

THE "TRANSPORTING" DRUG TRAFFICKER — DICTIONARY OR LEGAL SENSE?

*Ong Ah Chuan v. Public Prosecutor*¹*Koh Chat Cheng v. Public Prosecutor*

The facts were undisputed. The accused was observed by narcotics officers entering a car with a plastic bag. The officers trailed the accused as he drove from Woodlands to a house along Bukit Timah Road. Thereupon the officers arrested the accused and recovered the plastic bag from the accused's car together with another bag from his trousers pocket. The bags were found to contain 209.84 grams of diamorphine and the accused was accordingly charged with trafficking in that amount. In his defence the accused claimed that the diamorphine was for his own consumption and he had no intention of delivering it to someone else. Since he was merely carrying the diamorphine and there was no evidence of delivery to anyone, the accused contended that he was not trafficking within the meaning of the Misuse of Drugs Act 1973.²

The accused was convicted and sentenced to death in the High Court.³ He appealed unsuccessfully to the Court of Criminal Appeal⁴ and the Privy Council.⁵ Although all three courts concluded that the accused was guilty as charged, the decision of the Privy Council differed from those of the two lower courts in one major respect. This difference concerned the interpretation of the verb "transport" found in the definition of "traffic" in section 2 of the Act. The meaning to be given to the verb "transport" constituted a primary issue in the case for it formed the essence of the defence.

This note traces the different consequences which flow from the different meanings given to the verb "transport" by the courts. It also examines the presumption embodied in section 15 of the Act and criticises the relevance of that presumption in cases where the accused is charged for trafficking, such as the case under discussion.

The Meaning of "Transport"

Section 2 of the Act defines "traffic" as meaning "to sell, give, administer, transport, send, deliver or distribute". This is almost identical to the definition used for the purposes of the Narcotics Control Act of Canada 1960-61.⁶ The local courts have interpreted the verb "transport" in section 2 of the Act in its dictionary sense, that is, conveying from one point to another.⁷ Under this interpre-

¹ [1981] 1 M.L.J. 64.

² No. 5 of 1973; Reprints Supplement (Acts) No. 2 of 1978. Hereinafter termed "the Act".

³ [1981] 1 M.L.J. 64.

⁴ *Ibid.*, at p. 66.

⁵ *Ibid.*, at p. 67.

⁶ Chapter 35, Statutes of Canada (1960-61). Hereinafter termed "the Canadian Act". Under s. 2(i) of this Act, "traffic" means to "manufacture, sell, give, administer, transport, send, deliver or distribute".

⁷ *Wong Kee Chin v. P.P.* [1979] M.L.J. 157 *per* Choor Singh J. delivering the judgment of the Court of Criminal Appeal at p. 161; *Ong Ah Chuan* (High Court) *supra*, note 3 at p. 66; *Ong Ah Chuan* (C.C.A.), *supra*, note 4 at p. 66.

tation, the court will be satisfied that the accused has "transported" a drug if the prosecution adduces evidence showing that the accused while in possession of controlled drugs moved the drugs from one place to another. The prosecution need not additionally prove that possession of the drugs was actually transferred or intended to be transferred to another person.

The Judicial Committee of the Privy Council in *Ong Ah Chuan* considered the dictionary interpretation of "transport" but preferred a narrower legal meaning. As Lord Diplock put it:

"the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 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..."⁸

The preference for the narrower interpretation was two-fold. Firstly, the Judicial Committee observed that the verb "transport" in section 2 of the Act was sandwiched between "sell, give, administer" which preceded it and "send, deliver or distribute" which followed it. All these other verbs referred to various ways which the supplier or distributor might transfer possession of drugs to some other person. Accordingly, their Lordships were of the view that the immediate context of the verb "transport" attracted the maxim *noscitur a sociis*.⁹ Secondly, the Judicial Committee emphasized the fact that the verb "transport" appeared "in the definition of the verb to 'traffic', of which natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that... it [is] 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 distribution of the drug to another."¹⁰

The Judicial Committee went on to cite Canadian decisions in support of the legal interpretation it had given to the word "transport".¹¹ It is pertinent to note that these same decisions were earlier held to be inapplicable in Singapore by the lower courts.¹²

One would then have expected the Judicial Committee to follow up by requiring the prosecution to tender evidence which would establish that the accused had conveyed the drugs from one place to another in order to pass it on to some other person. Instead, their Lordship's conclusion in effect reverted the meaning of the verb "transport" back to its wider dictionary sense. This reversal was largely the result of the presumption contained in section 15 of the Act.

The Presumption in Section 15

Possession of controlled drugs in quantities larger than the amounts specified under section 15 of the Act raises the presumption that the

⁸ *Ong Ah Chuan*, *supra*, note 5 at p. 69.

⁹ *Ibid.*, at p. 68.

¹⁰ *Ibid.*, at pp. 68-69.

¹¹ *Ibid.*, at p. 69. The Canadian cases cited were *R. v. McDonald* (1963) 43 W.W.R. 337 and *R. v. Greene* (1977) 74 D.L.R. (3d) 354.

¹² *Wong Kee Chin*, *supra*, note 7 at p. 161; *Ong Ah Chuan* (High Court) *supra*, note 3 at p. 66.

accused was in possession of the drugs for the purpose of trafficking therein.¹³ However possession of a controlled drug for the purpose of trafficking is not an offence under the Act.¹⁴ As such, our courts have had to rule on the applicability of the presumption. The courts could have held that the presumption operated either to make the offence one of trafficking¹⁵ or possession. A number of decisions have held that the presumption pertained only to the possessory offence under section 6 of the Act, that is, the offence of possession under section 6 of the Act and not the offence of trafficking under section 3 of the Act was established from the mere fact that an accused had in his possession a controlled drug, however large might be the quantity of the drug involved.¹⁶ Until the decision of *Ong Ah Chuan* the presumption was regarded by the courts as applying solely to offences of possession. The presumption could be rebutted by the accused showing on a balance of probabilities, for instance, that he possessed the drug for his own consumption. If unrebutted, the presumption would probably have the effect of causing the court to impose a more severe sentence than in a case involving possession *simpliciter*.¹⁷

The Privy Council Decision

It has been noted that the Judicial Committee at the outset regarded the verb “transport” in a narrow legal sense. However the existence of the presumption coupled with the non-existence of a separate offence of possessing a controlled drug for the purpose of trafficking caused the Judicial Committee ultimately to interpret the verb in its dictionary sense. This was unequivocally done when their Lordships cited with approval¹⁸ the following passage in the Court of Criminal Appeal decision of *Wong Kee Chin v. P.P.*:

“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 section 15 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 section 15 would constitute a *prima facie* case of trafficking which if unrebutted would warrant his conviction.”¹⁹

The facts in *Wong Kee Chin* were similar to the present case. The accused had conveyed diamorphine on his person from Kuala Lumpur

¹³ Hereinafter termed “the presumption”. S. 15 reads: “Any person who is proved or presumed to have had in his possession more than — (a) 100 grammes of opium; (b) 3 grammes of morphine contained in any controlled drug; (c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or (d) 15 grammes of cannabis or cannabis resin, shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.” There is no such provision in the Canadian Act.

¹⁴ Cf. the Canadian Act, s. 4(3), which creates a separate offence of possessing any narcotic for the purpose of trafficking.

¹⁵ It is interesting to note that under the Canadian Act, the offence of trafficking and the offence of possession for the purpose of trafficking carry the same punishment.

¹⁶ For example, see *Poon Soh Har v. P.P.* [1977] 2 M.L.J. 126; *Seow Koon Guan v. P.P.* [1978] 2 M.L.J. 45.

¹⁷ The punishments spelt out in the Second Schedule of the Act for unauthorised possession of a controlled drug provide the sentencer with a sufficiently wide tariff scale to allow for this practice.

¹⁸ *Supra*, note 5 at p. 70.

¹⁹ *Supra*, note 7 at p. 161.

to the customs check-point at Woodlands. The accused contended that his act of carrying the drug did not constitute "transporting" within the definition of "traffic" as laid down in the Act. The Court of Criminal Appeal rejected this contention when it expressed the quoted passage. The accused was subsequently convicted and sentenced to death for trafficking in diamorphine.

The Judicial Committee did not set out clearly the relevance of the section 15 presumption to the offence of trafficking. Its reasoning was probably as follows:

- (i) The verb "transport" means to move a controlled drug for the purpose of transferring possession of it from the mover to some other person; the mere act of moving the drug, (*i.e.*, in the dictionary sense of "transport") does not of itself amount to trafficking.
- (ii) Section 15 of the Act enables the court to presume that a person found possessing a controlled drug above the quantity specified in that section is in possession of the drug for the purpose of trafficking therein.
- (iii) The effect of the presumption is that a person moving while in possession of a controlled drug above the quantity specified in section 15 of the Act would be presumed to be moving the drug for the purpose of transferring possession of it from himself to some other person, *i.e.*, would be presumed to be trafficking.
- (iv) This being the position, all the prosecution needs to prove to make out a *prima facie* case of trafficking is that the accused had moved the controlled drug from one place to another (*i.e.*, in the dictionary sense of "transport") and that the quantity of drugs involved attracts the presumption that he had moved the drug for the purpose of trafficking.²⁰

Criticism of the Decision

The submission here is that the Judicial Committee and the local courts were erroneous in directly relating the presumption to the offence of trafficking.

The courts had earlier correctly held that the presumption is referable only to the offence of possession and not to the graver offence of trafficking. The Judicial Committee's narrow definition of the verb "transport" cannot be satisfied simply by invoking the presumption. This is so when it is realised that section 15 is relevant only in regard to the *possession* of a controlled drug. It is difficult to appreciate how a section dealing with drug possession can be used with equal force in a case involving drug trafficking. Attractive as the words "for the purpose of trafficking" may be in suggesting that section 15 concerns trafficking, they more properly create a hybrid of possession which is to be more severely punished than possession *simpliciter*.

²⁰ This final step of judicial reasoning is most clearly expressed in the decision of *Wong Kee Chin*, *supra*, note 7, in the passage quoted at *ante* p. 277, see also *Ong Ah Chuan*, *supra*, note 5 at pp. 69-70.

Taking the argument further, section 15 creates a rebuttable presumption of law²¹ in that it specifies that the court *shall* presume, until the contrary is proved, that the accused had the controlled drug in his possession for the purpose of trafficking. How can such a statute-created presumption, designed to be used in relation to possessory offences, be transposed into one which can be used in cases of trafficking?

The reasoning of the Judicial Committee is erroneous in another respect. It contradicts the well-established judicial ruling that an accused who is presumed to have possession of a controlled drug for the purpose of trafficking can only be convicted for the offence of possession.²² To illustrate, a person is arrested in the course of conveying 10 grams of diamorphine from his house to his office. He had intended to keep the drug in his office as a ready supply for himself. If *Ong Ah Chuan* is followed he would probably be charged and convicted for trafficking, bearing in mind that it is not easy to rebut the presumption. For an extreme situation, consider the case of an accused who, when confronted by a narcotics officer, throws away from his kitchen balcony 55.48 grams of diamorphine.²³ The courts have held that the accused can only be convicted for possession of diamorphine. If the view of the Judicial Committee is applied to the same facts, such an accused may well be convicted for the offence of trafficking. This is because the quantity of diamorphine in his possession attracts the presumption. The presumption, together with the fact that the accused must have at some stage transported the drug to his flat, establishes a *prima facie* case of trafficking. As was said by Bird J.A. in the British Columbia Court of Appeal case of *R. v. Harrington and Scosky*, "every person who has a narcotic in his possession can be held guilty of trafficking; for it is inconceivable that he would not have conveyed or carried it from one place to another, if only from the hand of the supplier to his own person."²⁴

Based on these criticisms it is submitted that the Judicial Committee should not have concluded that the section 15 presumption had the effect of requiring the prosecution only to prove transportation of a controlled drug by the accused in the dictionary sense of the verb "transport".

A Preferred Solution

The Judicial Committee should have applied its narrow definition of "transport" throughout its decision and not taken recourse to section 15 of the Act. Their Lordships were correct in holding that a transporter could be convicted for trafficking if the prosecution successfully proved that his purpose, whether it was achieved or not, was to part with possession of the drug to some other person whether already known to him or a potential purchaser whom he hoped to

²¹ Cross on Evidence (5th edition, Butterworths, 1979) at p. 125 states: "In the case of a rebuttable presumption of law, once the basic fact is established, the conclusion as to the existence of the presumed fact must be drawn in the absence of evidence to the contrary."

²² *Supra*, note 16.

²³ These were the facts in *Seow Koon Guan*, *supra*, note 16. In that case the accused was charged for trafficking but was eventually convicted for possession.

²⁴ (1964) I.C.C. Cases 189, at p. 195.

find.²⁵ The prosecution could achieve this by tendering evidence such as the large quantity of the drug found in the accused's possession, the fact that the accused was not a drug addict, the type of "transporting" involved or the cautioned statement of the accused himself. Evidence of such nature would entitle the courts to infer that the purpose of the transporter was to distribute or supply the drug to another person, thereby satisfying the meaning of "transport" in its narrow legal sense.

It may be observed that such a holding would require far stricter proof on the part of the prosecution than as laid down in *Ong Ah Chuan*. By that decision, the prosecution is only required to prove that the accused while moving was in possession of an amount of drug slightly higher than the small quantities specified in section 15. Hence a transporter of 3 grams²⁶ of diamorphine could be punished for trafficking unless he could rebut the presumption that he possessed the drug not for the purpose of trafficking but, say, for his own consumption. The accused's position would be analogous to the rebuttable presumption of law contained in section 112 of the Evidence Act.²⁷ This would not be the case if the Judicial Committee had disallowed the application of the presumption to cases of trafficking. Under this preferred solution, evidence showing possession of 3 grams of diamorphine would, at best, raise a weak inference that the transporter had the drug for the purpose of passing it on to someone else.²⁸ Only when the quantity of the drug was "*much larger* than [was] likely to be needed for his own consumption [would] the inference that he was transporting them for the purpose of trafficking in them, in the absence of any plausible explanation by him, be irresistible."²⁹ Suffice it to say that 3 grams of diamorphine is too small a quantity for the courts to draw such an irresistible inference. This being the case, how can this amount be convincing proof that the transporter had the drug for the purpose of passing it on to another person? It is submitted that, at best, the amount mentioned can only be regarded as circumstantial evidence. This means that the court *may* presume the existence of any fact which it thinks likely to have happened based on the common course of human conduct in its relation to the facts of the particular case.³⁰

In cases of trafficking the quantities of drugs specified in section 15 may be invoked, if at all, only to denote the starting point for the

²⁵ *Supra*, note 5 at p. 69. This is the consequence of ss. 10 and 3(c) of the Act which provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug shall be guilty of the substantive offence of trafficking.

²⁶ The presumption in s. 15 of the Act becomes operative when the quantity of diamorphine involved is more than 2 grams. See *supra*, note 13.

²⁷ Cap. 5 of the Revised Laws of Singapore (1970). The section makes the fact that a person was born during the continuance of a valid marriage between his mother and any man conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been conceived.

²⁸ Cross on Evidence, *supra*, note 21 at p. 124, describes this situation as a presumption of fact. The inferences may be drawn by the courts which are not obliged to draw them as a matter of law even if there was no further evidence.

²⁹ *Ong Ah Chuan*, *supra*, note 5 at p. 69. Emphasis added.

³⁰ See for example, s. 114 of the Evidence Act.

strength of inferences which may be properly drawn by the courts. The principle based on common sense would then follow that "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."³¹ Hence the transporting of 3 grams of diamorphine would not raise a rebuttable presumption of law but only the weakest inference that the possessor had the drug for the purpose of distributing it to some other person. It must be re-emphasised here that the presumption in section 15 of the Act should be confined to offences of possession; to allow the presumption to be used in cases of trafficking makes it infinitely easier for the prosecution to prove a case of trafficking and exposes the accused too readily to the draconian penalties which the Act prescribes for traffickers.³²

Conclusion: A Need for Legislative Amendment

The legal problems caused by the presumption are due largely to the absence of a separate offence of "possession for the purpose of trafficking" in the Act. As a result the courts have had to determine whether the presumption applied to offences of possession or of trafficking and also whether it applied to cases involving transporters of controlled drugs. Despite the various judicial pronouncements on these issues, it is still possible for the Legislature to improve the present position by creating a separate offence of possessing a controlled drug for the purpose of trafficking therein.

This proposed amendment would enable the prosecution to relate the charge against the accused more appropriately to the facts and circumstances of a particular case than is presently done. For instance, an accused found conveying a small quantity³³ of a controlled drug may be charged only for the offence of possessing that drug for the purpose of trafficking and not the substantive offence of trafficking.³⁴ The substantive offence would be reserved for cases where the quantities of drugs conveyed are large.³⁵ The presumption would then find its proper place alongside the new offence and would cease to be invoked for the other specific offences of possession and trafficking. Thus the problems which have arisen by connecting the presumption to these latter offences would be resolved in one short stroke of the legislative draftsman's pen.

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³¹ *Ong Ah Chuan*, *supra*, note 5 at p. 69.

³² For a similar view propounded in the context of the rules of natural justice, see the Commentary on *Ong Ah Chuan* v. P.P. in [1981] Crim. L.R. 245 at p. 247.

³³ The quantities envisaged here are amounts which are slightly higher than those specified in s. 15. In such cases the accused would have to rebut the presumption that he had the drug for the purpose of trafficking. The accused would be convicted for the proposed offence of possessing a controlled drug for the purpose of trafficking if he fails to rebut the presumption.

³⁴ Ideally the punishment for the new offence would fall in between the less severe punishments for the possessory offences and the graver punishments for trafficking. *Cf.* the Canadian Act, s. 4(3), which provides the same punishments for the offences of trafficking and possession for the purpose of trafficking.

³⁵ What constitutes a "large" quantity might be determined by measuring the quantity seized against the average daily dosage of an addict of that particular drug.