IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 273

Cr Rev 8/1996

Between

Tanglin Cars Pte Ltd

… *Petitioner*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

Criminal Procedure and Sentencing — Disposal of property; Criminal Law — Statutory offences

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Tanglin Cars Pte Ltd v Public Prosecutor

[1996] SGHC 273

Cr Rev 8/1996
Yong Pung How CJ
25 November 1996

1 The petitioners sought revision of an order forfeiting a vehicle bearing registration number SCE 6015G (the vehicle) pursuant to s 28 of the Misuse of Drugs Act (Cap 185) (MDA). The relevant portions of s 28 state:

> *Where a person has been convicted of an offence under this Act, the court may order to be forfeited to the Government any ship, hovercraft, aircraft or vehicle which has been proved to have been used in any manner in connection with the offence except that -*
>
> *...*
>
> (b) no ... vehicle shall be forfeited under this section, if it is established by the owner thereof that the ... vehicle ... was unlawfully in the possession of another person without the owner`s consent.

2 The vehicle in question was registered in the name of one Ms Ramlah bte Reduan (the hirer). A hire-purchase agreement was executed on 12 August 1994 between the hirer and Citibank NA to finance the purchase of the vehicle. The petitioners were guarantors of the hire-purchase agreement pursuant to a motor dealer agreement with Citibank NA. The hirer`s sister, one Rahmah bte Reduan, was the other guarantor. Upon making full payment of all moneys due

to Citibank NA under the hire-purchase agreement, the petitioners acquired all rights and interests of Citibank NA by way of subrogation.

3 On 4 September 1994, the vehicle was used by one Atan bin Joki (the accused) in the commission of a capital offence of drug trafficking. The accused was the husband of the hirer and he was the sole authorised driver of the vehicle. He was arrested and the vehicle was subsequently seized by the Central Narcotics Bureau (CNB). The accused was eventually found guilty and convicted of a charge of drug trafficking and sentenced to death. On 7 August 1995, his appeal was dismissed by the Court of Appeal (Crim App 23/95) (unreported). It was only after these proceedings were concluded that the CNB gave notice of their intention to forfeit the vehicle. The Registrar of the subordinate courts was notified that there were claimants to the vehicle. A magistrate was directed to convene a disposal inquiry at Changi Prison as the accused was already on death row.

4 At the conclusion of the disposal inquiry, held on 27 October 1995, the magistrate ordered the vehicle to be forfeited. The petitioners originally filed an appeal against the magistrate`s decision (MA 351/95). The appeal was permitted to lapse and deemed to be withdrawn, as the petitioners later conceded that there was no right of appeal from a disposal inquiry. The petitioners then commenced the present proceedings for criminal revision.

5 **The preliminary question - jurisdiction to convene a disposal inquiry**

6 The question of forfeiture of the vehicle was not addressed at either the High Court or the Court of Appeal. It eventually arose for consideration before

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a magistrate. According to the CNB, the disposal inquiry was convened pursuant to s 386 of the Criminal Procedure Code (Cap 68) (CPC).

7 The DPP raised a preliminary objection, contending that the magistrate had no jurisdiction to convene a disposal inquiry, since there was no room for s 386 CPC to operate. This argument was premised on the following comments from the decision of this court in ***Long Foo Jin v PP*** [1996] 1 SLR 663 (at p 666):

> *There was no scope, contrary to the arguments of the appellant, for the holding of a disposal inquiry. ... Section 386 is clearly intended to apply only in a residual role, that is when the offence-creating provisions do not deal with the issue of the disposal of property used or concerned in any offence.*

8 In addition, the DPP also referred to ***Magnum Finance Bhd v PP*** [1996] 2 SLR 523 , in which this court held (at p 529):

> *Where forfeiture is discretionary, special provisions governing forfeiture may be contained in the relevant legislation (eg s 20(4) Environmental Public Health Act (Cap 95, 1988 Ed) or* ***s 28 Misuse of Drugs Act (Cap 185)****) . ... In these cases, there is no room for s 386 CPC to operate. As I have stated in* ***Chandra Kumar*** *and* ***Long Foo Jin****, s 386 CPC operates only in a residual role, that is when the offence creating provisions do not deal with the issue of the disposal of property used or concerned in any offence. [DPP`s emphasis.]*

9 The DPP contended that s 386 of the CPC could not have operated to confer jurisdiction on the subordinate courts to hold a disposal inquiry, since s 28 of the MDA already deals specifically with the question of forfeiture in the case of drug offences. He pointed out that there was no time limit specified within s 28 MDA for an application for forfeiture to be made. Unlike s 386 CPC which states that the order must be made `during or at the conclusion of any inquiry or trial`, there were no similar restrictions in the MDA. He also submitted that as s 28 MDA was the only governing provision, the application

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to forfeit the vehicle would have to be made before the trial court, which would be the proper forum to consider the application.

10 In addressing these arguments, two issues had to be considered:

11 (a) Does s 28 MDA operate to exclude the convening of a disposal inquiry under s 386 CPC?

12 (b) Do the subordinate courts have jurisdiction to hold a disposal inquiry where the conviction was obtained in the High Court?

13 **Issue (a)**

14 In ***Long Foo Jin*** , I made the point that s 386 CPC would operate only in a `residual role` in response to the appellant`s argument in that case that a disposal inquiry pursuant to s 386 CPC ought to have been held. There was no scope for holding a disposal inquiry, since s 43(3B) of the Road Traffic Act (Cap 276, 1994 Ed) was the `special provision` which governed forfeiture in that case.

15 I went on to state (at p 667) that where there is any objection to forfeiture, `[s]uch issues could and should have been raised upon the hearing of the application of the Public Prosecutor to forfeit the vehicle`. It is at that stage that all the relevant issues pertaining to the disposal of the vehicle have to be addressed. Assuming that a statute provides for discretionary forfeiture (eg s 28 MDA), it must contemplate the release of the property in the exercise of the court`s discretion. If forfeiture is not appropriate, the court will have to determine who is immediately entitled to possession. An order for delivery to

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that person will then have to be made. The proceedings culminating in the issuance of this order may be properly termed `disposal` proceedings.

16 Similarly, a statute may specify mandatory forfeiture upon the fulfilment of certain preconditions. If, however, the court determines that the preconditions have not been met, it must follow that the property has to be released to the person entitled to possession. Alternatively, the application to forfeit may have been entirely misconceived in law. Once again, the appropriate order would be to release the property to the person entitled to possession. These proceedings would be properly termed `disposal` proceedings as well.

17 The DPP rightly argued that applying the reasoning in ***Long Foo Jin*** and ***Magnum Finance*** , there would be no room for holding a disposal inquiry under s 386 CPC in the present case. However, as I have sought to clarify above, it would not follow that a disposal inquiry can never be held. It does not mean that a potential claimant to the property will be shut out altogether. After all, the power of forfeiture contained in s 28 MDA is a discretionary one, and the release of the property is clearly contemplated by s 28(b). A claimant will still have a right to be heard. The proceedings in which the court adjudicates on the claim to the vehicle would be properly characterised as a `disposal inquiry`. The question is where the source of jurisdiction to convene such an inquiry is found, if it cannot arise from s 386 CPC.

18 While there is specific provision in s 28 MDA governing forfeiture, it is silent on the ***holding of an inquiry*** where there are claimants to the property. It must be noted that there are at least three cases (***Sing Hoe Motor Co Ltd v PP*** [1968] 2 MLJ 54 ; ***Chung Khiaw Bank Ltd v PP*** [1968] 2 MLJ 196 ; ***PP v Ong Ah Kau*** [1976] 2 MLJ 31) in which the Malaysian courts have ruled that where the specific forfeiture provision is silent on the holding of an

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inquiry, an inquiry under s 407(ii) CPC (the Malaysian equivalent of our s 386(2) CPC) should be held.

19 The leading authority is the ***Chung Khiaw Bank*** case, a decision of the Federal Court on a criminal reference from Kota Bahru. The criminal reference arose from an application for forfeiture of a vehicle seized under s 92 of the Road Traffic Ordinance No 49 of 1958. Section 92(4) reads:

> *An order for the forfeiture or for the release of any motor vehicle seized under the provisions of sub-section (2) shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence against this section has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence.*

20 The first question on reference was whether the power of forfeiture contained in s 92 was mandatory. The second was whether the true legal owner of the vehicle had a right to be heard before any order of forfeiture was made. The court ruled that s 92 provided for discretionary forfeiture. McIntyre FJ went on to address the second question as follows (at p 199):

> ***It must follow therefore that the right to hold an enquiry for the purpose of exercising that discretion is implicit in that very power itself.*** *We are of the opinion that the court has also legislative sanction to dispose of any property seized to any person by virtue of the provisions of ss 406A and 407(ii) of the Criminal Procedure Code. An order made under these provisions is a judicial order and could be made only in accordance with the legal processes by which any court arrives at a decision.*

21 In this connection, Dato` Wan Ismail [for the Public Prosecutor] contended that on a proper interpretation of s 407(ii) of the Criminal Procedure Code the court is precluded from acting under that section since the question of forfeiture is governed by the provisions of the Road Traffic Ordinance. The Road Traffic Ordinance empowers the court at the close of a trial to forfeit or

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release a vehicle but is silent on the question of to whom it should be released in the event of a conviction. Therefore, ***in our opinion, the court has to act under s 407(ii) to release the property to the true owner if satisfied that the offence has been committed without his consent, knowledge and connivance. In so doing the court would not be transgressing any of the provisions of the Road Traffic Ordinance but acting in furtherance of the objects of the Ordinance.*** [Emphasis added]

22 In contrast with the Malaysian approach, in both ***Long Foo Jin*** and ***Magnum Finance*** , I indicated that if there is a specific forfeiture provision, that provision should, whether expressly or by necessary implication, govern the holding of disposal inquiries where there are claimants to the property. The specific provision operates to exclude s 386 CPC. As stated in ***PP v Chu Beow Hin*** [1982] 1 MLJ 135 (at p 137), `where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law`. This restates the maxim ***generalibus specialia derogant*** .

23 In ***Chandra Kumar v PP*** [1995] 3 SLR 123 and ***Long Foo Jin*** , the relevant statutes in question were the Environmental Public Health Act (Cap 95, 1988 Ed) (EPHA) and the Road Traffic Act (Cap 276, 1994 Ed). In ***Chandra Kumar*** , reference was made to sub-ss (6), (7) and (8) of s 20 EPHA then in force. It was noted (at p 128) that these subsections would cover a situation similar to a disposal inquiry, where there was no prosecution with regard to an offence under the EPHA. It was also suggested that `where there has been a prosecution, s 20(4) and s 20(5) would be the applicable provisions`. Disposal would take place under s 20 itself. A similar approach was adopted in ***Long Foo Jin*** in relation to s 43(3B) of the Road Traffic Act. My reasoning, therefore, was that, although the forfeiture provisions may not have expressly

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provided for the holding of disposal inquiries, it must be implied from these provisions that the court has both the jurisdiction and power to convene a disposal inquiry if questions relating to the appropriateness of forfeiture and the entitlement to possession of the property should arise.

24 The upshot of the ***Chung Khiaw Bank*** approach is that, even where specific forfeiture provisions exist, s 386 CPC may still have to come into play if there are claims to the property. Of some 20 specific forfeiture provisions which I have identified from various different legislation, virtually all deal only with the question of forfeiture and the preconditions that have to be satisfied before an application to forfeit can be brought. It appears that there is only limited express provision in four instances for the holding of a disposal inquiry. These deal exclusively with the situation where no prosecution has taken place (see s 124 Customs Act (Cap 70, 1995 Ed), s 20(6), (7), (8) EPHA, s 117 Road Traffic Act (Cap 276, 1994 Ed) and s 4 Road Vehicles (Special Powers) Act (Cap 277)). If the ***Chung Khiaw Bank*** approach is followed, it would mean that s 386 CPC would still have to be invoked since there is no express provision for holding a disposal inquiry in the remaining 16 specific forfeiture provisions. As in ***Chung Khiaw Bank*** itself, s 386 may even have to be resorted to in the four `limited` instances identified above, since specific provision for a disposal inquiry only exists under those statutes in relation to cases where no prosecution takes place.

25 It should be noted that in s 386 CPC itself, Parliament has not made express provision as to how a disposal inquiry is to be convened or conducted. Indeed, s 386 CPC does not make any mention of jurisdiction in relation to the holding of a disposal inquiry. It does not provide any conclusive answer to where the source of jurisdiction is to be found. The section is concerned primarily with the disposal ***orders*** that may be made. This presupposes that the

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court has ***jurisdiction*** to hold a disposal inquiry if there are claims to the property.

26 The power of disposal in s 386 CPC `shall be exercised subject to ... special provisions regarding forfeiture ...`. Section 28 MDA is clearly one such special provision, providing for discretionary forfeiture. It is implicit in s 28 MDA that a disposal inquiry will have to be convened if there are claims to the vehicle. After all, the Federal Court in the ***Chung Khiaw Bank*** case has acknowledged (at p 199) that where a discretion to forfeit exists under specific provisions, `the right to hold an enquiry for the purpose of exercising that discretion is implicit in that very power itself`.

27 In my opinion, applying the reasoning in ***Long Foo Jin*** , s 28 MDA would operate in the present case to exclude the convening of a disposal inquiry under s 386 CPC. However, the matter would not end there. For the reasons stated earlier, jurisdiction to convene the disposal inquiry emanated from 28 MDA itself and not s 386 CPC. I found no reason to depart from the recent views expressed by this court, where I had already indicated that the law in Singapore will proceed on a basis which is quite distinct from the ***Chung Khiaw Bank*** approach.

28 **Issue (b)**

29 It appears that there are no authorities relating to the question of the jurisdiction of the subordinate courts to hold a disposal inquiry, where the accused has been convicted in the High Court. A complementary question which arose was whether the trial court would necessarily be the only proper forum to hold a disposal inquiry.

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30 Section 28 MDA simply states that `where a person has been convicted of an offence under this Act, the court may order to be forfeited ...`. By necessary implication, the `court` must be the same court which has held the disposal inquiry. However, there is no corresponding indication that the `court` must invariably be the trial court, though the trial court should ordinarily be the forum where orders as to disposal of seized articles or case exhibits are sought.

31 Section 28 MDA may be contrasted with s 386(1) CPC, the relevant portions of which state:

> *During or at the conclusion of any* ***inquiry or trial in any criminal court the court*** *may make such order as it thinks fit for the disposal of any document, livestock or property produced before it. [Emphasis added.]*

32 Section 386(1) CPC envisages that the `court` making the order should be either the trial court or the court which has conducted an inquiry. There is an inherent suggestion that the `court` need not be the trial court itself. However, it is silent as to whether the court ordering the disposal of property must be ***the same court*** which has tried and convicted the accused. The breadth of the wording permits reference to a different set of inquiry proceedings, other than the trial proceedings. Unfortunately, this does not really resolve the question whether any court other than the trial court has jurisdiction to hold a disposal inquiry. Reference must therefore be made to the specific legislation dealing with forfeiture, ie s 28 MDA.

33 In both s 386 CPC and s 28 MDA, the legislature has refrained from specifying that the `court` which deals with forfeiture must be the court which has convicted the accused. If Parliament had intended that only the trial court could have jurisdiction, this could easily have been expressly provided for. In this connection, it is pertinent to consider three different categories of forfeiture

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provisions and the phraseology employed therein. Provisions within the first category contain an express provision in respect of this issue of jurisdiction. A clear illustration is s 123(1) of the Customs Act (Cap 70, 1995 Ed), which provides:

> *An order for the forfeiture or for the release of anything liable to forfeiture under the provisions of this Act shall be made by the court before which the prosecution with regard thereto has been held.*

34 From the terms of the above provision, only `the court before which the prosecution with regard thereto has been held` has jurisdiction to forfeit or release the vehicle. Other provisions having a similar or analogous effect are:

35 a Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53) s 26

36 b Immigration Act (Cap 133, 1995 Ed) s 49

37 c Intoxicating Substances Act (Cap 146A, 1988 Ed) s 10

38 d Medicines Act (Cap 176) s 60

39 e Private Lotteries Act (Cap 250) s 13

40 f Smoking (Control of Advertisements and Sale of Tobacco) Act (Cap 309, 1994 Ed) s 27

41 g States of Malaya Customs Duties Collection Act (Cap 316) s 40

42 h Undesirable Publications Act (Cap 338) s 7

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43 On the other hand, there is a second category of provisions which specify that the order for forfeiture or release `may be made by the court before which the prosecution with regard to an offence under the relevant legislation has been or will be held`. These are:

44 a EPHA s 20(5)

45 b House to House and Street Collections Act (Cap 128) s 9

46 c Regulation of Imports and Exports Act (Cap 272A, 1996 Ed) s 13

47 d Road Traffic Act (Cap 276, 1994 Ed) s 117(2)

48 e Road Vehicles (Special Powers) Act (Cap 277) s 4(3)

49 f Timber Industry Act (Cap 325) s 14

50 For present purposes, it is unnecessary to examine the rationale for the distinction between the use of `shall` and `may` in the two categories of provisions enumerated above. Where the word `shall` is used, Parliament`s intention was clearly to confer jurisdiction specifically on the trial courts. The same cannot be said of s 28 MDA. There is no indication whether the court before which the trial took place `shall` or `may` make the relevant disposal order. It belongs alongside a third, or residual, category of forfeiture provisions which are silent as to whether the order for forfeiture or release `shall` or `may` be made by the trial court. Apart from s 28 MDA, the other provisions within this residual category which are worded in a similar fashion are:

51 a Fisheries Act (Cap 111) s 14

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52 b Misuse of Drugs Act (Cap 185) s 27

53 c Road Traffic Act (Cap 276, 1994 Ed) s 43(3B)

54 Having regard to the above considerations, I was of the view that the subordinate courts were not precluded from holding the disposal inquiry, as s 28 MDA does not impose any specific jurisdictional constraints. Section 34 MDA fortifies this view. The section provides:

> *A District Court or a Magistrate`s Court shall have* ***jurisdiction to hear and determine all proceedings under this Act*** *and, notwithstanding anything to the contrary in the Criminal Procedure Code, a District Court shall have power to impose the full penalty or punishment in respect of any offence provided by this Act except the punishment of death. [Emphasis mine.]*

55 On a restrictive reading, it would appear that s 34 is concerned with conferring enhanced jurisdiction on the subordinate courts, ie exceeding these courts` ordinary hearing and sentencing jurisdiction. However, I saw no reason why a literal interpretation should not be adopted. The legislature has chosen to frame the jurisdictional limits in broad terms in s 34. The section provides that `all proceedings under this Act` may be heard and determined by the lower courts. The word `proceedings` is not defined. In its ordinary and natural meaning, it cannot be confined solely to proceedings resulting in the conviction and sentence of an accused person.

56 The DPP further contended that the only proper forum to deal with the application for forfeiture (and the corresponding disposal inquiry) was the trial court. I would concur that s 28 MDA does not preclude an order of forfeiture being sought after the conclusion of the trial. It may be argued that the trial court has not discharged the function of determining whether forfeiture should be ordered. It remains incumbent on the trial court to do so upon an application for

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forfeiture being made, since this would be the first time that the question was arising for its consideration.

57 An equally viable argument, however, is that any other court can convene a disposal inquiry, since the question has arisen for consideration for the very first time. In any event, the proceedings in a disposal inquiry have nothing to do with the `mainstream` trial proceedings resulting in conviction and sentence. In principle, the trial and inquiry proceedings remain separate and distinct. A right of appeal is available in respect of the former, but not against an order made pursuant to a disposal inquiry. As far as the trial court is concerned, therefore, it may be ***functus officio*** in relation to the `mainstream` criminal proceedings which have resulted in conviction and sentence. While it may still have jurisdiction to hold a disposal inquiry, there is no reason why it should be the only proper forum to hear and determine the application for forfeiture and the disposal inquiry attendant upon the application. Indeed, ss 28 and 34 MDA do not impose any such limitation.

58 In my opinion, s 28 MDA would have provided the source of jurisdiction in the present case, and not s 386 CPC. I was also of the view that the subordinate courts were not precluded from exercising jurisdiction, notwithstanding that the conviction of the accused was obtained in the High Court. Having ruled on the preliminary objection thus, I proceeded to hear further arguments on the question of the exercise of discretion in forfeiting the vehicle.

59 **Whether forfeiture was justified**

60 Under s 28 MDA, the burden was on the prosecution to show that there had been a conviction of an offence under the MDA, and that the vehicle had

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been used in any manner in connection with the offence. It was common ground that these two elements had been satisfied in the present case. It was also common ground that the petitioners were the legal and beneficial owners of the vehicle.

61 **(i) The exception in s 28(b)**

62 The petitioners sought specifically to rely on the provision in s 28(b) of the MDA that no vehicle shall be forfeited, `if it is established by the owner thereof that the ... vehicle ... was unlawfully in the possession of another person without the owner`s consent`. Counsel`s argument was founded on the fact that the offence was committed while the vehicle was in the accused`s possession. The commission of the offence rendered his possession unlawful. As the petitioners were unaware of the illegal use of the vehicle, they were not capable of consenting to its use.

63 Two cases were relied upon by counsel, namely, ***Eu Tong Sen Finance v PP*** [1965] 2 MLJ 29 and ***PP v Patani Motors Co Ltd*** [1957] MLJ 129 . Both cases dealt with ss 30(2) and 30(7) of the (Malaysian) Dangerous Drugs Ordinance 1952 (DDO). Section 30(2) provided as follows:

> *When any dangerous drug, in respect of which an offence under this Ordinance, or any breach of the restrictions or conditions subject to or upon which any licence has been granted, has been or is being committed, is found in any conveyance, such conveyance may be seized by any officer of customs or police officer and subject to the provisions of sub-section (3) of this section, shall be forfeited, unless it is proved, to the satisfaction of the Court, that* ***the offence or breach had been or was being committed without the knowledge, consent or connivance of the owner.****[Emphasis mine.]*

64 By s 2, a `conveyance` was defined to include a vehicle. Section 30(3) clarified that `no conveyance shall be forfeited under sub-section (2) ... unless

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the court shall have given the owner thereof or his agent an opportunity of showing cause why such conveyance should not be forfeited`. Section 30(7) further provided that the owner of a conveyance means `the person entitled to the possession of the same immediately before its seizure`. These provisions were in pari materia with those contained in s 30 of the Singapore Dangerous Drugs Ordinance No 7 of 1951, which was subsequently repealed by the enactment of the MDA in 1973. They also bore similar section numbers.

65 With the advent of the MDA, s 28 took the place of ss 30(2) and 30(7) in the local DDO. The scope of s 28(b) is clearly much narrower. Under s 30(2) DDO, the primary consideration was whether the ` ***offence had been or was being committed*** without the knowledge, consent or connivance of the owner`. Hence, the vehicle should not be forfeited where the owner was an innocent third party, uninvolved in the commission of the offence. In contrast, s 28(b) MDA simply focuses on whether the vehicle was unlawfully in the possession of another person (the accused) without the owner`s consent. Unlike s 30(2) DDO, s 28(b) says nothing about whether the owner knew, consented or connived in the commission of the offence.

66 The cases cited by counsel were therefore of little assistance in interpreting s 28(b). The petitioners suggested nonetheless that `a literal reading of s 28(b) appears to indicate that innocent parties who are unaware of the illegal usage of their vehicles should not be penalised`. From a plain reading of s 28(b), however, a vehicle is only `unlawfully in the possession` of the accused ***if the means by which it came into his possession were unlawful*** . Thus, if the accused had obtained possession as a consequence of some criminally culpable act (eg theft, cheating, extortion etc), the vehicle would be unlawfully in his possession. ***A fortiori*** , it would be in his possession without the owner`s consent. It would be implied that the owner would not have consented to the

accused having obtained possession by the use of unlawful means. The above construction may suggest that the words `without the owner`s consent` are otiose. I did not believe that this was so, but rather that these words may have been inserted ***ex abundanti cautela*** .

67 In my opinion, s 28(b) merely reflects Parliament`s intention that vehicles which have come into the possession of accused persons through unlawful means should not be forfeited. It says nothing about whether there was any unlawful purpose in using the vehicle. However, it should not be taken to mean that forfeiture will have to be ordered simply because the accused had obtained possession by lawful means. In determining whether the discretion to forfeit should be exercised, the court must consider the justice of each case.

68 In the present case, there was no suggestion that the hirer (the accused`s wife) had parted with possession after unlawful means had been employed. Moreover, the petitioners had actual or constructive notice of the accused`s status as an `authorised driver`. This could be taken to mean that the petitioners had impliedly consented to him being in possession of the vehicle. It follows that the accused was not unlawfully in possession of it.

69 Reliance was also placed by the petitioners on `automatic termination` clauses contained within the hire-purchase agreement. They argued that the hirer had `misused` the vehicle contrary to the terms of the hire-purchase agreement. As such, the right to possession immediately terminated and automatically reverted to the petitioners by virtue of cll 9 and 12(b). Any continued possession would thus be unlawful and lacking the owner`s consent. Clauses 9 and 12(b) state:

> *Cl 9: The hirer agrees to comply with all laws and regulations relating to this Agreement and the goods and to assume all risks*

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> *of liability arising for or pertaining to the operation and use of the goods.*
>
> *Cl 12(b): If during the term of this Agreement ... Hirer shall fail to observe or perform any other provision or term of this Hire Purchase Agreement expressed or implied ... then upon occurrence of any such event, this (Hire Purchase) Agreement shall automatically and without notice terminate and the Hirer shall no longer be in possession of the goods with the owner`s consent ...*

70 I was unable to see how these clauses were of any assistance to the petitioners as far as s 28(b) MDA was concerned. There was no explanation how the hirer had `misused` the vehicle. There was no suggestion from the petitioners that the hirer had connived with the accused, or was somehow guilty of complicity. If at all, the petitioners were contending that quite the contrary was true.

71 Clause 12(b) provides for legal possession to revert to the owner upon the commission of an offence. This was obviously designed to cater for s 28(b) MDA. With respect, it is immaterial for the purposes of s 28(b) that an offence was subsequently committed using the vehicle, if the accused had been lawfully in possession of the vehicle to begin with. There is no room for a shifting standard to apply. The accused was either lawfully in possession all the time or he was not. In any event, there was no suggestion that `unlawful possession` is to be determined according to whether the vehicle was used for an unlawful purpose.

72 The petitioners also argued that continued possession after automatic termination has been triggered is unlawful. As a matter of private contract, this could arguably be so. However, for the reasons given above, the argument did not bring them very far. It was not open to the petitioners to rely on the hire-

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purchase agreement as a contractual device to render lawful possession `unlawful`.

73 **(ii) The exercise of discretion**

74 The operative words in s 28 MDA clearly state that `the court ***may*** order [the vehicle] to be forfeited`. Forfeiture is therefore a matter of discretion. Unfortunately, there are no authorities to provide guidance as to how the discretion should be exercised. It would be useful to consider the broad guidelines enunciated by this court in ***Chandra Kumar v PP*** , applied recently in ***Magnum Finance Bhd v PP*** . In the latter decision, I stated (at p 530):

> *Generally, an important consideration will be the degree of complicity of the claimant in the offence. It may also be pertinent to have regard to the fact that he could not reasonably have taken any preventive measures regarding the use of the vehicle in the commission of the offence. The value of the vehicle is relevant insofar as it should be considered whether forfeiture will be proportionate to the gravity of the offence and the maximum punishment which may be imposed. The extent of use of the vehicle may be relevant where the offence was a continuing offence, or where the vehicle was used on several occasions for the illegal purpose.*

75 ***Magnum Finance*** was a case where all the relevant considerations pointed away from forfeiture. The claimant was an innocent third party and was not involved in the commission of the offence. The car had been borrowed from the hirer by the accused. The offence itself (under s 140(1)(d) of the Women`s Charter (Cap 353)) was not even considered sufficiently serious to warrant a custodial sentence, let alone the maximum fine of $10,000. The accused was only fined $8,000.

76 In the present case, it was similarly argued that the petitioners were innocent claimants. They were not involved in the commission of the offence,

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nor did they agree to the use of the vehicle for illegal purposes. At the highest, the petitioners conceded that they were aware that the accused would use the vehicle, since he was listed as an `authorised driver` on the vehicle insurance certificate. They had nothing to do with the fact that he subsequently went on to commit an offence using the vehicle. They did not benefit from the commission of the offence. Finally, they had taken all reasonable steps in assessing the credit risk and financial background of the hirer and the guarantor.

77 In reply, the DPP contended that there were cogent reasons to justify forfeiture. In particular, it was submitted, following dicta from ***Chandra Kumar*** (at p 126), that `a disregard for the consequences of the use of [the] vehicle` could be relevant in showing some culpability on the part of the petitioners. They could reasonably have taken preventive measures regarding the use of the vehicle in the commission of the offence. They failed to do so. Moreover, the value of the vehicle was not disproportionate to the gravity of the offence and the maximum punishment which could be imposed.

78 The following facts were emphasised by the DPP in support of his submission. First, the real `hirer` was the accused, since he was the one who paid the initial down-payment of $18,600 in cash. Secondly, the certificate of insurance clearly showed that the hirer would not be driving the vehicle. The only authorised driver was the accused. Thirdly, the petitioners were well aware that the hirer was a person of very low means. She was a factory worker who was earning at the most $1,000 per month, less than the monthly instalments of $1,064.91. Fourthly, at the end of 34 instalments, the hirer still had to pay a final instalment of $53,144. This was clearly well beyond the hirer`s known means or legal sources of income. Finally, the accused was the one who paid the instalments and there was nothing to suggest that the hirer had obtained a windfall from other legal sources of income to pay for the instalments.

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79 In the DPP`s submission, all the above facts ought to have set the alarm bells ringing. The petitioners had deliberately shut their eyes to the obvious fact that the car would most likely be used for some illegal purpose. In a sense, the petitioners had permitted the offence to be committed using the vehicle by failing to make reasonable enquiries or take any steps to prevent the illegal use of the vehicle.

80 The offence in question was clearly a serious one, attracting the mandatory death penalty. The magistrate accorded great weight to the seriousness of the offence in deciding that forfeiture was appropriate. He opined that the purpose of s 28 was to curb and impede offences under the MDA, and that exempting hire-purchase vehicles from forfeiture would `enable the hirers to defeat the aim of the section by using such vehicles to commit drug offences`.

81 In my opinion, while the nature and gravity of the offence cannot be ignored, this was insufficient by itself to justify forfeiture. Something more was required. In the present scenario, it would also have to be shown that in the circumstances, the petitioners were so grossly negligent in the manner they conducted their business that it could be said that they were `tainted with complicity` in having shown reckless disregard for the consequences of the use of their vehicle. The petition thus turned wholly on this question.

82 It was arguable that an order of forfeiture in the present case would not serve as a real deterrent against the use of vehicles for the commission of offences. There is already a mandatory death penalty in place under the MDA. It may be difficult to see how the prospect of forfeiture of vehicles may operate to pose any greater deterrence to would-be drug traffickers, or to the accused himself. On the other hand, the Minister for Law, while commenting on the justification for mandatory forfeiture provisions, has observed that forfeiture is

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in the public interest since it encourages hire-purchase companies, among others, to take precautions against the illegal use of their vehicles. This was essentially the same argument which was raised to support the DPP`s argument that forfeiture was justified in the present case.

83 Assuming that the petitioners had observed a reasonable and prudent standard of due diligence, a court should be slow to exercise its discretion to forfeit the vehicle. Parliament cannot expect all hire-purchase or car rental businesses to second-guess the latent criminal proclivities of their hirers or authorised drivers. The petitioners may not have been directly connected with the commission of the offence. However, in my opinion, they had clearly demonstrated reckless disregard for the consequences of the use of their vehicle. They went about almost perfunctorily in delivering possession of the vehicle to the hirer and enabling the accused to become the authorised driver of the vehicle. On the facts, they could be said to have been tainted with complicity.

84 I concurred with the DPP that the highly suspicious circumstances surrounding the hiring of the vehicle should have caused any reasonably prudent hire-purchase enterprise to have undertaken further enquiries. Instead, the petitioners saw no difficulty in placing the hirer in possession of the vehicle when she was patently in no position to pay for the vehicle. She did not even have a driving licence. There was no firm indication when, if ever, she would obtain one. She only made a bare assertion that she was learning to drive. Her own evidence was that she had acted on the accused`s instructions and had signed the necessary documents blindly.

85 It was pertinent to note the following sequence in her cross-examination during the inquiry proceedings:

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> *Q: Why did you purchase a car and have it registered in the name of Atan bin Joki?*
>
> *A: Since I could not drive and my husband could, not wrong for my husband to drive.*
>
> *Court: Not answering the question.*
>
> *A: At that point of time, I was learning how to drive and* ***I thought that once I have a licence, I could use the car and that`s why I have it registered under my name and not my husband`s name.***
>
> Q: After [you] purchased the car, [you] have no control over it?
>
> A: I agree with that. [Emphasis added]

86 The credibility of her explanations was highly doubtful. It would be unfair to draw an adverse inference solely from the fact that she could not pay for the vehicle, or the fact that she was unable to drive. It is not unthinkable that persons may place acquired property or assets in the names of their family members for a variety of reasons. Alternatively, the vehicle may have been a gift from the accused. However, this was not the hirer`s stand. Rather, she maintained that it was her purchase, although she did not pay for it, and that she had registered it under her name. In almost the same breath, she agreed that she had no control over the vehicle after its purchase. In addition, it had to be noted that the accused and the hirer were not exactly well-off. The accused did not own any other vehicle. It was not as if he was in a position to lavish a gift of a vehicle on the hirer in anticipation of her obtaining a driving licence.

87 The petitioners contended that they had acted prudently in insisting on a guarantor for the hire-purchase, since they were aware that the hirer was a factory worker. In the words of counsel, the hirer`s financial situation was `found to be inadequate and as such the guarantor was included`. The guarantor was the hirer`s sister and was allegedly a clerk at the material time. Her financial status was apparently left unascertained. No details were stated as to how the

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petitioners arrived at the conclusion that both the hirer and guarantor would be able to discharge the monthly instalment payments. It transpired that the guarantor was equally a woman of straw.

88 Moreover, the accused was the one who had provided the initial cash payment of $18,600. The petitioners were aware that he was the authorised driver. To all intents and purposes, he was the beneficial owner of the vehicle. Even so, there was no indication of how or whether the accused himself would have been capable of providing the finances to maintain the instalment payments. For that matter, the evidence of Tan Bee Lian, a director of the petitioners, was that she was not even aware that the accused was paying for the instalments. Either way, there would have been no legal recourse against the accused. In view of this, it would have been even more imperative that the petitioners should have exercised a higher degree of circumspection.

89 In the circumstances, the petitioners were not wholly innocent claimants. Granted, they were not culpable in the sense that they did not actually know that any offence would be committed with the vehicle. They certainly did not benefit from the offence committed by the accused. It may even be somewhat fanciful to suggest, as the DPP did, that if the petitioners had made reasonable enquiries, this would have led to their concluding that the accused was going to use the vehicle for illegal purposes. However, if the petitioners had acted in a reasonably prudent manner, they could have made it much more difficult for the hirer and the accused to obtain possession of the vehicle. They failed to take this crucial step which might well have prevented the use of the vehicle in the commission of the offence.

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90 I was satisfied that forfeiture of the vehicle pursuant to s 28 MDA was an appropriate order. Accordingly, I dismissed the petition and affirmed the magistrate`s order of forfeiture.

91 ***Petition dismissed*** .

Yong Pung How CJ

Mark Han Meng Kuan and Victor Mah (Yeo, Leong & Peh) for the petitioners
Wong Keen Onn (Deputy Public Prosecutor) for the respondent

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