

22, 1954

IN THE PRIVY COUNCIL

No.9 of 1954

37675

UNIVERSITY OF LONDON
W.C.1.

24 FEB 1955

INSTITUTE OF ADVANCED
LEGAL STUDIES

O N A P P E A L

FROM THE COURT OF APPEAL OF THE FEDERATION
OF MALAYA

B E T W E E N

WONG POOH YIN alias

KWANG SEN alias

KAR SIN

... ..

Appellant

and

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THE PUBLIC PROSECUTOR ...

Respondent

C A S E F O R T H E R E S P O N D E N T

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1. This is an appeal by Special Leave from a judgment of the Court of Appeal of the Federation of Malaya (Mathew C.J; Wilson and Buhagiar JJ.) dated the 5th day of October, 1953 whereby for reasons delivered on the 12th day of November, 1953 the Court of Appeal dismissed an appeal by the Appellant from the High Court of Kota Bharu, Kelantan in the Federation of Malaya. In the High Court the Appellant had been convicted on the 21st day of July, 1953 by a Judge (Abdul Hamid J.) sitting with two assessors of the offence of carrying firearms contrary to Regulation 4 of the Emergency Regulations, 1951 and had been sentenced to Death.

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p.34p.27
pp.28-33

p.18

2. The said Regulation as amended and in force at the material time provided :-

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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

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

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 firearm, ammunition or explosive in or in connection with the performance of his duty; or

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(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 fire-arm, ammunition or explosive; or

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(c) is a person exempted from the provisions 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".

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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 fire-arm, 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.)

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

3. This appeal raises the question of the effect of the words "without lawful excuse" contained in Regulation 4 (1).

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4. The case for the Prosecution was that the Appellant who was a Chinese Communist Terrorist had been captured together with another Terrorist on the 25th day of November, 1952, by a number of Temiars and that at the time of his capture he was carrying a revolver. The Appellant was charged with carrying the revolver contrary to Regulation 4 on the date of his capture.

10 5. The evidence called by the Prosecution can be summarised as follows :-

(a) A few days before the 25th day of November, 1952, the Temiars at Gua Cha discovered that the Appellant and another terrorist were in the neighbourhood at some distance from the place where the Temiars had their huts and from the Police Post. p.4 1.15

(b) The Temiars determined to capture the Appellant and his companion and to hand them over to the police. p.4 1.19

20 (c) To make their capture easier the Temiars persuaded the Appellant and his companion to move to another hut in an open area nearer to the Temiars' huts and to the Police Post. p.4 1.40

(d) After the Appellant and his companion had moved to this hut the Temiars, under the orders of their headman (P.W.1) and their assistant headman (P.W.2) surrounded the hut. The headman and some others went inside the hut. What happened then was described by P.W.1 in these words :- p.5 1.11

30 "When I first sighted the two Chinese, I saw one of them with a pistol and a hand grenade and that person is the accused. I stretched out my hand to greet him and I gripped it. After gripping I pushed him back whereupon he fell on his back. My men closed in and caught hold of him. I was still holding him when my men closed in on accused. Some of my men overpowered the other Chinese I took possession of the pistol which I handed later to the Police at the same time as I handed the accused to them". p.5 1.14

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(e) After capturing the Appellant and his companion the Temiars brought them to one Haji Ismail (P.W.3) described in evidence as "Dresser in charge of Temiars at Gua Cha". p.10 1.25

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p.13 1.5 (f) The Appellant and his companion were given into the custody of L/C Omar bin Hussain.

p.8 11.8-22 (g) According to P.W.2., he had seen the Appellant on two occasions shortly before he had moved to the new hut. The Appellant, on both occasions, was carrying a revolver.

p.16 11.17-25 6. The Appellant said in evidence that he had gone underground in November, 1949. He used to carry a rifle but in May, 1952, his Commander instructed a woman terrorist to give him the revolver which he carried thereafter on his waist until the day he was arrested. The Appellant said that about a month before his capture he had decided to surrender to the authorities having read the Government pamphlet saying that if he did so he would be well treated. Later he and another Terrorist with the intention of surrendering to the authorities deserted from their band. The Appellant brought with him his revolver and the other Terrorist a rifle. They both carried ammunition. Some Ten days after their desertion they met some of the Temiars who were not called as witnesses and told them that they wanted to surrender to the authorities and asked to see the Penghulu. Those Temiars said that they would arrange the surrender of the Appellant and his companion. The next day the Assistant Penghulu (P.W.2) brought some food to the Communists and asked them to move to a new house. On the 24th November P.W.2 returned with 8 or 9 Temiars and told the Communists that the Government was willing to let them surrender but that they would have to wait some time for arrangements to be made. The Communists told the Temiars that they (the Temiars) could take away their arms and ammunition but the Temiars told the Communists to keep their arms until it was arranged for the Police to take them away. On the 25th November P.W.2 with about 8 Temiars took the Communists to the new house. Later that day the Penghulu (P.W.1) and about 60 Temiars came to the house. The Appellant greeted P.W.1 who said that the arrangements for the Communists' surrender were now complete and the Government Regulations were that their hands were to be tied behind their back. The Appellant handed his revolver and ammunition to a Temiar and allowed his hands to be tied. The Appellant explained why he had surrendered to the Temiars rather than the Police by saying that the Government pamphlets advised the Terrorists to "contact the public to arrange" the surrender and that as he had a fire-arm "there would

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have been a misunderstanding if he had gone to the Police direct".

7. From the record of the proceedings at the trial it does not appear that the Appellant's story was put in any detail during the cross-examination of P.W.1 or P.W.2. But during his cross-examination P.W.1 said :

10 "The Accused could have gone to the p.6 1.27
Police if he wanted to surrender. It was not
necessary for him to see me if he wanted to
surrender".

....."I did not say to the Accused as I took p.7 1. 6
him out, 'Don't worry, nothing would happen'.
I heard somebody 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".

20 "I never had any information that p.7 1.15
Accused wanted to surrender before I arrested
him".

In re-examination P.W.1 said :

"I would have taken the Accused straight p.7 1.17
away to the Police Station if I knew that he
wanted to surrender. I would not have a hut
built for him either in that case".

In the course of his cross-examination P.W. 2 said:

30 "I did not hear at any time before the p.9 1. 2
Accused's arrest the words, 'Serah diri'
(surrender) said by the Chinese".

....."On the very first time the Chinese p.9 1.33
met me they said they would like to meet
P.W.1. They did not say that they wanted to
surrender".

There was no evidence by the Appellant or
any other witness that the Appellant had stated to
any person after his arrest and before his trial
any of the exculpatory matters deposed to in his
evidence.

40 8. In the course of his summing-up to the Assessors
the learned Trial Judge said :

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p.19 1.3

"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 "fire-arm", 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. You are not in any way concerned with the result of your decision. That is a matter which concerns some other authority. Now, as judges of facts, you have got to decide which fact you consider to be proved and which not proved; which aspect of the story of the prosecution and of the defence you accept or reject and then after applying to those facts the law which I shall direct you in due course come to your own conclusion".

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p.20 1.6

....."This alleged incident took place some eight or nine months ago, sometime in November last year. The case for the prosecution depended mostly, if not, entirely on the evidence of the Temiar witnesses. You have seen for yourselves those witnesses and it is for you as reasonable men of the world to give what allowance, if any, to witnesses of the type to which they belong. You have got to give allowance for their intelligence and mentality. You perhaps know more about Temiars than I do, and so I shall leave the question of credibility of their evidence to your consideration. The fact that the accused had the revolver at the time in question is not disputed. There 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

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10 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 Temairs.
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
fire-arm. 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.

20 "What did the accused have at the back
of his mind to meet P.W.1, the Penghulu or
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.

30 "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.

"Lastly, if you have any doubt on the whole
case or on any aspect of the case that doubt
must always resolve in favour of the accused.

40 "I think this is about all I can say to
you. I will now call upon you for your
opinions as to whether the accused is guilty
of the charge or is not guilty of the charge.
Do you wish to retire?"

9. The assessors found the Appellant guilty of
the offence without retiring and the Appellant
was convicted and sentenced to death on the 21st
July, 1953.

10. On the 31st July 1953 the Appellant filed a

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notice of appeal against sentence only but on the 26th August 1953 Further Grounds of Appeal were filed on behalf of the Appellant alleging (inter alia) that the summing-up at the trial was defective.

11. On the 5th day of October 1953 the appeal was heard by the Court of Appeal of the Federation of Malaya (Mathew C.J.Wilson and Buhagiar J.J) It was argued on behalf of the Appellant that

p.28 1.20

(1) The learned Trial Judge did not adequately or at all direct the assessors on the question of lawful excuse and lawful authority.

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(2) The learned Trial Judge was wrong in not directing the assessors that if they thought that the Appellant was intending to surrender he had a lawful excuse for carrying the revolver.

12. The Court of Appeal dismissed the appeal on the said 5th day of October. The grounds for judgment were delivered on the 12th November 1953 by Mathew C.J.

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13. In the course of his judgment the learned Chief Justice said :

p.32 1.23

"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 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.

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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 fire-arm in a suit-case 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 without the meaning of the regulation.

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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.

We dismissed the appeal."

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The Respondent submits that this appeal should be dismissed for the following (among other)

R E A S O N S

- (1) BECAUSE the Appellant's evidence, even if it had been accepted by the trial Court, did not prove that he had a lawful excuse for carrying fire-arms.
- (2) BECAUSE the Appellant's evidence was rightly rejected by the trial Court.
- (3) FOR the reasons given by Sir Charles Mathew, Chief Justice.

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B. MacKENNA

D. A. GRANT

No.9 of 1954

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF
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BETWEEN

WONG POOH YIN alias KWANG
SIN alias KAR SIN Appellant

and

THE PUBLIC PROSECUTOR
Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2
Solicitors for the Respondent