pondent's counterclaim for damages under clauses 20 and 21 of the agreement, as the respondent was responsible for the delay in ordering extra work and late delivery of the site.

Damages under clause 10 of the Agreement:

Although the respondent failed in enforcing clauses 20 and 21 because of the delay occasioned by the late delivery of the site to enable the appellant to commence construction work immediately and also by the extra work ordered by the respondent, such failure does not prevent him from claiming unliquidated damages. (See *Hudson*, p. 633).

The learned trial judge found that the appellant was in breach of clause 10 of the agreement because he did not build a temporary house required under this clause in order to house the respondent whilst the new houses were being constructed. Although a hut for the purpose was built, the respondent did not agree to live in it as it was very small with hardly sufficient room to accommodate his large family and as a result he went to live with his sister at St. Nicholas School canteen for two years. He paid his sister $200.00 a month for occupation of the canteen. The learned trial judge therefore assessed the damages at $2,400.00 for two years at the rate of $100.00 per month. Counsel for the appellant submitted that as the money paid by the respondent was according to his sister (DW 1) meant for water and electricity charges and that it was paid to her gratuitously, the respondent suffered no damage at all and therefore the learned trial judge should not have awarded the sum of $2,400.00 as unliquidated damages against the appellant.

With respect to counsel, we disagree with him. We think that the learned trial judge was right. The fact that the money was paid without his sister asking for it, does not detract from the fact that it was paid because of his sense of obligation arising out of the occupation of the school canteen. What she did with the money, whether paid for water and electricity charges or even treated it as her pocket money, is immaterial. There was breach of the agreement and the respondent was entitled to damages. We think that the appeal on this point fails.

Cross-appeal:

As to the cross-appeal by the respondent, we do not think that there is much substance in it. As we have allowed the appellant's appeal on the liquidated damages under clauses 20 and 21, the cross-appeal is only limited to the unliquidated damages of $2,400.00. Interest is always a matter of discretion of the learned trial judge. Although he gave no reason why he did not order interest on the sums awarded for the appellant's claim and the respondent's counterclaim, we are not prepared to interfere with his discretion, as we do not think that he was in error. As regards costs it is also a matter of discretion and should follow the event.

Conclusion:

The order we would propose in this case is therefore as follows:

(a) the appellant's appeal against the liquidated damages under clauses 20 and 21 of the agreement is allowed;

(b) the appeal against unliquidated damages of $2,400.00 is dismissed.

(c) the respondent's cross-appeal is also dismissed.

(d) the appellant is entitled to costs of the proceedings before this court, and in the court below.

Order accordingly.

Solicitors: *Yong & Co.; Chan, Jugah, Wan Ullok & Co.*

PUBLIC PROSECUTOR v. LAU KEE HOO

[F.C. (Suffian L.P., Wan Suleiman F.J., Salleh Abas F.J., Abdul Hamid F.J. and Abdoolcader J.) September 29 & October 25, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 7 of 1982]

Criminal Law and Procedure – Mandatory death sentence for offence under Internal Security Act, 1960 – Whether unconstitutional – Deprivation of life and liberty in accordance with law – Provision of offences and penalties necessary in order to stop or prevent subversion – Equality before the law – Discretion of Attorney-General to charge person under one or other law – Fact that Court has no alternative does not make mandatory death sentence unconstitutional – Federal Constitution, arts. 5(1), 8(1), 121(1) & 149(1) – Internal Security Act, 1960, s. 57(1)(b).

Constitutional Law – Whether mandatory death sentence unconstitutional – Federal Constitution, arts. 5(1), 8(1), 121(1) & 149.

In this case the respondent had been charged with having under his control in a security area without lawful excuse or authority ammunition contrary to section 57(1) of the Internal Security Act, 1960 which carries a manda-

tory death sentence. Counsel for the respondent raised a preliminary point at the commencement of the trial, contending that the mandatory death penalty was unconstitutional. Subsequently the Attorney-General suggested that the matter be referred to the Federal Court. The learned trial judge agreeing, stayed the proceedings and referred the following question of law to the Federal Court –

"Whether or not the mandatory death sentence provided under section 57(1) of the Internal Security Act, 1960, is *ultra vires* and violates Articles 5(1), 8(1) and 121(1) of the Federal Constitution".

Held: (1) it is clear from article 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional;

(2) although the Internal Security Act is designed to stop or prevent subversive action, as the whole of it is valid and is still in force it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts. What better way is there of preventing similar acts then by prosecuting offenders like the respondents?

(3) in the light of article 145(3) of the Constitution the Attorney-General has complete discretion whether to charge the respondent under the Internal Security Act, 1960 or the Arms Act, 1960;

(4) Capital punishment is not unconstitutional *per se*. In their judicial capacities judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made;

(5) all criminal law involves classification of individuals for purpose of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What article 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. Everybody charged under section 57(1) of the Internal Security Act, 1960, is liable to the same punishment and therefore it is not discriminatory;

(6) It is the function of the legislature not the judiciary to decide the appropriate punishment for persons charged under the Internal Security Act and the Arms Act. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law there is no inconsistency with article 8(1) of the Constitution. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness;

(7) there is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may be to some extent diminished if it is not.

Cases referred to:

(1) *Attorney-General, Malaysia* v. *Chiow Thiam Guan* [1983] 1 M.L.J. 51.
(2) *Public Prosecutor* v. *Yee Kim Seng* [1983] 1 M.L.J. (to be published in April at p. 252).
(3) *Michael de Freitas* v. *Benny* [1976] A.C. 239.
(4) *Runyowa* v. *The Queen* [1967] 1 A.C. 26.
(5) *Bachan Singh* v. *State of Punjab* A.I.R. 1980 S.C. 898.
(6) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.
(7) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.
(8) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64.
(9) *Liyanage* v. *The Queen* [1967] 1 A.C. 259, 291.

The following cases were also referred to in argument: *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49; *Riley* v. *Attorney-General, The Times* 29 June 1982; *Public Prosecutor* v. *Khong Teng Khen* [1976] 2 M.L.J. 166, 170; *Datuk Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155, 165; *Public Prosecutor* v. *Su Liang Yu* [1976] 2 M.L.J. 128; *Hinds & Ors.* v. *The Queen* [1976] 1 All E.R. 353, 370; *Queen* v. *Burah* (1878) 5 I.A. 178, 192; *Chang Liang Sang & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 231.

FEDERAL COURT.

Tan Sri Abu Talib bin Othman, Attorney-General, (*Phang Ah Hee, Deputy Public Prosecutor*, with him) for the applicant.

Karpal Singh (*Ngeow Yin Ngee* and *Gurbachan Singh* with him) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): Lau Kee Hoo ("the respondent") was charged with having under his control in a security area without lawful excuse or authority ammunition contrary to section 57(1) ("the section") of the Internal Security Act, 1960 ("ISA"), which carries a mandatory death sentence.

At the commencement of the trial, his counsel Mr. Karpal Singh raised a preliminary point, contending that the mandatory death penalty was unconstitutional.

The learned Deputy Public Prosecutor was taken by surprise and on his application the case was adjourned to the following morning to enable him to "consult his seniors".

On the following morning the learned Attorney-General himself appeared with the learned Deputy. The Attorney-General suggested that this matter be referred to the Federal Court, and that was how the Public Prosecutor came to be designated in these proceedings as the "appellant". The learned trial Judge agreeing stayed the proceedings, and acting under section 48(1) of the

Courts of Judicature Act No. 7 of 1964, referred the following question for our decision:

"Whether or not the mandatory death sentence provided under section 57(1) of the Internal Security Act, 1960 is ultra vires and violates Articles 5(1), 8(1) and 121(1) of the Federal Constitution"

That day, after considering the rival arguments, we answered the question in the negative, that is to say we ruled that the mandatory death sentence under the section is not *ultra vires* and does not violate the Articles referred to. We now give our reasons.

Before doing so we would like to remark that the same question was considered by Hashim Yeop. A. Sani, J., as he then was, on August 12, 1982 in Kuala Lumpur Civil Suit No. A12 of 1982[1] and by Ajaib Singh, J. on September 16, 1982 in a ruling on a preliminary issue in Ipoh Criminal Trial No. 12 of 1982.[2]

The matter came before Hashim Yeop A. Sani, J. by way of a civil suit because the prisoner there had exhausted all the criminal remedies available to him including an appeal to this court and another to the Pardons Board which were all unsuccessful. In the suit he sought a declaration that the mandatory death penalty under the section was unconstitutional, it being argued that the penalty contravened Articles 5(1) and 8. As it happened, on application of the learned Attorney-General the Statement of Claim was struck out on the ground that it disclosed no cause of action, the learned Judge holding that the two Articles have not been contravened.

Before Ajaib Singh, J. the accused was charged with being in possession of a hand grenade in a security area without lawful excuse and without lawful authority under the section and his counsel argued in a preliminary objection that the mandatory death penalty under the section was unconstitutional as it infringed Articles 5(1), 8(1), 121(1) and 149(1). Ajaib Singh, J. too ruled that the Constitution had not been contravened.

Article 5(1)

First, we considered the argument based on Article 5(1) which provides:

"No person shall be deprived of his life ... save in accordance with law".

Thus it will be seen that the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional. That this is so is fortified by reference to Article 42 which deals with the power of the Yang dipertuan Agong, a Ruler and Governor to grant pardons, reprieves and respites. There is a campaign inspired from some Western countries to abolish the death penalty on the ground that it is cruel, but there is no provision in our constitution corresponding to Article VIII of the American constitution prohibiting "cruel and unusual punishment", nor similar to the provision contained in section 2(b) of the Constitution of Trinidad and Tobago which was considered by the Privy Council in *Michael de Freitas* v. *Benny*[3]. Nor does our constitution contain any provision prohibiting "torture or inhuman or degrading punishment" like section 60 of the Constitution of Rhodesia and Nyasaland which was considered by the Privy Council in *Runyowa* v. *The Queen*[4]. Mr. Karpal Singh did not however seek to argue that the penalty in question was cruel or unusual, or was tantamount to torture or was inhuman or degrading; but simply because, as earlier stated, it was said to contravene certain provisions of our constitution. In parenthesis it may be remarked that one would not expect Parliament to countenance torture or any punishment that is inhuman or degrading; that as regards the death penalty which has existed here for well over a century, while it may be regarded as cruel in certain other countries, public opinion here is not quite ready to follow suit as far as certain grave offences are concerned, though it might do so in future; and that if the fathers of our constitution had desired to abolish it they would have said so in the clearest of language.

The ISA is legislation against subversion expressly authorized by Article 149 of the Constitution. Mr. Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to Article 5(1); because the Article itself expressly provides that any provision of law enacted under the Article *is* valid "notwithstanding that it is inconsistent with Article 5".

It was however argued that the law authorized by the Article must, as stated in the Article, be one "designed to *stop* or *prevent* that action" meaning subversive action of the kind listed in Clause (1) of the Article, that for instance a person might be subjected to *preventive* detention; that the action of which the respondent was accused had taken place, that therefore there was no question of preventing or stopping it, and that if at all he should

be proceeded against not under the ISA but under other laws.

In our judgment there is no merit in this argument. True the I.S.A. is designed to stop or prevent subversive action, but as the whole of it is valid and is till in force it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts. In any event, what better way is there of preventing similar acts than by prosecuting offenders such as the respondent?

Mr. Karpal Singh submitted that we should follow the minority judgment of Bhagwati J. in *Bachan Singh* v. *State of Punjab*(5) who ruled that section 302 of the Indian Penal Code (dealing with murder), in so far as it provides for the imposition of the death penalty for that crime as an alternative to life imprisonment is *ultra vires* and void, being violative, he said, of Articles 14 and 21 of the Indian Constitution, "since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence". The learned Judge gave his detailed reasons two years later in August 1982, according to a newspaper report produced by Mr. Karpal Singh. One of the reasons highlighted was that as the law gave no guidelines, it operated arbitrarily; and that a bench of even the Supreme Court might in a particular case affirm it, while the same court differently constituted might not. "The three worst judges in this respect were Justices Vaidyalingam, Dua and Alagiriswamy, all now retired". According to the newspaper report:

"The judgment was a long essay [174 pages] quoting ancient Indian classics, Jayaprakash Narayan, and a number of world thinkers and writers from all times. It juxtaposed the standard arguments of retentionists and abolitionists, siding passionately with the latter".

In our view that case can be distinguished because there the court was dealing with law that provides for two alternative penalties, namely death or life imprisonment, whereas here we are dealing with law that provides for a mandatory death sentence.

In any event, we respectfully prefer the view of the majority (four judges) to the contrary, that the death penalty under section 302 of the Indian Penal Code did not contravene Articles 19 and 21 of the Indian Constitution.

For this purpose it is enough to reproduce only Clause (1) of Article 19 which reads:

"19(1). All citizens shall have the right –

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) ...

(g) to practise any profession, or to carry on any occupation, trade or business"

Article 21 is approximately the same as ours and reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law".

Next Mr. Karpal Singh brought to our attention another Indian case, in which according to a cutting from the Indian Express of November 13, 1980, one Mithu, a person who apparently while already in prison for life committed murder and was sentenced to death, moved the Supreme Court to declare unconstitutional the provision which makes death a mandatory sentence for murder committed by a life convict. His counsel Mr. R.K. Jain contended that this provision was unconstitutional as the State had no power to kill its citizens, no procedure was envisaged for the trial, that a mandatory death sentence violated the rule of law and that murder by a life convict did not mean that the prisoner could not be reclaimed, and moreover the State's share in the crime (by not keeping offensive weapons away from the prisoner) was ignored. As the death sentence here is mandatory, like the death sentence under section 57(1) of ISA, Mr. Karpal Singh suggested that we should await the decision of the Indian Supreme Court before making up our own mind.

With respect we declined to do so, because, first there is no knowing how long we would have to wait and, secondly we should decide cases before us in the light of our own constitution, our own laws and the conditions in our own country which are not necessarily the same as conditions in other countries.

Moreover as the late H.T. Ong, C.J. said at page 141 in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*(6) in which conflicting opinions of Indian courts were cited and considered:

"... in my humble opinion ... Indian judges, for whom I have the highest respect, impress me as indefatigable idealists ..."

Article 8(1)

Next we considered the argument based on Article 8(1) which reads as follows:

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

Mr. Karpal Singh argued that a person found in unlawful possession of ammunition might be charged under the Arms Act, 1960, which by section 8 provides for a maximum penalty of imprisonment for seven years or a fine of $10,000 or both, or under section 57(1) of I.S.A.; and it was said that by charging the respondent under I.S.A. the Attorney-General has deprived him of the protection of equality before the law guaranteed by Act 8(1).

It is now beyond dispute in the light of Article 145(3) and *Teh Cheng Poh* v. *Public Prosecutor*(7) that the Attorney-General has complete discretion whether to charge the respondent under one or other law.

As regards the question whether or not a mandatory death sentence is constitutional in the light of Article 8 we would respectfully follow the reasoning of Lord Diplock when delivering the judgment of the Privy Council in an appeal from Singapore, *Ong Ah Chuan* v. *Public Prosecutor*(8), holding that the mandatory death sentence for trafficking in heroin exceeding 15 grammes contrary to section 3 of the Singapore Dangerous Drugs Act, 1973 was constitutional and not contrary to Articles 9(1) and 12(1) of the Singapore Constitution which are *in pari materia* with our Articles 5(1) and 8(1). We reproduce below relevant extracts from that judgment:

"Finally their Lordships will deal with the contention that the mandatory sentence of death upon conviction for trafficking in more than 15 grammes of diamorphine (heroin) is contrary to the Constitution ...

It was not suggested on behalf of the appellants that capital punishment is unconstitutional *per se*. Such an argument is foreclosed by the recognition in Article 9(1) of the Constitution that a person may be deprived of life 'in accordance with law'. As their Lordships understood the argument presented to them on behalf of the appellants, it was that the mandatory nature of the sentance, in the case of an offence so broadly drawn as that of trafficking created by section 3 of the Drugs Act rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. This, it was contended, was arbitrary and not 'in accordance with law' as their Lordships have construed that phrase in Article 9(1); alternatively it offends against the

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

B Their Lordship would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs.

Whether there should be capital punishment in Singapore C and, if so, for what offences are questions for the legislature of Singapore ...

All criminal law involves the classification of individuals for the purpose of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the D state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others, it does not forbid discrimination in punitive treatment between E one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

The discrimination that the appellants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition F of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence.

The questions whether the dissimilarity in circumstances justifies any differentiation in the punishment imposed G upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely H arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Article 12(1) of the Constitution.

The social object of the Drugs Act 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. The social I evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to deter-

mine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary.

Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variations in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real: it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. But Article 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.

In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good samaritan out of the kindness of the heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.

In the instant case the law required that sentences of death should be imposed. There is no substance in the contention that the requirement of the law is inconsistent with the Constitution. The appeals must be dismissed". (pages 71 to 73).

In an earlier case *Runyowa* v. *The Queen*(2), *supra,* an appeal from Rhodesia and Nyasaland, the constitutionality of the death penalty prescribed by section 33A(1) of the Law and Order Maintenance Act, 1960, as amended, for certain types of arson was in question; and Lord Morris delivering the judgment of the Privy Council remarked at p. 49.

"A legislature must assess the situations which have arisen or which may arise and form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace, order and good government. It can hardly be for the courts unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation. ... if once laws are validly enacted it is not for the courts to adjudicate upon their wisdom, their appropriateness or the necessity for their existence".

For our purposes the relevant principles which may be extracted from the above judgments are as follows:

1. Capital punishment is not unconstitutional *per se.*
2. In their judicial capacity judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made.
3. All criminal law involve the classification of individuals for the purposes of punishment.
4. Equality before the law and equal protection of the law require that like should be compared with like. What our Article 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others.
5. Everybody charged under section 57(1) of I.S.A. is liable to the same punishment. Therefore it is not discriminatory.
6. It is the function of the legislature not judiciary to decide the appropriate punishment for persons charged under the I.S.A. and the Arms Act.
7. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law, there is no inconsistency with Article 8(1).
8. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness.

With regard to Mr. Karpal Singh's argument that the Attorney-General might charge a person found offending against the impugned section in a security area under the I.S.A. and another person under the Arms Act, 1960, which, as has already been noted, carries a lighter penalty; with respect we do not see any merit in this argument for as stated by Lord Diplock at page 56 when giving the advice of the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor*(5)

"There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute

in a particular case for a particular offence should not be dictated by some irrelevant consideration".

Article 121(1)

Finally, we come to the argument based on Article 121(1) which provides:

"(1) Subject to Clause (2) the judicial power of the Federation shall be vested in the [two] High Courts ...

and in such inferior courts as may be provided by federal law".

It was argued that the vesting of judicial power in the judiciary means that judges should have a discretion as regards appropriate sentences, that by prescribing a mandatory death sentence under the impugned section Parliament has deprived judges of that discretion, and that this is tantamount to the legislature usurping judicial power which has been entrusted by the constitution to the courts. In support Mr. Karpal Singh quoted this passage of the Privy Council in *Liyanage* v. *The Queen*(9) an appeal from Ceylon, where the constitutionality of the penalty prescribed by the Criminal Law (Special Provisions) Act No. 1 of 1962, as amended by the Criminal Law Act No. 31 of 1962, was in question:

"Quite bluntly, their aim [i.e. that of the two Acts] was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences".

With respect, that case is distinguishable. The two Acts were enacted to deal with persons involved in a specific event, namely the abortive *coup d'état* of January 27, 1982, and were to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the state committed on or about the date of the *coup* or from one year after the date of the commencement of the Act, whichever was later. The Acts were expressed to be retrospective allowed arrest without warrant for waging war against the Queen, and prescribed new minimum penalties for that offence and other offences and widened the scope of that offence. Here the I.S.A. is not expressed to be retrospective nor is it intended to apply to participants in a particular event.

As stated by Lord Diplock at page 72 in *Ong Ah Chuan* v. *Public Prosecutor*(8) the Singapore case already referred to:

"There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentences for murder and for offences against the President's person still is".

Then His Lordship added the following significant words:

"If it were valid, the argument for the appellants [that a mandatory death sentence under the impugned section of the law in question there was unconstitutional] would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim".

The foregoing are our reasons for answering the question posed in the negative.

Order accordingly.

Solicitors: *Ngeow & Co.*

PUBLIC PROSECUTOR v. TAN HOCK HAI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Razak & Abdoolcader JJ.) November 1, 1982]

[Kuala Lumpur – Federal Court Criminal Appeal No. 32 of 1982]

Criminal Law and Procedure – Sentence – Offence of trafficking in heroin – Sentence of death should be imposed except in the most exceptional circumstances – Dangerous Drugs Act, 1952, s. 37(da).

Dangerous Drugs – Trafficking in heroin – Sentence – Death – Dangerous Drugs Act, 1952, s. 37(da).

In this case the respondent had been convicted for trafficking in some 736.5 grammes of heroin. The learned trial judge imposed a term of imprisonment for life with whipping of 10 strokes. The Public Prosecutor appealed against the sentence.

Held: (1) the sentence of death should be imposed for trafficking in drugs other than in the most exceptional circumstances;

(2) there were no extenuating circumstances in this case that would justify a classification of the case as most exceptional and there was no justification for the sentence of life imprisonment imposed. The respondent should be sentenced to death.

Cases referred to:

(1) *Loh Hock Seng & Anor.* v. *Public Prosecutor* [1980] 2 M.L.J. 13.
(2) *Public Prosecutor* v. *Oo Leng Swee & Ors.* [1981] 1 M.L.J. 247.
(3) *Chang Liang Sang & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 231.

FEDERAL COURT.

Shaikh Daud bin Haji Mohamed Ismail (Deputy