offender is a willing or reluctant participant, a principal or an agent, or whether he is a first offender or a repeat offender. The power to determine the criteria for identifying and distinguishing one class from others is vested in the legislature. Provided that the distinguishing factor employed is not purely arbitrary, and it bears a reasonable relation to the object of the law, that is not discrimination even if arguments can be made that some other criteria could suit the purpose better.

83 Parliament has prescribed the offence, the type and quantity of drugs as the bases to determine the sentences to be meted out to offenders. By its preamble the Misuse of Drugs Act was enacted "for the control of dangerous drugs or otherwise harmful drugs and substances and for purposes connected therewith". The differentiating factors employed for the death sentence are not arbitrary, and they bear a reasonable relation to the object of the Act.

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.

85 The Defence also relied on the Privy Council's decision in *Reyes v The Queen* [2002] 2 AC 235 that a mandatory death penalty is cruel and inhuman punishment.[8] This case originated in Belize. Reyes was convicted of murder by shooting, a class A murder under the laws of Belize, and the mandatory death sentence for class A murders was imposed. He challenged the constitutional validity of the sentence, and succeeded before the Privy Council.

86 Lord Bingham of Cornhill, in delivering the judgment of the Board, ruled at [29] that:

A law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 because it fails to respect his basic humanity.

87 The provision referred to is s 7 of the Constitution of Belize which provides that:

> No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

88 To ascertain whether a punishment is inhuman or degrading a court is required to take into account the "evolving standards of decency that mark the progress of a maturing society".

89 Lord Bingham reviewed decisions from several jurisdictions and came to the conclusion at [43] that:

> [T]he provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.

90 The case was argued and decided around s 7 of the Belize Constitution. *Reyes* would be relevant to the present case if there is an equivalent provision to s 7 in Singapore, but no such provision exists in the Constitution or any Act. The Defence was not deterred by that, and submitted after referring to the passage in the foregoing paragraph that "the mandatory death penalty offends the protection offered by Article 12 in the same manner".[9]

91 That brings the argument back to the question of proper and impermissible classification criteria, which has been dealt with.

Separation of powers

92 Article 93 of the Constitution declares that:

> 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.

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.

95 Defence counsel also took issue with the post-sentencing provisions in the CPC relating to death sentences. The specific provisions counsel were concerned with are sub-ss (c) and (e) of s 220 which read:

> (c) in cases in which notice of appeal or notice of an application for leave to appeal is not given within the prescribed period, the Judge who presided at the trial shall, as soon as conveniently may be after that period has elapsed, forward to the Minister a copy of the notes of evidence taken at the trial, together with a report in writing signed by him stating whether, in his opinion, there are any reasons (and, if so, what reasons) why the sentence of death should or should not be carried out;
>
> (e) the President, acting in accordance with section 8 of the Republic of Singapore Independence Act shall communicate to the High Court a copy under his hand and seal of any order which he makes, which order, if the sentence is to be carried out, shall state the time and place when and where the execution is to be held, and, if the sentence is commuted into any other punishment, shall so state and, if the person sentenced is pardoned, shall so state;

96 They submit that:

> Section 220 requires the trial judge to prepare a report for the Minister or the Court of Appeal stating whether there are any reasons why the death penalty which he has had no choice but to pronounce should not be carried out. The trial judge hears the case, pronounces the sentence and then is called upon to express a view about the sentence ultimately to the executive without the accused person having any role in the process – indeed having no protection.
>
> Section 220 of the Code may be treated as evidence of the breach of the doctrine of separation of powers. It is a legislative requirement on a judicial officer to take part in the administrative process of the executive. That requirement arises because of the earlier breach of the doctrine by the legislature mandating and fixing the sentence.
>
> An issue which arises is whether it is compatible with the doctrine of the separation of powers to provide for the individualised consideration only after the imposition of the sentence and by the Executive with no accessible criteria and with no requirement to give reasons for the final outcome. It is submitted that the power to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders should not be committed to the executive for, in both substance and reality, the decision as to which of those convicted of importing a controlled substance actually deserves to suffer death is a sentencing function. The individualised determination should be performed by the judiciary before the death sentence is pronounced, not afterwards. Otherwise, contrary to the separation of powers principle, the sentencing function is being trusted to the executive.[10]

It was not made clear whether the submission is that the sentence of death or the power conferred by s 220 is invalid for being in breach of the doctrine of separation of powers embodied in the

Constitution. The tenor of the submission suggested the latter.

97 Section 220 does not stand alone. It draws its authority from Art 22P of the Constitution which provides that:

> 22P.—(1) The President, as occasion shall arise, may, on the advice of the Cabinet —
>
> (a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
>
> (b) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or
>
> (c) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.
>
> (2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by subsection (1).

98 Art 22P and Art 93 exist together. The judicial power of the courts is to be wielded alongside the President's prerogative powers. A power conferred by the Constitution cannot be considered unconstitutional.

The Beijing Statement

99 The statement entitled "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" was signed by the participants at the 6th Conference of Chief Justices of Asia and the Pacific, including the Chief Justice of Singapore, on 19 August 1995.

100 Defence counsel submitted:

> The Beijing Statement adds great force to our submission and underlines the importance of the judiciary in death penalty cases.
>
> In the Statement, the Judiciary is described as an "institution of the highest value in every society". The statement also declared that the Judiciary is indispensable to the implementation of rights under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. One of the stated objectives and functions of the Judiciary was to promote, within the proper limits of the judicial function, the observance and attainment of human rights. Importantly, it was also stated that the Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

> It is submitted that the imposition of sentence is fundamentally justiciable in its nature and part of the criminal trial process and thus requires the sentence to be passed by an independent and impartial tribunal offering the accused "the equal protection of the law".[11]

101 I have to say that I read nothing in the Statement that relates to death sentences or mandatory death sentences. Counsel did not explain how the Statement, which does not have the force of a treaty or a convention, assists the accused's argument that mandatory death sentences are illegal.

Hanging as a cruel and inhuman punishment

102 The defence asserted that the death penalty that the accused faces is not only unconstitutional for being a denial of equal protection, but is also unconstitutional because execution by hanging is cruel, inhuman and degrading and is not compatible with the evolving standards of decency that mark the progress of a maturing society.[12]

103 Counsel argued that although there is no constitutional provision against cruel and inhuman punishment, hanging contravenes Art 9(1) which provides that:

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

104 Section 216 of the CPC states that sentences of death are to be carried out by hanging. Nevertheless counsel argued that "law" should be read to include Art 5 of the Universal Declaration of Human Rights ("UDHR") that:

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

105 Counsel justified the position on the basis that:

> [T]he articles of the UDHR … protect a person subject to the criminal law from a death penalty which is cruel and inhuman. A cruel, inhuman and degrading method of execution would not represent the deprivation of a life "according to law" under Article 9(1).
>
> [A]n important question arises and that is the role of treaties and customary international law in domestic or municipal law. We submit that Singapore's vital participation in the world of transnational trade and commerce necessarily connects it to the influence of international standards and that they in turn must affect Singapore's domestic or municipal law.[13]

106 The Declaration is not an international treaty or convention and there is no consensus that it is a statement or codification of customary international law, and it does not refer to hanging.

107 There are those who believe that hanging is a cruel, inhuman or degrading punishment, but that is by no means a settled view. For example, when this issue was brought up before the United States Court of Appeals in *Campbell v Wood* 18 F 3d 662 (1994), the majority decision was that hanging did not violate the constitutional protection against cruel and unusual punishments.

108 Even if there is such a customary rule, it would not apply if it is inconsistent with the domestic law. As Lord Atkin explained in *Chung Chi Cheung v The King* [1939] AC 160 at 167–168:

> [S]o far, at any rate, as the Courts of this country are concerned, international law has no

validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

And in *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1, the House of Lords affirmed the proposition that if a statute is unambiguous, its provisions must be followed even if they are contrary to international law.

Conclusion

109 The Defence has failed to establish that the mandatory death sentence is unlawful for contravening the Constitution or international law. That being the case, and having found the accused guilty and convicted him, the sentence I impose is that he shall suffer death.

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[1] Notes of Evidence page 129

[2] Notes of Evidence page 120

[3] Notes of Evidence page 115

[4] Defence Closing Submissions Part I, para 29

[5] Defence Closing Submissions, Part II, paras 40 and 44

[6] Defence Closing Submissions Part II, para 52

[7] Defence's Response To The Prosecution's Closing Submissions Part II, paras 7 and 8

[8] Defence Closing Submissions Part II, para 6

[9] Defence Closing Submissions Part II, para 47

[10] Defence Closing Submissions Part II, paras 66–67, 69

[11] Defence Closing Submissions Part II, paras 56–58

[12] Defence Closing Submissions Part II, para 114

[13] Defence Closing Submissions Part II, paras 106 and 107