Adnan bin Kadir *v* Public Prosecutor
[2012] SGHC 196

Case Number : Magistrate's Appeal No 122 of 2012

Decision Date : 28 September 2012

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : The appellant in person; Lee Lit Cheng, Wong Woon Kwong and Ruth Wong (Attorney-General's Chambers) for the respondent.

Parties : Adnan bin Kadir — Public Prosecutor

Criminal Law – Statutory Offences – Misuse of Drugs Act

28 September 2012 Judgment reserved.

Chan Sek Keong CJ:

Introduction

1 This is an appeal against sentence by Adnan bin Kadir ("the Appellant"). He pleaded guilty in the District Court to one count of importing 0.01g of diamorphine into Singapore, which is an offence under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the current MDA"), and was sentenced to five years' imprisonment and five strokes of the cane.

The facts

2 The Appellant is a 41-year old male. The charge which was proceeded upon by the Prosecution ("the Diamorphine Charge") reads as follows:

> … [T]hat you, on 21st December 2011 at or about 6.36 a.m., at Immigration Checkpoint Authority, Woodlands Checkpoint, Singapore, did import into Singapore … one packet containing 0.35 grams of granular/powdery substance which was analyzed and found to contain 0.01 gram of Diamorphine … and you have thereby committed an offence under section 7 of the Misuse of Drugs Act, Chapter 185 and punishable under Section 33 of the said Act.

3 The relevant parts of the Statement of Facts which the Appellant admitted to in the District Court ("the SOF") are as follows:

> …
>
> 2 On 21st December 2011 at about 6.36 a.m., acting on the information received, the accused [*ie*, the Appellant] was stopped by [officers from the Immigration and Checkpoints Authority] when detected at the car arrival green channel. The accused was travelling in a motor vehicle bearing a Malaysian registration number JHY 4607 ('the car'). He was later referred to [the Central Narcotics Bureau ("CNB")] and CNB officers conducted a search on him.
>
> 3 Upon questioning, the accused surrendered one plastic packet containing brown granular

substance, which was hidden under the driver's seat cover. The accused also informed CNB officer that the brown granular substance was 'Pei Hoon' (street name for Heroin).

4 The accused was placed under arrest, and the exhibit was thereafter seized and marked as 'ABK-A1'. …

…

5 On 13th February 2012, [the Health Sciences Authority] issued a certificate … stating that the exhibit marked as 'ABK-A1' was found to be one packet containing 0.35 gram of granular/powdery substance which was analyzed and found to contain 0.01 gram of Diamorphine.

…

7 The accused was aware that he was importing drugs into Singapore in the said vehicle.

…

4 In addition to the Diamorphine Charge, the Appellant was also charged with importing into Singapore, on the same occasion (*ie*, at or about 6.36am on 21 December 2011), one packet containing 0.05g of crystalline substance, which was analysed and found to contain methamphetamine ("the Methamphetamine Charge").

The proceedings in the court below

5 On 28 May 2012, the Appellant (who was unrepresented) initially claimed trial in the court below. After noting that the Appellant had earlier indicated at a pre-trial conference that he wished to plead guilty, the senior district judge ("the SDJ") asked him whether he had a defence to importation. The Appellant stated that he wished to plead guilty. The SDJ reminded the Appellant that he should be sure that he wished to plead guilty. The SDJ also pointed out to the Appellant that he was the only person who would know if he had a defence. The Appellant then pleaded guilty to the Diamorphine Charge and consented to the Methamphetamine Charge being taken into consideration for the purpose of sentencing.

6 The Appellant had no antecedents. In his oral mitigation plea, he stated that: (a) the drugs were for his own consumption; (b) his wife had passed away in 2010; and (c) he had five children and an elderly mother-in-law to support. He stated that he was remorseful and pleaded for leniency.

7 The Deputy Public Prosecutor ("DPP") prosecuting the case, DPP Joshua Lai ("DPP Lai"), took issue with the Appellant's assertion that the drugs were for his own consumption because an *earlier* version of the SOF had stated that the Appellant intended to deliver the drugs to someone in Singapore. Nonetheless, DPP Lai submitted that this discrepancy had no legal effect on the Appellant's plea of guilt on the ground that personal consumption was not a defence to a charge of importation.

8 The SDJ sentenced the Appellant to the mandatory minimum sentence of five years' imprisonment and five strokes of the cane. In his written grounds of decision (as reported in *Public Prosecutor v Adnan bin Kadir* [2012] SGDC 203), the SDJ pointed out that during his perusal of the court files, he had seen the earlier version of the SOF, which stated that the Appellant intended to deliver the diamorphine to someone in Singapore. However, he went on to hold that this was immaterial:

10 More fundamentally, *irrespective of whether the drugs were meant for delivery or for his personal consumption*, I did not see this having any material impact on sentence. *There was no qualification of his plea of guilt to the charge of drug importation. All the necessary elements of the offence were established and admitted*. In my view, the circumstances of the offence would not have warranted the imposition of a sentence beyond the prescribed mandatory minimum, given his lack of antecedents and plea of guilt at the pre-trial stage. Moreover, the quantity of drugs involved was relatively small. [emphasis added]

The hearing of this appeal on 2 August 2012

9 In support of his appeal against sentence, the Appellant filed a written mitigation plea dated 6 July 2012 in which he reiterated, *inter alia*, that the drugs were for his own consumption. He also stated that a urine test which was conducted on him on the day of his arrest (*viz*, 21 December 2011) had produced a positive result.

10 At the oral hearing on 2 August 2012, the Appellant again repeated his statement that the drugs which he brought into Singapore were intended for his own consumption. When I queried the DPP appearing in this appeal, DPP Ruth Wong ("DPP Wong"), as to whether if what the Appellant said was true, it could constitute a defence to the charge of importation, she stated that it would not. I queried her further on why, for instance, if the Appellant had been charged for trafficking in the same drugs, he would be entitled to plead as a defence that the drugs were for his own consumption, but he could not do so if he had been charged for importing the same drugs. Such an anomaly would be obvious if the drugs involved were diamorphine (as in this case) and the quantity found on him was 15.01g of diamorphine. DPP Wong's response was that the offence of "importation" was different from trafficking in that importation as defined in the current MDA meant the act of bringing into Singapore, and that the purpose of doing so was irrelevant.

11 In view of this anomaly, I decided to look further into the nature of the offence of importation to satisfy myself that as a matter of law the Appellant would not be able to plead possession of the drugs for personal consumption as a defence to the charge of importation. Accordingly, I adjourned the hearing and directed DPP Wong to file written submissions on this issue for further consideration.

The written submissions

12 The written submissions, which were drafted by DPPs Lee Lit Cheng and Wong Woon Kwong (hereinafter referred to as "the DPPs"), reiterated that there is no defence of personal consumption to the offence of importation under s 7 of the current MDA. The purpose of the importation is only relevant as a sentencing consideration. In support of this argument, the DPPs relied on the legislative history of the current MDA and also the decisions of the courts on the meaning of importation. I shall examine first the statutory framework and its legislative history.

The statutory framework

The relevant sections of the current MDA

13 The relevant sections of the current MDA are as follows:

Interpretation

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

…

"traffic" means —

(a) to sell, give, administer, transport, send, deliver or distribute; or

(b) to offer to do anything mentioned in paragraph (a),

otherwise than under the authority of this Act, and "trafficking" has a corresponding meaning;

…

PART II

OFFENCES INVOLVING CONTROLLED DRUGS AND SUBSTANCES

Trafficking in controlled drugs

5.—(1) Except as authorised by this Act, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not that other person is in Singapore —

(*a*) to traffic in a controlled drug;

(b) to offer to traffic in a controlled drug; or

(*c*) to do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug.

(2) For the purposes of this Act, a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking.

Manufacture of controlled drugs

6. Except as authorised by this Act, it shall be an offence for a person to manufacture a controlled drug.

Import and export of controlled drugs

7. Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug.

Possession and consumption of controlled drugs

8. Except as authorised by this Act, it shall be an offence for a person to —

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

(*b*) smoke, administer to himself or otherwise consume —

(i) a controlled drug, other than a specified drug; or

(ii) a specified drug.

…

PART III

EVIDENCE, ENFORCEMENT AND PUNISHMENT

...

Presumption concerning trafficking

17. Any person who is proved to have had in his possession more than —

...

(*c*) 2 grammes of diamorphine;

...

… shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

14 It can be seen from the above provisions that the drug offences under the current MDA are set out in the following chronological order: (1) trafficking; (2) manufacturing; (3) importation/exportation; (4) possession; and (5) consumption. This order of offences was first enacted in 1973 by the Misuse of Drugs Act 1973 (Act 5 of 1973) ("the 1973 MDA").

Legislative history and context

15 The earliest predecessor of the current MDA is the 1973 MDA. In moving the Misuse of Drugs Bill 1972 (Bill 46 of 1972) ("the Misuse of Drugs Bill 1972"), *ie*, the Bill which was later enacted as the 1973 MDA, at its second reading, the then Minister for Health and Home Affairs explained the rationale of the Bill as follows (see *Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at cols 414–418):

> This Bill is a consolidation of the Dangerous Drugs Act enacted in 1951 and the Drugs (Prevention of Misuse) Act of 1969. It also incorporates additional provisions to provide for a firm and extensive control on certain dangerous and harmful drugs of addiction as well as heavier penalties. These drugs, defined as "controlled drugs" in this Bill, are known to the pharmacologist as hallucinogens, narcotic analgesics, central nervous system stimulants and tranquillisers. The Dangerous Drugs Act was enacted about 21 years ago and the controls provided therein are grossly inadequate for the 70's, with the introduction of a host of new drugs of medical value if properly used.
>
> *Control has been brought in line with those in force in other countries* ***closely concerned with the spread of the addictive use of such drugs within their own countries and the increased international traffic which supplies such demands. The different categories of control as recommended by the United Nations have been incorporated into this Bill.***
>
> …

Singapore, by its geographical position and development, is now a strategic centre of communication and international trade. Whilst welcoming trade, visitors and tourists, we must at the same time be constantly on the alert for the trafficker, the addict and the hidden consignment of controlled drugs. …

The ill-gotten gains of the drug traffic are huge. The key men operating behind the scene are ruthless and cunning and possess ample funds. They do their utmost to push their drugs through. Though we may not have drug-trafficking and drug addiction to the same degree as, for instance, in the United States, we have here some quite big-time traffickers and their pedlars moving around the Republic selling their evil goods and corrupting the lives of all those who succumb to them.

They and their trade must be stopped. To do this effectively, heavy penalties have to be provided for trafficking. Clause 15 specifies the quantities of controlled drugs which, if found in the possession of a person unless the contrary is proved, will be presumed to be in his possession for the purposes of trafficking.

The Second Schedule to the Bill shows the various penalties for offences committed under the Bill. For unauthorised traffic in a Class A controlled drug, for example, morphine, opium, heroin, the maximum sentence is 20 years or $40,000 or both, and ten strokes of the rotan. The heaviest penalty will apply to those convicted of unauthorised trafficking in a Class A controlled drug to persons under the age of 18 years. For this offence a maximum penalty of 30 years or $50,000 or both, and 15 strokes of the rotan, and a minimum penalty of five years or $10,000 or both, and three strokes of the rotan have been provided. *The existing law on dangerous drugs provides for the offence of trafficking, but there is no distinction as regards the age of the person to whom the drugs are sold. The penalties for the offence of trafficking in the existing law are $10,000 or five years, or both. These penalties are obviously totally inadequate as deterrents.*

[The] Government views the present situation with deep concern. To act as an effective deterrent, the punishment provided for an offence of this nature must be decidedly heavy. We have, therefore, expressly provided minimum penalties and the rotan for trafficking. However, we have not gone as far as some countries which impose the death penalty for drug trafficking.

Drug addiction is a problem increasing in size daily. What was once smoking opium and marijuana (the dried plant which is known locally as ganja) or the consumption of opium pills amongst a comparatively small group of middle-aged or elderly people has developed into the taking of methaqualone (known popularly as MX pills) or the smoking of marijuana amongst the younger age group in their teens or early 20's who can be found not only in the street or coffee-shop but also in the school and the university.

The young person falls under the influence of such a drug in a variety of ways. It might be the result of boredom, sense of adventure to know how it feels by taking it or he might be inducted to it before being accepted as one of the circle of so-called "friends". The danger is that when he finds that the effects of such a drug are not too upsetting but rather pleasant in the transient light-headed feeling it induces, he continues to take it.

After this, he so very easily progresses to more potent drugs that will give him that same feeling of euphoria after failing to get it with those drugs which he first used, even in increasing quantities. Once he becomes "hooked" on a hard drug, e.g. morphine or heroin, his path to ruination and disaster is certain. He will not be able to stop taking such a drug as the physical and mental symptoms known as "withdrawal symptoms" following will be unbearable. It is known

that once a person is hooked to a hard drug, he will lie, cheat, steal or even kill just to get the drugs. Thus, *a drug trafficker is the most abominable of human beings if he can be deemed "human". He is a merchant of "living death" which he brings to a fellow human being. He, therefore, deserves the maximum punishment*.

Members of this House will, however, note that it is not all punishment written into this Bill. *A clear distinction has been made between the drug addict and the trafficker and pedlar*. I am moving an amendment at the Committee Stage to remove the provision of a minimum sentence of two years for a second or subsequent offence for smoking, self-administering or consuming a controlled drug as provided in the Second Schedule to clause 29, which was inserted as a result of an oversight. *For those addicts who wish to stop this vicious habit, there are provisions under clause 33(3) for them to volunteer for treatment at an approved institution. Any statement given for the purpose of undergoing treatment will not be admissible as evidence against him in any subsequent prosecution. Anyone who has been addicted to any of the controlled drugs and especially those who have had their first acquaintance with such a drug can take advantage of this provision to have himself rehabilitated.* …

[emphasis added in italics and bold italics]

16 In 1975, the 1973 MDA was amended (via the Misuse of Drugs (Amendment) Act (Act 49 of 1975)) to introduce the mandatory death penalty as a punishment for the trafficking or importation of large quantities of controlled drugs. The then Minister for Home Affairs and Education explained that this was necessary in the interest of deterrence (see *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at cols 1379–1385):

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 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 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 [*ie*, the 1973 MDA], 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 [*viz*, the Misuse of Drugs (Amendment) Bill 1975 (Bill 55 of 1975)], 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 [the] amounts 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*** **.**

…

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. …

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

...

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. ...

[emphasis added in italics and bold italics]

17 The above passages clearly express the legislative objective of the 1973 MDA and of the amendments in 1975, which was to combat drug trafficking by imposing very severe penalties on drug dealers in order to deter the spread of controlled drugs in Singapore through trafficking. At the same time, the new legislative framework intended to create and maintain a clear distinction between drug dealers and drug addicts. This intention was carried into effect by the creation of a sharp distinction in penalties between, on the one hand, the offences of manufacturing, importation, exportation, and trafficking, and, on the other hand, the offences of possession and consumption.

18 The Dangerous Drugs Act (Cap 151, 1970 Rev Ed) ("the DDA"), which was one of the predecessors of the 1973 MDA, expressly defined "import" as follows:

Interpretation and Definition

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

...

"import", with its grammatical variations and cognate expressions, in relation to Singapore, means *to bring, or to cause to be brought into Singapore by land, air or water, otherwise than in transit*;

…

[emphasis added]

However, when the 1973 MDA repealed the DDA and set up an entirely new framework to combat the trafficking of controlled drugs, the 1973 MDA omitted any definition of the term "import". The DPPs submit, correctly in my view, that the omission to define "import" in the 1973 MDA indicates that Parliament must have intended, *vis-à-vis* the offence of drug importation under s 7 of the current MDA, to adopt the definition of "import" in s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the

IA"), which is as follows:

> **Interpretation of certain words and expressions**
>
> **2.**—(1) In this Act, and in every written law enacted before or after 28th December 1965, the following words and expressions shall … have the meanings respectively assigned to them unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:
>
> …
>
> "import", with its grammatical variations and cognate expressions, means to bring or cause to be brought into Singapore by land, sea or air;
>
> …

According to the DPPs, a further reason why Parliament must have intended the definition of "import" in s 2(1) of the IA to apply to the offence of drug importation under s 7 of the current MDA is because the definition in the IA is consistent with the definition of "import" in the Single Convention on Narcotic Drugs 1961 ("the Convention"), which Singapore acceded to on 15 March 1973. Article 1(1)(*m*) of the Convention defines "import" as follows:

> *Article 1*
>
> DEFINITIONS
>
> 1. Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention:
>
> …
>
> (*m*) "Import" and "export" mean in their respective connotations the physical transfer of drugs from one State to another State, or from one territory to another territory of the same State.
>
> …

The result of adopting the IA definition was that the words "otherwise than in transit" in the DDA definition were omitted.

19 The DPPs point out that while the definition of "import" in s 2 of the DDA explicitly excluded drugs in transit, the Convention definition of "import" in Art 1(1)(*m*) means the physical transfer of drugs into a State, which, the DPPs submit, is a definition that necessarily includes drugs in transit. According to the DPPs, the broader definition of "import" in Art 1(1)(*m*) is consistent with Art 31, the relevant portions of which are as follows:

> ***Article 31***
>
> **SPECIAL PROVISIONS RELATING TO INTERNATIONAL TRADE**
>
> …

10. Consignments of drugs entering or leaving the territory of a Party not accompanied by an export authorization shall be detained by the competent authorities.

11. A Party shall not permit any drugs consigned to another country to pass through its territory, whether or not the consignment is removed from the conveyance in which it is carried, unless a copy of the export authorization for such consignment is produced to the competent authorities of such Party.

…

14. The provisions of paragraphs 11 to 13 relating to the passage of drugs through the territory of a Party do not apply where the consignment in question is transported by aircraft which does not land in the country or territory of transit. If the aircraft lands in any such country or territory, those provisions shall be applied so far as circumstances require.

…

The DPPs submit that the provisions of Arts 31(10), 31(11) and 31(14) make it clear that the Convention imposes an obligation on its signatories ("Party States") to ensure that their territories are not used as transit points for the illegal movement of drugs.

20 In addition, the DPPs point out that the definition of "import" in Art 1(1)(*m*) of the Convention does not include any requirement that such import be for the purpose of trafficking. Instead, they submit, the Convention imposes an obligation on Party States to criminalise the mere physical transfer of drugs into their territories, and this is apparent from Art 36(1) of the Convention, which provides as follows:

Article 36

PENAL PROVISIONS

1. Subject to its constitutional limitations, each Party [State] shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, *transport, importation and exportation of drugs* contrary to the provisions of this Convention … *shall be punishable offences when committed intentionally*, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

[emphasis added]

This court's decision

The DPPs' argument based on legislative history

21 The first part of the DPPs' argument based on legislative history is simply that (a) Parliament, in omitting to define "import" in the 1973 MDA, intended to apply the definition of "import" in the IA; and (b) that definition must be given a meaning that is consistent with the meaning of "import" as contemplated by the Convention.

22 I would agree with this argument, but it does not carry the DPPs' overall argument further

because the IA definition applies unless "there is something in the subject or context inconsistent with such construction". Similarly, the Convention definition is expressed to apply throughout the Convention "[e]xcept … where the context otherwise requires". Thus, the crucial question which is not answered by the DPPs' submission is whether the context of the IA or the Convention requires the word "import" to be interpreted other than according to its literal meaning as defined in s 2(1) of the IA or Art 1(1)(*m*) of the Convention. For this purpose, I proceed on the basis that both definitions have the same meaning, except that the Convention definition is to be preferred because it is clearer and it describes the actual process of bringing in the drugs, *ie*, "the physical transfer of drugs from one State to another State". If this definition is applied to the facts in the present case, this would mean that the Appellant had imported the drugs into Singapore within s 7 of the current MDA because he had physically transferred the drugs from Johor to Singapore. This conclusion would give effect to a legislative policy (if that be the policy) that absolutely proscribes the bringing in of any drugs into Singapore, and that any breach of that policy would be punishable with greater punishment than if the accused person had distributed the drug to a consumer or to another distributor (see [53] below).

23 But, is this the legislative policy? In order to answer this question, it is necessary to consider the legislative purpose of the offence of importation in the context of the current MDA. What then is the purpose of s 7 of the current MDA? Section 9A(1) of the IA requires a court to adopt a purposive approach in interpreting a statute (*Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [57], and *Chief Assessor and another v First DCS Pte Ltd* [2008] 2 SLR(R) 724 at [10]). In his second reading speech on the Misuse of Drugs Bill 1972 that became the 1973 MDA, the Minister emphasised that the 1973 MDA was intended to bring the control of dangerous drugs "in line with those in force in other countries closely concerned with the spread of the addictive use of such drugs within their own countries and the increased international traffic which supplies such demands", and to incorporate the different categories of control recommended by the United Nations into domestic law (see [15] above). This statement was most likely a reference to the Convention because Singapore acceded to the Convention only a month after the second reading of the Misuse of Drugs Bill 1972. It is possible, therefore, that the categories of control in the Convention may support the DPPs' contention that the offence of importation is committed once the drugs are brought into Singapore regardless of the purpose of the importation.

24 Reading the Convention as a whole, it is clear that the mischief which it is targeted at is the international trade in illicit drugs (*ie*, drug trafficking). It was not the first international treaty designed to combat drug trafficking. The authors of *Commentary on the Single Convention on Narcotic Drugs, 1961* (United Nations, 1973) ("*Commentary on the Single Convention*") state (at p 426), "Article 36 [of the Convention] deals with the subject-matter covered in articles 2, 4, 5, 6, 7, 8, 9, 14 and 15 of the [Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs ("the 1936 Geneva Convention")]". The preamble to the 1936 Geneva Convention states, "Having resolved ... to combat by the methods most effective in the present circumstances the *illicit traffic* in ... drugs and substances ... [emphasis added]". The name of the 1936 Geneva Convention itself also indicates that its purpose is to combat drug trafficking. Various commentators agree that the 1936 Geneva Convention was clearly targeted at drug trafficking: see *A Century of International Drug Control* (United Nations Office on Drugs and Crime, 2008) at p 56; Jay Sinha, *The History and Development of the Leading International Drug Conventions* (February 2001); David Bewley-Taylor and Martin Jelsma, *Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation* (Transnational Institute, March 2011) at p 5; and Julia Buxton, *The Historical Foundations of the Narcotic Drug Control Regime* (World Bank Policy Research Working Paper, March 2008) at p 16.

25 The 1936 Geneva Convention's objective was also taken up in the Convention. The authors of *Commentary on the Single Convention* state (at p 112):

> Article 45 of the Third Draft, which served as [the] working document of the Plenipotentiary Conference, enumerated in its paragraph 1, subparagraph (*a*) "possession" among the actions for which punishment would be required. This paragraph is identical with the first part of paragraph 1 of article 36 of the Single Convention, dealing with "possession" as one of the punishable offences. Article 45 of the Third Draft is included in chapter IX, headed "Measures against illicit traffickers". ***This would appear to support the opinion of those who believe that only possession for distribution, and not that for personal consumption, is a punishable offence under article 36 of the Single Convention*** . The Draft's division into chapters was not taken over by the Single Convention, and this was the only reason why the chapter heading just mentioned was deleted, as were all the other chapter headings. *Article 36 is still in that part of the Single Convention which deals with the illicit traffic*. It is preceded by article 35, entitled "Action against the illicit traffic", and followed by article 37, entitled "Seizure and confiscation". [emphasis added in italics and bold italics]

The authors of *Commentary on the Single Convention* go on to state as follows (at pp 426–427):

> As far as possible under the complex conditions of different national views on principles of criminal law and jurisdiction, *article 36 [of the Convention] ... tries to ensure that all activities of the illicit traffic and all forms of participation in such activities ... will be prosecuted* ...
>
> ...
>
> *The enumeration in [Art 36(1)] of the activities which should be penalized very closely followed that of article 2, paragraph (a) of the 1936 Convention*. In order to make sure that *all activities coming under the general heading "illicit traffic" would be covered by [Art 36(1)]* and that any gap which may exist in the list in that provision, not only the actions specifically mentioned but "any other action which in the opinion of 'a Party' may be contrary to the provisions" of the [Convention] must be treated by that Party as a punishable offence in accordance with the terms of article 36. ...
>
> [emphasis added]

26 Confirmatory evidence of the Convention's purpose can be found in Art 35 which provides as follows:

> **ACTION AGAINST THE *ILLICIT TRAFFIC***
>
> Having due regard to their constitutional, legal and administrative systems, the Parties shall:
>
> (*a*) Make arrangements at the national level for co-ordination of preventive and repressive action against *the illicit traffic* ...
>
> (*b*) Assist each other in the campaign against *the illicit traffic* in narcotic drugs;
>
> (*c*) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against *the illicit traffic*;
>
> ...
>
> [emphasis added]

Article 35 of the Convention explicitly addresses the problem of illicit trafficking of drugs across national borders and requires Party States to suppress such activities within their borders or to assist each other in doing so across international borders. Illicit trafficking in drugs has two aspects: (a) illicit trafficking within national borders; and (b) illicit trafficking across national borders (*ie*, where drugs are brought out of one State into another State). Drugs can only be brought into one State from another State or brought out of one State to another State by physical means, *ie*, by transporting them in one form or another by some means or other by land, sea or air. However, such transportation is carried out not for its own sake, but rather for a particular purpose which, as contemplated by the Convention, is to distribute them at enormous profits to consumers (resulting in their eventual ruination). Importation or exportation is, by itself, a neutral act (from the perspective of the fight against drug trafficking) of physically transferring the drugs from one State to another State. It is the trafficking of such imported or exported drugs that the Convention is intended to target.

27 Accordingly, on a purposive interpretation of the Convention, the word "import" in Art 36(1) of the Convention connotes the requirement of distribution or intended distribution to other persons for their consumption or onward trafficking. *The word "import" in Art 36(1) of the Convention does not connote personal consumption because (a) personal consumption is not trafficking, and (b) Art 36(1) of the Convention makes no express mention of personal consumption of drugs*. The Convention was not intended to oblige Party States to criminalise the mere physical transfer of drugs from one Party State to another Party State. Rather, its purpose was to provide an international legal framework for all Party States to criminalise the transfer of drugs from one Party State to another Party State (a) for distribution in that Party State (whether for profit or otherwise), or (b) for export from that Party State to a third Party State for distribution there (whether for profit or otherwise). Article 36(1) of the Convention, which obliges Party States to criminalise various forms of conduct, subject to domestic constitutional limitations, must be read in light of this purpose of the Convention. So, for instance, Art 36(1) of the Convention does not oblige Party States to criminalise the "dispatch, dispatch in transit, transport, importation [or] exportation" of drugs if this conduct is done for the purpose of *personal* consumption.

28 Articles 31(10), 31(11) and 31(14) of the Convention are concerned with improving international co-operation to stem the flow of illicit drugs by (a) creating a licensing system for the legal import and export of drugs, and (b) ensuring that Party States do not permit the unlicensed transit of drugs through their territories. These provisions of the Convention, which deal with "consignments of drugs", clearly contemplate the movement of very large quantities of drugs and are consistent with the purpose of the Convention which is to combat drug trafficking. Furthermore, the DPPs' reliance on these provisions is misplaced because these provisions merely impose an obligation on Party States at the international level and do not purport to deal with the domestic criminal law of Party States at all.

29 The foregoing analysis of the purpose of the Convention (and of its predecessor, the 1936 Geneva Convention) shows that the DPPs' contention, *viz*, that the offence of drug importation under s 7 of the current MDA is committed by the mere act of bringing drugs into Singapore, is based on a literal interpretation of some provisions of the Convention and is not justified or supported by the purpose of the Convention.

30 For the avoidance of doubt, I note that although Art 36(1) of the Convention, interpreted in a purposive manner, does not oblige Party States to criminalise personal consumption, this does not mean that Party States are *prohibited* by the Convention from doing so. Article 39 of the Convention provides as follows:

APPLICATION OF STRICTER NATIONAL CONTROL MEASURES THAN THOSE REQUIRED BY

THIS CONVENTION

Notwithstanding anything contained in this Convention, a Party [State] shall not be, or be deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention ...

The DPPs' argument based on the case law on the offence of drug importation

31 The second limb of the DPPs' argument relies on their interpretation of decisions of the Court of Appeal which, in their view, have consistently held that the offence of importation under s 7 of the current MDA is committed once controlled drugs are brought or caused to be brought into Singapore without authorisation, regardless of the purpose for which the drugs are imported. The DPPs refer to the following decisions: *Ko Mun Cheung and another v Public Prosecutor* [1992] 1 SLR(R) 887 ("*Ko Mun Cheung (CA)*"), *Ng Kwok Chun and another v Public Prosecutor* [1992] 3 SLR(R) 256 ("*Ng Kwok Chun (CA)*"), *Tse Po Chung Nathan and another v Public Prosecutor* [1993] 1 SLR(R) 308 ("*Tse Po Chung Nathan (CA)*") and *Tan Kheng Chun Ray v Public Prosecutor* [2012] 2 SLR 437 ("*Tan Kheng Chun Ray*"). I shall now discuss these cases.

The first case: Ko Mun Cheung (CA)

32 In *Ko Mun Cheung (CA)*, the two appellants arrived at Changi Airport on a flight from Bangkok. They were each charged under s 7 of the Misuse of Drugs Act (Cap 185, 1985 Rev Ed) ("the 1985 MDA") with importing about 1.1kg of diamorphine into Singapore. The High Court found that both appellants had come into Singapore only with a view to boarding a flight to Amsterdam the next day; they had no intention of delivering the drugs to anyone in Singapore (see *Public Prosecutor v Ko Mun Cheung and another* [1990] 1 SLR(R) 226 ("*Ko Mun Cheung (HC)*")). One of the arguments raised in the appellants' defence was that they were not guilty of the offence of importing diamorphine into Singapore because they had not intended to deliver the drugs to anyone in Singapore. The High Court rejected this defence at [21]–[25] of *Ko Mun Cheung (HC)* as follows:

> 21 You, AMK [the second appellant] have admitted all along … that you knew you were carrying "Pak Fun" from Bangkok to Amsterdam. ... You stated that … it was your intention to carry the drug to Amsterdam but not to Singapore *and that you broke your journey in Singapore for convenience and not with a view to disposing of the drug in Singapore or delivering it to any person, not even Ah Mun, your contact man in Singapore … The air tickets seized by the CNB officers from Ah Mun corroborated your evidence as regards your intention to carry the drug to Amsterdam. So did Ah Mun's evidence.*
>
> 22 *On this evidence, your counsel has submitted that you have not committed the offence of importing the drug into Singapore … but only of being in possession … The submission is valid only if the word "import" in s 7 has a meaning which restricts it to bringing something into Singapore as its ultimate destination. The [Prosecution] has referred us to two decisions which support the contrary view that the word "import" in s 7 should be given its ordinary and natural meaning of bringing something into a country, whatever the purpose may be and whether or not it is the ultimate destination thereof.* In *R v Geesman* (1970) 13 CRNS 240, a Quebec Sessions Court found the accused guilty of importing hashish into Canada under s 5(1) of the Narcotic Control Act 1960–61 when he was arrested by the customs authorities at Dorval Airport, Montreal after arriving from Spain with ten pounds of hashish strapped to his body which he had intended to transport to British Columbia and then across the border to the United States. Section 5(1) [of Canada's Narcotic Control Act 1960–1961] is similar to s 7 of the [1985 MDA], and neither law contains a definition of the word "import". The President of the court gave the word its ordinary

and natural meaning, *ie* to bring or cause to be brought in something from a foreign country. His Honour was able to ascertain the intention of the Canadian Parliament as to the scope of that word by reference to Canada having ratified the [Convention], Art 1, s 1(M) of which defines the word "import" to mean the transfer of drugs from one state to another state. …

…

24 In our view, the reasoning in *R v Geesman* is applicable to ascertaining the meaning of the word "import" in s 7 of the [1985 MDA]. Singapore has also ratified the [Convention]. The [1985 MDA] is not a law which is concerned with customs duty but a law enacted by Parliament as part of Singapore's efforts to suppress the illegal importation into and exportation from Singapore of controlled drugs as defined in the [1985 MDA].

2 5 *Furthermore, the [Prosecution] has drawn our attention to s 2 of the Interpretation Act (Cap 1, 1985 Rev Ed) which defines the word "import" … to mean, "to bring or cause to be brought into Singapore by land, sea and air". The definition is clear and unambiguous. We do not see any reason for not applying the statutory definition to the said word in the [1985 MDA]*.

[emphasis added]

33 On appeal, the Court of Criminal Appeal ("CCA") affirmed the decision of the High Court. At [20] of its judgment, the CCA said:

2 0 *We were unable to see any reason why the definition of "import" in the Interpretation Act [(Cap 1, 1985 Rev Ed)] should not apply to the word "import" in the [1985 MDA]*. We accordingly agree with the decision of the trial judges that as the two appellants had (knowingly) brought the diamorphine in question into Singapore, they had contravened s 7 of the [1985 MDA]. Having so decided, there is no necessity for us to consider in detail the cases of *R v Geesman* (1970) 13 CRNS 240, *Bell v R* (1984) 3 DLR (4d) 385 and *R v Smith (Donald)* [1973] QB 924 referred to by the trial judges. Suffice it to say that *those cases lend support to the view taken that the offence under s 7 of the [1985 MDA] is committed when the drugs are brought into Singapore regardless of whether or not Singapore is the ultimate destination of the drugs*. [emphasis added]

34 In *Ko Mun Cheung (HC)* and *Ko Mun Cheung (CA)*, the issue of personal consumption as a defence to the capital charge did not arise as the appellants did not raise the defence. Their defence was that the drugs *were meant for distribution not in Singapore but only in Amsterdam*, and that they had agreed to be the couriers because they were in debt to one "Ah Lock"; they themselves were not drug addicts. The decisions of the High Court and of the CCA accordingly do not support the DPPs' argument.

The second case: Ng Kwok Chun (CA)

35 The facts in *Ng Kwok Chun (CA)* were slightly different from those in *Ko Mun Cheung (CA)*. The two appellants arrived at Changi Airport on a flight from Phuket which landed at about 2.20pm on 26 April 1989. They had a connecting flight to Brussels, which was scheduled to depart at 6.15pm on the same day. The first appellant was carrying 2.3kg of diamorphine while the second appellant was carrying 2.5kg of diamorphine. They were arrested in the transit area of Changi Airport. Their defence was that since they had not gone through passport control, they had not entered Singapore, and therefore could not have imported the drugs into Singapore. The High Court rejected this defence in *Public Prosecutor v Ng Kwok Chun and another* [1992] 1 SLR(R) 159 for the following reasons:

22 Counsel invited us to give the word "import" a restricted meaning [to exclude "transit lounge" cases]. To accord such an interpretation would, in our view, run counter to the intent of the Legislature. The [1985 MDA] is not concerned or connected with collection of customs duty or monitoring the entry of people into Singapore. *The law enacted by the Singapore Parliament was to suppress and wipe out drug trafficking and drug importation without authorisation under the [1985 MDA].*

23 In our view, the words "import into Singapore" as used in the [1985 MDA] is [*sic*] not intended to bear the narrow and uniquely specialised meaning for which defence counsel contended. To subscribe to the view advocated by counsel for [the first appellant] would negative its purport and be a construction contrary to the intention of the Legislature. Our view is therefore in tandem with the opinion expressed … in [*Ko Mun Cheung (HC)*] … and we are of the view that *the word "import" must include the bringing in of any merchandise from a foreign country for sale or use in Singapore as well as for transhipment or distribution overseas. It follows therefore that bringing drugs from elsewhere into Singapore albeit into the transit lounge of the Singapore airport with a view only to proceeding to another destination would fall within the scope and ambit of the word "import" as used in s 7 of the [1985 MDA]*.

[emphasis added]

36 On appeal, the CCA dismissed the appeal and said:

12 We therefore turn to examine the meaning of "import" in s 7 of the Act [*ie*, the 1985 MDA]. As there is no definition of "import" in the Act itself, the issue is whether there is anything in the subject or the context of s 7 of the Act that is inconsistent with the meaning ascribed to it by s 2 of the Interpretation Act (Cap 1) [*ie*, the Interpretation Act (Cap 1, 1985 Rev Ed)]. We start first with the legislative intent of the Act. The long title of the Act states that it is an Act "… for the control of dangerous or otherwise harmful drugs and for purposes connected therewith". The purpose of the Act has been described by the Privy Council in *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710 at [38] as follows:

> The social object of the Drugs Act [*ie*, the 1973 MDA] is ***to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade*** *and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine*.

13 The purpose of the Act was also considered in this court in *Lau Chi Sing v PP* [1988] 2 SLR(R) 451. It was argued that for the purpose of trafficking in drugs by transporting them contrary to s 5 of the Act, it was necessary that the destination of the transportation be within Singapore. This court rejected the argument in principle, stating as follows (at [10]):

> Apart from authority, it is plain that the proposition submitted by counsel for the appellant could not have been intended by Parliament. To accept counsel's submission that one has not committed the offence of trafficking where one has transported drugs within Singapore merely because such drugs were transported with the intention of delivering them to someone else in some other country, would be to declare Singapore as a safe transit point for drug traffickers all over the world. Such a result is wholly unacceptable. We can see no difference between a person who has been caught transporting drugs and delivering the drugs to another in Singapore, and that other person who is then caught transporting the same drugs within Singapore but is found to be in possession for the sole purpose of bringing them out of Singapore to be delivered to someone in a foreign country. It seems to us absurd to suggest that in such a case the first transporter should be guilty of trafficking but

the second not. Yet, this would be the conclusion if the submission by counsel for the appellant were accepted.

14 These statements of the purpose of the Act, and, in particular, the statement in *Lau Chi Sing* ([13] *supra*), indicate that ***the Act is directed not simply at the control of the use and distribution of the drugs in Singapore*** , ***but also at the movement of drugs through Singapore for distribution in other countries*** . *This purpose is attained by giving the word "import" in the Act the meaning ascribed to the word by s 2 of the Interpretation Act (Cap 1) and, in our view, it would be frustrated by a narrower and more restricted meaning*.

...

2 4 *[Articles 31(10), 31(11) and 31(14) of the Convention] make it abundantly clear that the Convention imposes an obligation on its signatories to ensure that their territory is not used as a transit point for the illegal movement of drugs*.

…

34 In view of the authorities and the considerations stated above, we were unable to accept the arguments … that *Ko Mun Cheung [(CA)]* … was wrongly decided. In our view, the meaning given to the term "import" in s 7 of the Act by this court gives effect to the intention and the policy of the Act. We do not think that such meaning is contrary to international comity although it may in some instances result in the infliction of a punishment imposed by Singapore law which is heavier than that which would have been imposed by the country of ultimate destination. … This court in *Lau Chi Sing* ([13] *supra* at [14]) stated, in the context of an argument that punishing the transportation of drugs intended for another country would be contrary to international comity, that:

> *It would not savour of comity to treat such transportation of drugs within Singapore as excusable merely because they are, so to speak, in transit, and are* ***intended to be delivered to someone else in another country*** .

35 The same point applies to the present case. *In our view, international comity does not require that Singapore refrain from stamping out any inclination to use her as a staging post for the movement of drugs between countries. The Convention clearly indicates the contrary: comity requires that she exerts every effort to prevent illegal movement of drugs. The Legislature has enacted the Act to give effect to its obligations under the Convention and the courts would be frustrating the policy and the intention of the Legislature to give the word "import" in the Act a meaning which is different from the meaning given to it by the Interpretation Act (Cap 1).*

[emphasis added in italics and bold italics]

37 Again, the issue of personal consumption did not arise in that case. However, the High Court stated (*obiter* at [23] of its judgment), that "the word "import" must include the bringing in of any merchandise from a foreign country for sale or use in Singapore as well as for transhipment or distribution overseas". The CCA agreed with the High Court's interpretation at [14] of its judgment (see [36] above) in holding that "the Act is directed not simply at the control of the use and distribution of the drugs in Singapore, but also at the movement of drugs through Singapore for distribution in other countries*".* Central to both statements is the focus on the distribution and use (other than for personal consumption) of the imported drugs. The appellants had clearly intended to

transport the large quantity of diamorphine to Brussels for the purpose of distribution or use (other than for personal consumption) there. As in *Ko Mun Cheung (CA)*, the appellants in this case had agreed to be the couriers because they were in debt; they themselves were not drug addicts.

The third case: Tse Po Chung Nathan (CA)

38 In *Tse Po Chung Nathan (CA)*, the two appellants arrived at Changi Airport on a flight from Phuket which landed at 2.24pm on 28 February 1989. They had a connecting flight to Amsterdam at 9.55pm on the same day. They were each carrying about 2.1kg of diamorphine. They were arrested in the transit lounge of Changi Airport. Their defence was identical to that raised by the appellants in *Ng Kwok Chun (CA).* They argued that they had not "imported" the drugs into Singapore because they had not entered Singapore. The CCA held as follows:

> 18 The objects of [the 1985 MDA] are clear, namely, to eradicate drug abuse and drug trafficking. There is a clear and simple definition of the word "import" in our Interpretation Act [*ie*, the Interpretation Act (Cap 1, 1985 Rev Ed)]. There is nothing in the context or subject of the [1985] MDA which demands that that definition should not be applied to the [1985] MDA. … *To construe the word "import" in the restricted sense contended by the appellants here would mean that drug runners could use the Changi Airport transit lounge as a centre for international drug trafficking. This would be contrary to Singapore's solemn obligation under the [Convention]: see in particular Art 31, paras 10, 11 and 14*. It may well be that the word "import" could have a technical or special meaning in other Acts (*eg* our Customs Act) or contexts but not here. Accordingly, we do not think there is any reason for this court to construe the word "import" differently from that in *Ng Kwok Chun [(CA)]* … [emphasis added]

The fourth case: Tan Kheng Chun Ray

39 The final case which the DPPs relied upon is *Tan Kheng Chun Ray.* In that case, the appellant drove into Singapore from Malaysia via the Causeway on 10 October 2009. At the Woodlands Checkpoint, an inspection of the appellant's car revealed the presence of drugs and drug paraphernalia. The appellant pleaded guilty to seven charges under the current MDA for, *inter alia*, the importation, possession and consumption of controlled drugs. The first charge was for importing four packets of granular/powdery substance containing not less than 14.99g of diamorphine ("the First Charge"). The second charge was for importing two packets of crystalline substance containing not less than 1.12g of methamphetamine ("the Second Charge"). The appellant was sentenced by the High Court to 22 years' imprisonment and 15 strokes of the cane on the First Charge, and five years' imprisonment and five strokes of the cane on the Second Charge (see *Public Prosecutor v Tan Kheng Chun Ray* [2011] SGHC 183). The High Court ordered that the sentences for these two charges (collectively, "the First and Second Charges") should run consecutively (with the sentences for the five remaining charges running concurrently), with the result that the total sentence was 27 years' imprisonment and 20 strokes of the cane.

40 The appellant appealed against sentence. One of his grounds of appeal was that the one transaction rule applied to the First and Second Charges, and therefore the High Court should not have ordered that the sentences in respect of these charges were to run consecutively. At [17] of its judgment, the Court of Appeal said:

> 17 The Judge in the present case considered that the one-transaction rule did not apply in respect of the First and Second Charges because the drugs in respect of each of the two charges were imported for different purposes: the diamorphine was imported for the specific purpose of passing on to a drug courier whilst the met[h]amphetamine was imported for the

> [a]ppellant's own consumption … This, in our view, would be an unsatisfactory application of the one-transaction rule because **importing drugs for the purpose of trafficking is more serious than importation of drugs for one's own consumption** . Such a view is founded upon the fact that trafficking in drugs generally carries stiffer penalties as compared to possession and/or consumption of drugs (see the Second Schedule to the [current MDA] for the prescribed penalties). Given that it is trite that **motive in committing an offence is a relevant sentencing consideration** (see, for example, the Singapore High Court decision of *Zhao Zhipeng v PP* [2008] 4 SLR(R) 879 at [37]), it would, with respect, be wrong, on the facts of this particular case, to reject the one-transaction rule and sentence a less culpable offender to a more severe sentence …
>
> [emphasis in bold and underlining added by the DPPs]

The DPPs submit that the Court of Appeal in the above passage had "clearly addressed its mind to the factual matrix of the appellant having imported methamphetamine for his own consumption, and concluded that the motive behind the importing of drugs was relevant only as a sentencing consideration" [note: 1] .

41 I do not agree with this submission insofar as it implies that the Court of Appeal had rejected the defence of personal consumption to a charge of importation. Such a defence was not raised and not addressed by the Court of Appeal. What the Court of Appeal said at [17] of its judgment (see [40] above) was that "motive in committing an offence *is* a relevant sentencing consideration" [emphasis added], and not that motive is *irrelevant for other purposes*. Furthermore, the Court of Appeal was only concerned with whether the two offences, *viz*, importation of diamorphine for the purpose of trafficking and methamphetamine for the purpose of personal consumption, committed at the same time by the appellant could be subject to the one-transaction rule. The Court of Appeal held (at [18] of its judgment) that the one-transaction rule should apply in respect of the First and Second Charges because these offences were committed in one instance insofar as the appellant had imported both the diamorphine and methamphetamine into Singapore at the same time via the same modus by transporting them in his vehicle, and therefore the sentences for the First and Second Charges should be served concurrently.

42 To summarise the holdings in the four decisions of the CCA and the Court of Appeal discussed above, none of them addressed the question of law before me as to whether the offence of importation under s 7 of the current MDA is committed where the purpose of the importation is not to distribute the drugs either within Singapore or in another State but for the purpose of the importer's own consumption.

Public Prosecutor v Majid Bin Abdul Rahim [2007] SGDC 222

43 This question of law, however, arose directly in *Public Prosecutor v Majid Bin Abdul Rahim* [2007] SGDC 222 ("*Majid*"). The accused was charged with importing four packets of granular/powdery substance containing 1.23g of diamorphine into Singapore under s 7 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the 2001 MDA"). He raised the defence that the drugs were meant for his own consumption and therefore he was not guilty of the offence of importation, but only of possession of controlled drugs under s 8(*a*) of the 2001 MDA. The district judge rejected this argument on the following grounds:

> 4 It was the submission of the defence that even though … [*Ko Mun Cheung (HC)*] … had ruled that the statutory definition of the word "import" in Section 2 of the Interpretation Act [(Cap 1, 2002 Rev Ed)] … should apply to the word "import" in the [2001 MDA], the accused in this case,

because of the fact that the amount of controlled drugs that he brought into Singapore was only 1.23 grams and because … the drugs were meant for his own consumption should only be considered to have "transported" the controlled drug, and "mere transportation of drug will not amount to trafficking unless it is shown that it is to be delivered to some third person" (*Ong Ah Chuan vs. PP* [1981] 1 MLJ 64).

5 There was nothing wrong with learned counsel's submission with regard to the definition of "transport" in the context of the definition of "trafficking" in Section 2 of the [2001 MDA]. Unfortunately for the accused in this case, the charge against him was not for an offence [of trafficking] under Section 5 of the [2001 MDA] but for an offence of "importing" under Section 7 of the [2001 MDA].

6 The social object to [*sic*] the [2001 MDA] is to prevent the growth of drug addiction in Singapore and the legislature has seen it fit to provide for different penalties for possession, trafficking, importing and other offences under the [2001 MDA]. Counsel for the defence was wrong when he submitted that "the punishments prescribed for trafficking and importing are identical". Whilst the minimum punishments for importing and trafficking in Class A drugs are similar, the minimum punishments for importing and trafficking in Class B and Class C drugs are not the same. The minimum punishments for importing Class B and Class C drugs are higher than for trafficking in the similar drugs (5 years and 5 strokes for importing a Class B drug and 3 years and 3 strokes for trafficking in a Class B drug. For importing a Class C drug, the minimum sentence is 3 years and 5 strokes and for trafficking, it is 2 years and 2 strokes). *As mentioned earlier …* [Ko Mun Cheung (HC)] *has ruled on the definition of "import" in the [2001 MDA] and there was absolutely no reason for the court to agree with defence counsel that an offence under Section 7 of the [2001 MDA] would not be committed unless the importer intended to deliver the controlled drug to other parties.*

[emphasis added]

44 The district judge sentenced the accused to six years' imprisonment and five strokes of the cane for the importation charge. The accused appealed against conviction and sentence in Magistrate's Appeal No 149 of 2007 ("MA 149/2007"). His sole ground of appeal against conviction was that the drugs were meant for his own consumption and therefore he was not guilty of the offence of importation, but only of possession of controlled drugs under s 8(*a*) of the 2001 MDA. His appeal against conviction and sentence was dismissed by a High Court judge in October 2007 without giving any written grounds. As my perusal of the appeal record in MA 149/2007 discloses that there was no submission based on the legislative history and purpose of the 1973 MDA (and the subsequent amendments in 1975 which introduced the mandatory death penalty) as well as that of the Convention, I will examine afresh the reasoning of the district judge in *Majid* to determine its soundness in law.

Whether a person bringing drugs into Singapore for personal consumption is guilty of the offence of importation

45 In *Majid*, the district judge relied on three reasons in holding that there is a difference in kind between the offence of trafficking and the offence of importation. The first reason was that the case law on trafficking was irrelevant because the charge against the accused was that of importation and not trafficking. The second reason, which can be dismissed immediately as erroneous (see [34] above), was that the High Court in *Ko Mun Cheung (HC)* decided, implicitly, that personal consumption was not a defence to the offence of importation. The third reason was that the offence of importation carries a higher punishment than trafficking in relation to Class B and Class C controlled

drugs, and therefore they are different offences.

46 With respect to the first reason – that the case law on trafficking was irrelevant because the charge was that of importation – the district judge did not go on to consider whether the *reasoning* in the case law on trafficking could nonetheless be applied where the charge was that of importation.

47 Section 2 of the current MDA (see [13] above) defines "traffic" as doing or offering to do one of the following acts: selling, giving, administering, transporting, sending, delivering or distributing. The courts have consistently held that where an accused person is charged with trafficking by transportation, it is not sufficient merely to prove that he had transported the drugs because he must also have transported the drugs for the purpose of distribution to another person or persons. As Lord Diplock said in *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"):

> 10 To "traffic" in a controlled drug so as to constitute the offence of trafficking under s 3 [the then equivalent of s 5 of the current MDA], involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (*a*) of the definition of "traffic" and "trafficking" in s 2. *Even apart from any statutory definition, the ordinary meaning of the verb "to traffic", in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied*. This concept, involving transfer of possession is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking "transport" is sandwiched between "sell, give, administer" which precede it, and "send, deliver or distribute" which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. *"Transport", although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears*. In their Lordships' view the immediate context of the verb "transport", to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to "traffic", of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that *the evident purpose of the [1973 MDA] is to distinguish between dealers in drugs and the unfortunate addicts who are their victims*, *all combine to make it clear that "transport" is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s 3 with its draconian penalties is directed*.
>
> ...
>
> 1 2 *... [S]imply to transport from one place to another a quantity of a controlled drug intended for one's own consumption ... involves an offence of having the drug in one's possession under s 6* [the then equivalent of s 8(*a*) of the current MDA] *but does not amount to the offence of trafficking under s 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find*. …
>
> [emphasis added]

48 The Privy Council in *Ong Ah Chuan* adopted this interpretation of the offence of trafficking because it found that Parliament had not intended the scope of this offence to include the situation where the accused person had transported drugs for personal consumption. This reasoning was applied subsequently by the Court of Appeal in *Lau Chi Sing v Public Prosecutor* [1988] 2 SLR(R) 451 ("*Lau Chi Sing (CA)*"). In that case, the accused arrived in Singapore from Kuala Lumpur and checked into a hotel in Geylang. On the following day, he took a taxi to Changi Airport. He was arrested at the airport after he checked in for a flight to Amsterdam. He was subsequently charged with trafficking in 242.85g of diamorphine by transporting it from Geylang to Changi Airport. The accused's evidence was that he had transported the drugs from Geylang to Changi Airport for distribution in Amsterdam and not in Singapore. One of the arguments raised in his defence was that he had not in law committed the offence of drug trafficking because the intended destination of the drugs was Amsterdam and not Singapore. The High Court rejected this defence, holding as follows (see *Public Prosecutor v Lau Chi Sing* [1987] SLR(R) 617):

> 18 One point which has not been explicitly covered in this very comprehensive judgment [in *Ong Ah Chuan*] is the position such as the instant case where the transporter is transporting the drugs out of this country for distribution abroad. But it seems to us that it is implicit in that judgment that such an act of transporting falls within the meaning of "transport" in s 2. As decided there, the test for determining whether an act of transporting drugs from one point to another within the meaning of "transport" in s 2 is the purpose for which the drugs are being transported. *If the drugs are transported for the purpose of distributing or giving them to one or more persons, known or in contemplation, at the intended destination then that act of transporting falls within the statutory meaning and is an act of trafficking; if, on the other hand, the purpose is for the transporter's own consumption, such act of transporting is not trafficking within the meaning of s 2*. Hence, it seems to us that so long as the drugs are transported for the purpose of distribution, it is immaterial whether the intended distribution takes place here or abroad. We are not, in this case, concerned with the act of distribution but with the act of transporting for the purpose of distribution. *The gravamen of the charge in this case is not the act of distributing the drugs but the act of transporting them for the purpose of distribution*. Adopting the words of Lord Diplock, if the purpose for which the drugs are being moved is to transfer possession from the mover to some other person known or in contemplation at the intended destination the mover is guilty of the offence of trafficking in drugs, irrespective of whether the purpose is achieved or not and – we would add – irrespective of whether the intended destination is here or abroad. Logically, it must follow that such a mover commits the offence immediately after he has begun his journey of moving the drugs, irrespective of whether he reaches his destination or not. Again, adopting the words of Lord Diplock, *it is the act of transporting drugs for the purpose of distribution which is one of the evils against which s 5, with its draconian penalties, is directed*. [emphasis added]

49 The decision of the High Court was upheld on appeal: see *Lau Chi Sing (CA)*. The CCA stated:

> 9 In our opinion counsel for the appellant had misunderstood the Privy Council decision in *Ong Ah Chuan* … The reference to the purpose for which drugs are being transported was a commonsensible one and was made for the sole reason that *otherwise the mere act of transporting drugs would amount to the offence of trafficking under the [1985 MDA] even though the drugs are intended for the transporter's own consumption. Such a result would be repugnant to the ordinary meaning of the word "traffic" and to the structure of the [1985 MDA] which draws a distinction between the offence of possession and that of trafficking, the latter being punishable with far heavier penalties including, in certain cases, death.* [emphasis added]

50 The question then is whether the reasoning in *Ong Ah Chuan* and *Lau Chi Sing (CA)* applies

where the charge is one of importation. The reasoning in those cases applies with equal force where the charge is one of importation as, in my view, Parliament did not intend the scope of the offence of importation to include the case of the accused person bringing into Singapore drugs for his personal consumption. The offence of importation is, in substance, trafficking across national borders. The enactment of the 1973 MDA and its subsequent amendment in 1975 to impose more severe punishments was expressly intended to combat drug trafficking while at the same time creating and preserving a distinction between drug dealers, who would bear the full brunt of the harsh penalties, and drug addicts, who would not (see [15]–[17] above). This dual objective of our drugs legislation has been consistently reiterated over the years when the scope of the mandatory death penalty was widened to include opium, cannabis, cocaine and methamphetamine (see *Singapore Parliamentary Debates, Official Report* (30 November 1989) vol 54 at cols 862–864, and *Singapore Parliamentary Debates, Official Report* (1 June 1998) vol 69 at cols 40–43). Interpreting the offence of importation to include importation for the purpose of personal consumption would be inconsistent with Parliament's intention to maintain the distinction between the more harmful activity to the general public of a drug trafficker and the less harmful activity of a drug addict bringing in drugs for his own consumption. The same reasoning would apply in the case of the offence of exportation.

51 In addition, interpreting the offence of importation to require that the importation be for the purpose of trafficking will not undermine the intention of Parliament to combat drug trafficking. Where an accused person imports for the purpose of personal consumption, he harms himself and not the larger class of drug addicts. Of course, where he imports more drugs than is necessary for his own consumption intending to distribute the quantity in excess, he will also be guilty of trafficking with respect to the quantity in excess. An inference of such intention may be drawn from the quantity of drugs imported (see [61] below). Where an accused person imports for the purpose of trafficking, the drugs will destroy the lives of many others. As the High Court observed in *Public Prosecutor v Tan Kiam Peng* [2007] 1 SLR(R) 522 at [8]:

> 8 The drug trade is a major social evil. While drug peddlers may not be visibly seen or caught taking away or damaging lives, they nonetheless inflict alarmingly insidious problems on society that have the potential to destroy its very fabric if left unchecked. *Each successful trafficker has the disturbing potential to inflict enormous and enduring harm over an extremely wide circle of victims. Apart from the harm that drugs inflict on an addict's well-being, drug trafficking engenders and feeds a vicious cycle of crime that inexorably ripples through the community.* [emphasis added]

Construed in this way, the offence of unauthorised importation of controlled drugs under s 7 of the current MDA deals with the cross-border trafficking (by transportation) of controlled drugs, while the offence of trafficking under s 5 of the current MDA deals with the trafficking of controlled drugs within Singapore.

52 The courts must always consider the purpose of the law and not simply the letter of the law. A useful illustration of a nuanced, purposive, approach is the decision of the Court of Appeal in *Ng Yang Sek v Public Prosecutor* [1997] 2 SLR(R) 816 ("*Ng Yang Sek*"). In that case, the accused was arrested while travelling in a taxi and found in possession of 3,449g of opium. Another 13,956.1g of opium was found in his house. He was charged with two charges of trafficking under s 5 of the 1985 MDA. The trial judge found that the accused was a practitioner of Chinese medicine and that the opium in his possession was used solely for the manufacture of medicinal plasters. Nonetheless, the trial judge convicted the accused of trafficking and sentenced him to the mandatory death penalty. On appeal, the Court of Appeal set aside the conviction on the charges of trafficking for the following reasons:

> 35 The central issue raised in this appeal therefore is the definition of "trafficking". As

previously mentioned, the trial judge took a literal approach to this question. Before us, the DPP argued that, even if the definition attributed to the term "administer" by the trial judge was wrong, the appellant by his own admission was "selling" or "giving" the opium in the form of medicinal plasters. As also mentioned previously, the crucial issue was whether the appellant's avowed purpose for the opium took his actions out of the meaning of "trafficking".

36 Although there are no authorities directly on point, in the seminal case of *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710, the Privy Council declined to interpret the s 2 definition of "trafficking" literally. It was stated by their Lordships that the mere physical conveyance of drugs is not "transporting" under s 2 if it is not accompanied by the ultimate purpose that the drugs be distributed (see also *Tan Meng Jee v PP* [1996] 2 SLR(R) 178). *The underlying rationale of these cases is that, if the law does not give these verbs such an interpretation, there is no distinction between drug dealers and drug addicts engaged in the physical transporting of drugs, the one for distribution and the other for his own consumption* …

...

[In *Ong Ah Chuan*,] Lord Diplock was influenced into arriving at the above conclusion, *inter alia*, by the "natural meaning" of the verb "traffic" and the "evident purpose" of the Act which was to *distinguish between dealers in drugs and their addict victims and whose draconian penalty was directed at those who supply or distribute addictive drugs to others. The Act after all provides for a separate and less serious offence of possession under s 8 thus acknowledging the qualitative difference between the acts of "trafficking" and acts of "possession".*

37 Perhaps another example to illustrate why the courts should not invariably adopt a literal approach concerns the term "administer". The plain meaning of this term need not envisage the transfer of the drug to another person. The appellant could administer the drug to himself and on the face of the s 2 definition, this would be considered "trafficking" as well. *The obvious absurdity of such a result precludes its occurrence.* Yet another example is the case where a person is arrested outside a neighbourhood police post with the controlled drugs and he manages to rebut the presumption in s 17 by establishing that his intent was to surrender the drugs to the authorities. Surely in such a case that person is not in the act of "giving" the drugs in the sense used by the s 2 definition? *The point is that the application of the plain meaning of the s 2 definition of "trafficking" can, and in certain circumstances must, be construed in the light of the purpose of the legislation to avoid injustice.*

38 The s 2 definition is drafted broadly to maximise the efficacy of the Act in controlling drug trafficking. Nevertheless, *Ong Ah Chuan* and the line of cases following it which have recognised the defence of self-consumption show that the courts have in that context refused to take the definition on its face. There are distinctions to be drawn between certain acts, which although they may be described by the same verbs in s 2, nevertheless take place within different factual contexts. *These distinctions, if drawn, are not inconsistent with the purpose of the legislation. In fact, they are inherent in the legislation itself, if not expressly stated, and certainly can be identified in the debates preceding the passing of the legislation. The courts have been alive to this. By interpreting the legislation to reflect these distinctions, the courts, rather than defeating the intention of Parliament, are instead ensuring that the legislation operates in a manner conforming with its object.* Borrowing the words of Dube J in *Regina v Rousseau* (1991) 70 CCC (3d) 445, "it is not necessary to sacrifice the object pursued by Parliament on the altar of formalism".

...

40 The ministerial speeches, members' speeches and ministerial replies at each of the debates concerning the introduction of the Act and its amendments are *replete with references to the need to control the spread of the addictive use of drugs and the "international traffic which supplies such demands" by using severe penalties to deal with the so-called merchants of death who ply their evil trade.*

41 Parliament, as the trial judge correctly pointed out, had "foreseen the need for a very strict control on the possession and movement of drugs to Singapore and also within it". However, in our opinion, this does not lead inexorably to the conclusion that what the appellant was guilty of doing was "trafficking". That he was in possession of a controlled drug and therefore guilty of an offence under s 8 of the Act is, in our opinion, not in doubt. However, whether he was engaged in "trafficking" is an altogether different question. *It is clear to us that the appellant does not fall within the class of offenders which Parliament had in mind when it enacted s 5 of the Act. The opium in the appellant's possession was never meant or even remotely contemplated to be used in a manner associated with drug addiction. On the incontrovertible evidence before us, it can be categorically stated that he was never associated in any way with the "evil trade" in narcotics. Such a result as arrived at by the trial judge is furthermore not dictated by the legislation. As discussed above, the authorities show that the courts have previously refrained from a literal interpretation of the s 2 definition. Although not directly on point, those cases show that there are situations where it would be unduly formalistic to apply the Act literally especially in view of its avowed purpose and the draconian sanction for trafficking. In our opinion, the present case is one such situation.*

...

4 6 *In our judgment, it is clear beyond doubt that the appellant's conduct should not attract the disapprobation that is reserved for the drug dealers who exploit the vulnerability of addicts and who spread the poison of narcotic addiction in society. The dangers associated with the appellant's possession of drugs*, eg *that they could inadvertently fall into the wrong hands, are under the scheme of the Act to be punishable under s 8 and not s 5. In our opinion, it is unarguable that Parliament did not intend that the legislation operate in such a way as held by the trial judge and contended for by the Prosecution. These interpretations are unduly formalistic and pay undue deference to the letter of the law, not its object.*

47 Accordingly, we allow the appeal and order that the appellant's conviction for trafficking be substituted by one for possession.

[emphasis added]

Why are the punishments for importing higher than those for trafficking in relation to Class B and Class C controlled drugs?

53 What then of the third reason given by the district judge in *Majid* that the offence of importation is different and distinct from the offence of trafficking because the punishment for the first offence is higher than the second offence with respect to Class B and Class C controlled drugs? Why should there be a difference in the punishments and how can this difference be accounted for except on the basis that they are two entirely different offences? Unfortunately, the parliamentary materials do not address this issue, and therefore the court must try to identify a probable basis for this difference. In my view, a reasonable explanation for the difference, and one that goes to the heart of the law in combating the spread of drug consumption within a State, is that the physical transfer of drugs from one State into another State increases the stock of drugs in the second State

and thereby potentially increases the harm to its residents in making available for trafficking more drugs than before. Therefore, the offence of importation is potentially more harmful than the offence of trafficking an existing stock or supply of drugs which reduces that stock or supply over time. As the exportation of drugs to another State is the mirror image of importation (with the difference being one of perspective), the same explanation applies equally to the offence of exportation.

54 However, the higher potential harm of importation as compared to trafficking does not justify interpreting the offence of importation as being distinct from the offence of trafficking which is not committed where the accused person transports drugs for the purpose of personal consumption (as the Privy Council held in *Ong Ah Chuan*). First, Parliament had clearly intended to distinguish between drug dealers and drug addicts (see [50] above) and it is consistent with, and would further, this intention to interpret the offence of importation as being committed only where the accused person had imported the drugs for the purpose of trafficking. Secondly, the higher potential harm of importation only arises where the drugs are in fact imported for the purpose of trafficking. To import drugs is to bring them into Singapore from another State. Drugs can only be brought into Singapore by some form of conveyance that effects the physical transfer (in the words of Art 1(1)(*m*) of the Convention) of the drugs from another State into Singapore. The word "import" therefore merely describes the process of transporting the drugs physically from another State into Singapore. The extent of the harm caused by such importation depends on the purpose of the importation. *Ex hypothesi*, there is no increase in the stock of drugs for trafficking if the accused person imports for personal consumption.

55 The same rationale is also applicable to explain the severe punishments for the unauthorised manufacture of controlled drugs in Singapore which is an offence under s 6 of the current MDA. The word "manufacture" is defined in s 2 of the current MDA as follows:

> "manufacture", in relation to —
>
> (*a*) a controlled drug, includes any process of producing the drug and the refining *or transformation of one drug* into another; or
>
> (*b*) a controlled substance, includes any process of producing the substance and the refining or transformation of one substance into another;

It may be noted that the definition says nothing about the purposes for which a controlled drug is manufactured. The Second Schedule to the current MDA prescribes the death penalty for the offence of manufacturing morphine, diamorphine, cocaine or methamphetamine, whatever the quantity that may be manufactured. For other Class A drugs, the minimum punishment is 10 years' imprisonment and 5 strokes of the cane and the maximum punishment is 30 years' imprisonment or life imprisonment and 15 strokes of the cane. For Class B drugs, the punishment is the same as for Class A drugs (other than morphine, diamorphine, cocaine and methamphetamine). For Class C drugs, the minimum punishment is 5 years' imprisonment and 5 strokes of the cane and the maximum punishment is 20 years' imprisonment and 15 strokes of the cane. These punishments are more severe than those for importation and trafficking.

56 It can reasonably be argued that the manufacture of controlled drugs in Singapore will increase the stock of drugs available for distribution to consumers and must therefore be punished more severely than the offence of trafficking of an existing stock of drugs which thereby reduces the stock in the course of time. Yet, it is even more reasonable to argue that it cannot have been the legislative intent that if someone manufactures only 0.01g of morphine, diamorphine, cocaine or methamphetamine, he shall suffer the death penalty even though he then consumes it himself or

destroys it. That would be an absurd interpretation of the offence of manufacturing controlled drugs without authorisation. It is absurd because the mere manufacturing of controlled drugs is, *per se*, a neutral act (from the perspective of the fight against drug trafficking). It causes no harm to others if the manufactured drugs are not distributed for consumption by others. If the manufactured drugs are used for personal consumption, the manufacture of these drugs does not increase the stock or supply of drugs for distribution. In my view, the sensible and correct approach is to construe the offence of unauthorised manufacture of controlled drugs under s 6 of the current MDA as being committed only if the drugs are intended for distribution to drug addicts within Singapore or outside Singapore. This interpretation is consistent with the legislative intent as explained in Parliament in November 1975 by the then Minister for Home Affairs and Education (see [16] and [50] above).

57 While the punishments for manufacturing are higher than those for importation, this does not indicate that the offence of manufacturing was intended by Parliament to include the situation where the accused manufactured drugs for personal consumption. Parliament had clearly intended to preserve a distinction between drug dealers and drug addicts, and interpreting the offence of manufacturing to require that the manufacturing be for the purpose of trafficking would not undermine Parliament's intention to combat drug trafficking (see also [54] above in the context of the offence of importation).

58 I therefore conclude that the higher punishments prescribed for the unauthorised importation or manufacture of controlled drugs is not a sufficient reason for rejecting personal consumption as a defence to a charge of importation or manufacture of such drugs. Interpreting these offences as requiring that the importation or manufacture be done for the purpose of trafficking will lend coherence to the statutory framework in the current MDA which is intended (a) to control the distribution of controlled drugs within and across national borders, in line with the objectives of the Convention, and (b) to create and maintain a distinction in terms of punishment between drug dealers and drug addicts.

59 This interpretation also lends consistency to the law in two ways. First, it allows for the possibility that an accused who is charged with a capital offence of importing more than 15g of diamorphine can escape the mandatory death penalty by satisfying the court that part of the diamorphine was imported for personal consumption, just as an accused who is charged with trafficking more than 15g of diamorphine is presently entitled to do the same (see, for instance, *Abdul Karim bin Mohd v Public Prosecutor* [1995] 3 SLR(R) 514 at [38]–[39]). Where an accused is charged with trafficking by transportation, the only difference is that in the importation scenario the accused had transported the drugs across national boundaries while in the trafficking scenario he had transported the drugs within Singapore. In my view, this is an immaterial difference because the harm that may potentially be caused to society depends on the purpose for which the drugs were transported, regardless of whether they were transported within or into Singapore. Secondly, it avoids the anomaly that a Singapore citizen or permanent resident is guilty of consuming controlled or specified drugs under s 8(*b*) of the current MDA if he consumes the drugs overseas (s 8A(1) of the current MDA), which is an offence carrying a maximum punishment of ten years' imprisonment, a fine of $20,000, or both, whereas he is guilty of drug importation under s 7 of the current MDA the moment he brings the drugs into Singapore for the purpose of personal consumption in Singapore, which is an offence carrying, where Class A drugs are concerned, a *mandatory minimum* sentence of five years' imprisonment and five strokes of the cane, with a maximum punishment of 30 years' imprisonment and 15 strokes of the cane (assuming that the offender imports a small quantity of drugs). This would give rise to an absurd outcome given that the harm to society resulting from the offender's actions is the same in both situations (*ie*, where the offender consumes drugs overseas and where he imports drugs for personal consumption in Singapore).

The burden of proof in relation to personal consumption

60 In the present case, the Appellant had imported 0.35g of granular/powdery substance containing 0.01g of diamorphine (which formed the subject of the Diamorphine Charge which was proceeded upon) and 0.05g of crystalline substance containing methamphetamine (which formed the subject of the Methamphetamine Charge which was taken into consideration for the purpose of sentencing). The 0.01g of diamorphine which the Appellant had imported is below the prescribed quantity that would trigger the presumption under s 17 of the current MDA ("the s 17 presumption") that the Appellant had the drug in his possession for the purpose of trafficking. The question therefore arises as to the burden of proving that the drug in the present case was intended for personal consumption. In the ordinary case of an accused person found in possession of a controlled drug in a quantity that does not trigger the s 17 presumption, the burden of proving that he had it in his possession for the purpose of trafficking would be on the prosecution if the defendant is charged with an offence of trafficking under s 5 of the current MDA. As the Court of Appeal recently reiterated in *AOF v Public Prosecutor* [2012] 3 SLR 34 at [2], it is a fundamental principle that the Prosecution bears the legal burden of proving its case against the accused person beyond a reasonable doubt.

61 What is the correct analysis of the Appellant's conduct in the present case? He had transported the drugs from Johor to Singapore in his car, thereby importing (in a literal sense) the drugs into Singapore. He could have been charged for trafficking by transporting the drugs from where he crossed into the Singapore side of the Causeway to the Woodlands Checkpoint where he was arrested, and if he had been so charged, the burden would be on the Prosecution to prove beyond a reasonable doubt that the drug was transported for the purpose of trafficking. Lord Diplock stated in *Ong Ah Chuan*:

> 14 Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. *Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in s 15* [the then equivalent of s 17 of the current MDA].
>
> 15 As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.
>
> 16 Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under

s 3 [the then equivalent of s 5 of the current MDA].

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

> (a) *the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in s 2; but* ***if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under s 3*** *, whether that purpose was achieved or not*. This is the effect of the provisions of s 3(*c*) and s 10 [the then equivalent of s 12 of the current MDA]; and
>
> (*b*) *if the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.*

18 So, in their Lordships' view, the effect of the [1973 MDA] was stated with clarity and accuracy in the following passage of the judgment of the Court of Criminal Appeal in [*Wong Kee Chin v Public Prosecutor* [1977–1978] SLR(R) 628] ... at [33] ... :

> When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under s 15(2) [the then equivalent of s 17 of the current MDA] that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under s 15(2) would constitute a *prima facie* case of trafficking which if unrebutted would warrant his conviction. *In those circumstances* ***the burden of proof would clearly shift*** *to the accused and he would have to rebut the case made out against him.* The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the type of "transporting", the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court.

[emphasis added in italics and bold italics]

In order to discharge this burden, the Prosecution may argue, as the Privy Council noted in *Ong Ah Chuan*, that the court should draw an inference from, *inter alia*, the weight of the drugs imported that those drugs were imported for the purpose of trafficking.

62 In the context of this case which involves a charge of drug importation, there is no reason why the fundamental principle that the Prosecution bears the burden of proving its case beyond a reasonable doubt (see [60] above) should not apply. Parliament had intended that an essential ingredient of the offence of importation should be that the accused person had imported the drugs for the purpose of trafficking (see [48]–[51] above). The burden is thus on the Prosecution to prove beyond a reasonable doubt that the Appellant had brought the drug into Singapore for the purpose of trafficking. If the Prosecution is unable to discharge this burden, the Appellant can only be convicted of the offence of unauthorised possession of a controlled drug under s 8(*a*) of the MDA.

63 However, in my view the Prosecution may rely on the s 17 presumption if an accused person is proved to have had in his possession a quantity of drugs which exceeds the specified amounts in s 17 of the current MDA, and he is charged with an offence of drug importation under s 7 of the current MDA. The rationale of the s 17 presumption is not predicated on the formal classification of offences in the current MDA; rather, it is premised on the assumption that persons in possession of large quantities of drugs (far in excess of what would be needed for normal daily consumption) must have had the drugs in their possession for the purpose of trafficking. As the then Deputy Prime Minister and Minister for Home Affairs explained during the second reading of the Misuse of Drugs (Amendment) Bill 2005 (Bill 40 of 2005) (see *Singapore Parliamentary Debates, Official Report* (16 January 2006) vol 80 at col 2095):

> … [C]lause 5 of the MDA Bill amends section 17 [of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed)] to extend the presumption clause for trafficking to Ketamine. Any person who has in his possession … more than 113 grammes of Ketamine shall be presumed to be in possession of Ketamine for the purpose of trafficking and the onus is on him to prove that his possession of Ketamine was not for that purpose. *This amount of 113 grammes of Ketamine is equivalent to 100 times the estimated daily dosage of the drug for an abuser. This basis is the same as that used for deriving the presumption amounts for other drugs, such as methamphetamine, 'Ecstasy' and heroin. Just to give you an idea of what 100 shots of Ketamine cost. 113 grammes of Ketamine cost about $8,000 in market value. This means that if a person needs to spend $8,000 on Ketamine for himself, then he cannot be doing for himself, he must be trafficking. That is the basis for the presumption*. [emphasis added]

This rationale applies with equal force where a person is caught importing, exporting or manufacturing large quantities of drugs. In such cases, the burden will then shift to the accused person who will have to prove, on a balance of probabilities, that he had imported, exported or manufactured (as the case may be) for the purpose of personal consumption or for some other purpose wholly unconnected with trafficking.

The appropriate orders

64 In view of my finding that the offence of importation of a controlled drug under s 7 of the current MDA is committed only if the drug is brought into Singapore for the purpose of distribution, it becomes necessary to consider what are the appropriate orders to make in the present case given that the Appellant is appealing only against sentence, but on the basis that the drugs imported by him were for his own consumption. It is pertinent to note that the DPPs have accepted that the quantity of diamorphine imported by the Appellant (one packet of 0.35g of granular/powdery substance containing 0.01g of diamorphine) will fill about one and a half straws, although they added that the amount of *doses* produced will vary according to an individual's rate of consumption.

65 Since the Appellant is unrepresented by counsel, I could proceed with his appeal as if it were an application for revision under s 400 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("the CPC"). However, this procedure would not be necessary because s 390(3) of the CPC, read with s 394 thereof, is wide enough to vest in an appellate court the power to set aside a conviction based on a plea of guilty. Section 390(3) of the CPC provides as follows:

> **Decision on appeal**
>
> **390**.—(1) ...
>
> ...

(3) Notwithstanding section 375 [which provides that an accused who has pleaded guilty and has been convicted on that plea in accordance with the CPC may appeal only against the extent or legality of the sentence] and without prejudice to the generality of subsections (1) and (2), where an accused has pleaded guilty and been convicted on such plea, the appellate court may, upon hearing, in accordance with section 387, any appeal against the sentence imposed upon the accused —

(*a*) set aside the conviction;

(*b*) make such order in the matter as it may think just; and

(*c*) by such order exercise any power which the trial court might have exercised.

…

Section 394 of the CPC provides as follows:

Grounds for reversal by appellate court

394. *Any judgment, sentence or order of a trial court may be reversed or set aside only where the appellate court is satisfied that it was wrong in law* or against the weight of the evidence or, in the case of a sentence, manifestly excessive or manifestly inadequate in all the circumstances of the case.

[emphasis added]

Conclusion

66 For the reasons above, I set aside the Appellant's conviction on the Diamorphine Charge and remit the case to the District Court for another district judge to hold a new trial to determine whether the drugs were imported by the Appellant for his own consumption.

[note: 1] See the respondent's further submissions dated 16 August 2012 at para 25.