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22,1954

IN THE PRIVY COUNCIL

No. 9 of 1954

ON APPEAL FROM THE COURT OF APPEAL OF THE

FEDERATION OF MALAYA

B E T W E E N :

37674

WONG POOH YIN alias KWANG
SIN alias KAR SIN

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

UNIVERSITY OF LONDON
W.C.1.

24 FEB 1955

INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR THE APPELLANT

1. This is an appeal in forma pauperis by special leave from the order of the Court of Appeal of the Federation of Malaya dated the 5th day of October, 1953 whereby for reasons delivered on the 12th day of November, 1953 the said Court dismissed the appeal of the Appellant from the decision of the High Court of the Federation of Malaya on the 21st day of July, 1953, whereby the Appellant was convicted on a charge under Regulation 4(1)(a) of Emergency Regulations, 1951 and sentenced to suffer death.

RECORD
P.27

P.28-33

2. The Appellant (hereinafter called " the accused") was prosecuted on a charge that on or about the 25th day of November, 1952 in the Temiar Ladang Area known as Gua Chah in the District of Gua Musang, Ulu Kelantan he did carry a firearm, to wit, a white handled revolver .38 without lawful authority therefor and thereby committed an offence punishable under the Regulation 4 (1) (a) of the Emergency Regulations, 1951.

P.1-2

3. The said Regulation states:-

- "4. (1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control-
- (a) any fire-arm, without lawful authority therefor; or

RECORD

"(b) any ammunition or explosive without lawful authority therefor,

and shall be guilty of an offence and shall on conviction be punished with death.

(Amended by L.N. 363/1.7.52).

(2) A person shall be deemed to have lawful authority for the purposes of this Regulation only if he-

(a) is a police officer or a member of Her Majesty's Naval, Military or Air Forces or of any Local Force established under any written law or any person employed in the Prisons Department of the Federation and in every such case is carrying or is in possession of or has under his control such firearms, ammunition or explosive in or in connection with the performance of his duty; or

(b) is a person duly licensed, or authorised without a licence, under the provisions of any written law for the time being in force to carry, possess or have under his control such firearm, ammunition or explosive; or

(c) is a person exempted from the provision of this Regulation by an Officer-in-Charge of a Police District or is a member of any class of persons so exempted by the Commissioner of Police by notification in the "Gazette".

Provided that no person shall be deemed to have lawful authority for the purpose of this Regulation or to be exempt from this Regulation if he carries or has in his possession or under his control any such firearms, ammunition or explosive for the purpose of using the same in a manner prejudicial to public safety or the maintenance of public order.

(Substituted by L.N. 363/1.7.52)

(3) A person charged with an offence against this Regulation shall not be granted bail"

4. The principal ground of appeal is that the learned trial judge misdirected or failed adequately to direct the assessors as to the meaning of "lawful

excuse" for the possession or carrying of the revolver. RECORD

5. The trial took place under the Emergency (Criminal Trials) Regulations, 1948.

6. The case for the prosecution was that the accused with another Chinese was arrested on the 25th day of November, 1952, by a party of Temiars and found to be carrying a revolver.

7. The case for the defence was that at the time of the "arrest" the accused had already surrendered or had the intention of surrendering and therefore had a "lawful excuse" for the carrying of the revolver.

8. The evidence of the prosecution was that a few days before November 25th it was reported to the Penghulu (Headman) of the village of Gua Chah (P.W.1.) by one Long Babi that two Chinese were in the neighbourhood of the village; that the Penghulu reported this to one Haji Ismail (P.W.3.) the dresser in charge of Temiars at Gua Chah who supplied food to be given to the Chinese; that the assistant Penghulu (P.W.2.) was sent with his food to the Chinese and also to invite them to move to another area where a hut was built for them; that the Chinese moved to the hut and further food was supplied to them; that on the 25th day of November a party of about 70 Temiars surrounded the hut and the Chinese one of whom was the accused, were arrested and that at that time the accused was carrying the revolver. p.4-14

9. In cross-examination

(a) The Penghulu (P.W.1.) said, inter alia:- p.5

" I came to know of the existence of the two Chinese in the vicinity about three days before the day they were brought out. I received the information of their existence from one of my men and of their desire to see me. My informer was Long Babi."

X X X X X

" When I shook hands with Accused he was squatting. My men had to wait for orders from me before they could overcome the Accused. p.6-7

Q. Was Accused's attitude hostile or friendly when he greeted you ?

A. Friendly. He greeted me 'Salamat Penghulu'.

Before Accused could say anything further he was overpowered.

RECORD

I did not say to Accused as I took him out, 'Don't worry, nothing would happen'. I heard someone say those words at the time Accused was arrested. I cannot remember who the person was. I did not question Accused why he was in the vicinity'.

I never had any information that Accused wanted to surrender before I arrested him".

(b)The Assistant Penghulu (P.W.2.) said, inter alia-

p.9.

"I did not hear at any time before the Accused's arrest the words "Serah diri" (surrender) said by the Chinese.

x x x x x x

I carried a message from the Chinese to P.W.1. that the former wanted to meet the latter. P.W.1. did not say anything to it .

I came to know that the Chinese were in the blukar about three days before their arrest. On that day some of the Temiars were in the jungle. We all gathered together about two days later. We did not have much food ourselves to eat.

The Chinese were not hostile towards me before their arrest.

On the very first time the Chinese met me they said they would like to meet P.W.1. They did not say to me that they wanted to surrender.

Q. Did it ever occur to you that if you effected the arrest you would be rewarded?

A. No.

" It was not for the reward that we planned out the arrest of the two Chinese".

10. The Accused gave evidence as follows:-

p.14-16

"I was arrested on 25th November last year. Sometime in November 1949 I went underground. I was in different places and eventually came to Kelantan. I belonged to a party consisting of 60 or 70 persons. I and another member of the party were arrested at the same time. I do not know where the other members of the party had gone to as I and the other men left them about 10 days before we contacted the Temiers. I left them because whilst in the jungle we have read the

Government pamphlet calling on us to come out to RECORD surrender and that we would be properly treated. The two of us left the party with the intention to surrender to the authorities. We carried with us our ammunition. I brought out Ex.P.2.

"After getting away from my comrades I first contacted 5 or 6 Temiars who are not in Court.

"I speak little Temiar. I told these few Temiars that I and my friend wanted to surrender to the authorities and requested them to assist and that we wanted to see the Penghulu. They made known to us that they would arrange our surrender to the Police. They went away after the conversation.

"The same day they brought us ten roots of tapioca.

"About ten Temiars came on the next day. P.W.2. was one of them. They brought us some milk, sardines, rice and tea because we asked them for some food when we first met them.

"The foodstuffs were not given to us free. They asked us to pay for them. We gave them \$10/- in two \$5/- notes.

"There was a suggestion that we move into new quarters.

"On 24th November between 8 and 9 Temiars came among whom was P.W.2. They told us that the Government was willing to let us surrender but we had to wait for some time to enable the to make arrangements.

"We told them that as we desired to surrender they could take away our ammunition and firearms. We were told to keep them till it was arranged for the Police to take them away.

"It was indicated to us that we would have to move on the next day to a place nearer to the Police Station.

"On 25th November about 8 Temiars came. P.W.2. was among them. They took us to the new place. Arriving at the new place they brought us a dog which we slaughtered and ate. On the same day at about 3 p.m. about 60 Temiars came under the leadership of P.W.1. I greeted P.W.1. warmly. I shook his hand and saluted 'Selamat'. P.W.1. said that arrangements for our surrender had been

RECORD

completed and that the Government regulations were that our hands must be tied up. Our hands were tied to the back.

"When I was on the point of having my hands tied up I surrendered my revolver and ammunition to one of the Temiars in the presence of P.W.1.

"The attitude of the 60 Temiars towards me was friendly when they came. When they led me away I thought they were taking me for the purpose of surrender.

"I did not surrender to the Police because from the Government pamphlets that I have read it would be better to contact the public to arrange for me to surrender. Further as I had firearms there would be misunderstanding if I were to go to the Police direct."

and in cross-examination said, inter alia-

p.16-17

"I made up my mind to surrender about one month before my arrest. Before that I did not know what would be the attitude of Government towards us.

"I always carried my revolver with me. I had the revolver on my person when I was arrested.

"Five or six Temiars could easily overpower me and my comrade.

"If I had no intention to surrender I would have fought the Temiars instead of allowing myself to be arrested by them."

p.17

11. It was submitted by Counsel for the defence that if the accused had the genuine intention to surrender and had offered the revolver to the first group of Temiars he was not guilty as he would have a lawful excuse for carrying the firearm.

12. In his summing up to the Assessors the learned trial judge said, inter alia-

p.19

"I should like to tell you at the beginning that there is only one issue before you and that is a simple one. The charge as you have seen from the copy of the charge which is before you concerns carrying a 'firearm', an offence punishable with death. The issue is whether the accused on this particular day, the 25th November, 1952, carried a revolver on his person. Your duty as I have already indicated to you, will be just concerned with the finding as to whether the accused had committed the act or the crime or he had not committed it."

"The fact that the accused had the revolver RECORD at the time in question is not disputed. There p.20-21 was clear evidence that he had no authority for carrying the revolver. The defence, as I can see it from the cross-examination of the prosecution witnesses and from the accused's evidence was that while not denying having the revolver with him, said that he was justified in having it because he had informed some of the Temiars of his intention to surrender himself to the authorities and that he was told to keep it till arrangements for the surrender had been made and that his arrest was really deceitful on the part of the Temiars who were out to benefit from rewards offered by Government for captured terrorists. You have heard the submission of learned counsel for the defence that it could not be an offence if the accused had the genuine intention to surrender the revolver and to offer it to the first group of Temiars. To this submission I am not inclined to agree because intention to surrender is no defence to a charge of possession or carrying of a firearm. If this can be a defence any accused person found with a firearm can always absolve himself from the charge by saying that at the time he was found with it he had the intention to surrender it to the authorities. That defence can only go towards mitigating the sentence.

"What did the accused have at the back of his mind to meet P.W.1., the Penghulu of the Temiars? Was it to effect his surrender or was it something else? It is for you to decide on this point. Not a single main prosecution witness would concede that the accused ever indicated to give himself up.

"Well, you have nevertheless to give every consideration to the accused's story and to form your opinion whether his story is acceptable or not. If you consider that the story is reasonably probable and it raises in your minds a genuine doubt as to the truth of the prosecution story then you must give the benefit of that doubt to the accused."

12. The accused appealed to the Court of Appeal on the following among other grounds:-

1. The charge as framed is defective in that it does not state "without lawful excuse". p.23-24
2. The learned trial judge misdirected the assessors in his summing up when he stated as follows:-

RECORD

"You have heard the submission of learned counsel for the defence that it could not be an offence if the accused had the genuine intention to surrender the revolver and to offer it to the first group of Temiars. To this submission I am not inclined to agree because intention to surrender is no defence to a charge of possession or carrying of a firearm. If this can be a defence any accused person found with a firearm can always absolve himself from the charge by saying that at the time he was found with it he had the intention to surrender it to the authorities. That defence can only go towards mitigating the sentence."

3. The learned trial judge in his summing up to the assessors did not direct them on the law as to lawful excuse and thereby he misdirected them.
4. The learned trial judge failed to deal with that part of the evidence before the Court which constituted lawful excuse.
5. The learned trial judge in his summing up failed to put the case of the defendant properly to the assessors.

p.27 13. The said Court of Appeal ordered on the 5th day of October, 1953, that the said appeal be dismissed and on the 12th day of November Mathew C.J. gave the grounds of Judgment.

14. The said grounds of Judgment contained the following passages.

p.28- 29 "The Appellant was convicted of carrying a revolver without lawful authority contrary to regulation 4(1)(a) of the Emergency Regulations, 1951, and was sentenced to death. Mr. Benjamin who appeared for the appellant has made two submissions:-

(i) the learned trial judge did not adequately or at all direct the assessors on the question of 'lawful authority' and 'lawful excuse'.

(ii) the learned trial judge was wrong in not directing the assessors that if they thought that the appellant was attempting to surrender he had a lawful excuse for carrying the revolver.

Regulation 4 (1)(a) reads:-

"Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control-

(a) any firearm, without lawful authority, therefor..... shall be guilty of an offence and shall on conviction be punished with death." RECORD

(The words underlined were added by L.N.
363 of 1.7.52)

"The regulation aims at the absolute prohibition of the carrying possessing or controlling of firearms, ammunition and explosives except under licence or by members of the security forces or by persons exempted from the provisions of the regulation. A person carrying, possessing or controlling a firearm without authority can only avoid conviction if he can prove that he has a lawful excuse for contravening the regulations. The regulation contemplates an absence of lawful authority being cured by lawful excuse.

"It is no concern of ours to define the meaning of 'lawful excuse', and it would clearly be undesirable to attempt to do so, as each case requires to be examined on its individual facts. Mr. Benjamin has submitted that if a terrorist is coming in to the authorities to surrender and brings with him a fire-arm or other thing covered by the regulation, he has proved a 'lawful excuse' which would entitle him to acquittal. We think it right at once to say that the policy which is adopted by the Government to induce terrorists to surrender is no concern of ours, and for the Courts to attempt to apply a policy, that has not been made the subject of a written law, can only lead to confusion. Whether an individual is prosecuted or not is a matter entirely for the authorities responsible for launching prosecutions and it cannot be submitted successfully as a defence that Government in general terms has indicated that certain offences would be overlooked if offenders took a certain course.

x x x x x

"In the present case the carrying of a firearm is absolutely prohibited by the regulation unless a lawful excuse is found. The excuse claimed by the appellant to be lawful is in short: 'I was on my way to surrender'. That may be a ground for commutation of sentence, but it cannot cure his admitted carrying of a firearm without lawful authority. He is saying in effect: 'I admit having a revolver without lawful authority, but as I am bringing it in to give to the police I have a lawful excuse,' or, put in another way: 'my decision to surrender' p.32-33

RECORD

made the carrying of the revolver lawful.' 'My intention to cease committing an offence provides a lawful excuse for continuing temporarily to commit the offence'. This is tantamount to saying that a man can change the nature of his act, from an unlawful to a lawful one, by a mere change in his intention. That may be true of offences of which intention is an ingredient but it is not true of offences to which the doctrine of 'absolute prohibition' applies.

"In our view, even accepting the bona fides of the appellant's intention to surrender, this could not constitute a lawful excuse. If an administrator who is compelled by law to take possession of a deceased's property is found to have an unlicensed firearm in a suitcase not yet opened, he clearly has a lawful excuse. If a person finds a stick of dynamite on the road and takes it to the appropriate authorities, he clearly has a lawful excuse. If a terrorist after some time in the jungle decides to surrender with his arms, he has an excuse, and if he is acting on a 'surrender leaflet' addressed to him by the security forces, he may have a political or an administrative excuse but, in our opinion, that does not amount to a lawful excuse within the meaning of the regulation.

"In our view, the learned trial judge adequately directed the assessors on 'lawful authority', and rightly rejected the submission of counsel for the accused at the trial that a 'lawful excuse' had been established which entitled the accused to acquittal. The fact that he did not actually use the words 'lawful excuse' did not appear to us to be of moment."

p.34- 14. Special Leave to Appeal in forma pauperis to Her
36 Majesty in Council was granted by Order in Council dated the 20th day of January, 1954.

15. The Appellant humbly submits that this Appeal should be allowed and the said judgment and order of the Court of Appeal of the Federation of Malaya should be set aside and his conviction and sentence quashed for the following among other

R E A S O N S

- (1) Because the learned judges of appeal put a construction on the words "lawful excuse" that was too limited and that they could and should have taken into consideration "the policy which is adopted by the Government to induce terrorists to surrender"

- (2) Because the learned judges of appeal were wrong in holding that an intention to surrender could not constitute a lawful excuse.
- (3) Because, as the accused had offered the said revolver to the assistant Penghulu and had been told to keep it, he had lawful excuse for carrying it, and that neither the learned trial judge nor the learned judges of appeal considered this question.
- (4) Because, the learned trial judge misdirected or failed adequately to direct the assessors as to the law as to lawful excuse.
- (5) Because the learned trial judge and the learned judges of appeal failed to consider or to consider adequately the defence of the appellant .
- (6) Because the appellant had lawful excuse for carrying the said revolver.

THOMAS O. KELLOCK.

No.9 of 1954

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B E T W E E N :

WONG POOH YIN alias KWANG
SIN alias KAR SIN
Appellant

- and -

THE PUBLIC PROSECUTOR
Respondent

CASE FOR THE APPELLANT

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