

Appeal No. 16 of 1967

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N
UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
15 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

THE PUBLIC PROSECUTOR

Appellant

- and -

OIE HEE KOI

Respondent

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C A S E FOR THE APPELLANT

RECORD

1. This is an Appeal by Special Leave from the Judgment and Order of the Federal Court of Malaysia Holden at Kuala Lumpur (Appellate Jurisdiction) (Syed Sheh Barakbah, Chief Justice, Malaya; Ong Hock Thye, Judge, Federal Court, Malaysia; Ismail Khan, Judge, High Court, Malaya) dated the 12th day of July 1966 by which Judgment and Order the Respondent's appeal against his convictions and sentences by the High Court in Malaya at Muar in the State of Johore (S.S. Gill, Judge) on the 25th day of March 1966 upon 3 charges under the Internal Security Act 1960 (No. 18 of 1960) was allowed and his said convictions and sentences were quashed.

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2. The Respondent was charged as follows:-

"1st Charge

That you at about 6.40 a.m. on the 13th day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely, Kampong Sekarai, Tenang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had under your control a firearm, to wit one Rifle MK: 3 No. 3501 without lawful authority and that you have thereby committed an offence

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punishable under section 57(1)(a) of the Internal Security Act, 1960."

2. "2nd Charge:

That you at about 6.40 a.m. on the 13th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely Kampong Sekarai, Tanang, Labis, in the District of Segamat, in the State of Johore without lawful excuse had under your control ammunitions, to wit, 200 rounds of .303 ammunitions, and two hand-grenades Chinese Type, without lawful authority and that you have thereby committed an offence punishable under Section 57(1)(b) of the Internal Security Act, 1960." 10

"3rd Charge:

That you between 2.00 a.m. on the 2nd day of September, 1964, and 6.40 a.m. on the 13th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964 namely Kampong Sekarai, Tenang, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms and ammunitions in contravention of the provisions of Section 57(1) of the Internal Security Act, 19/60 in circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian Armed Forces in a manner prejudicial to Public Security and that you have thereby committed an offence punishable under Section 58(1) of the same Act." 20 30

3. The Respondent at his trial raised no question as to the jurisdiction of the Court to try him or as to his status, and upon arraignment he pleaded not guilty to the first 2 charges and guilty to the 3rd charge. The trial proceeded on all 3 charges and the Respondent was convicted thereon. The learned trial Judge in his Grounds of Judgment thus summarised his findings upon the pleas which had been entered. 40

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"The accused had pleaded guilty to the third charge at the commencement of the trial, but as he had claimed to be tried on the other two charges I deferred accepting his plea until the end of the trial. In the event I found the accused guilty on the first and the second charges and convicted him. On the third charge I convicted him both on his plea of guilty and on the evidence produced in the case."

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The Respondent was sentenced to death on each charge.

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4. The principal grounds of this Appeal are:

(a) That the Federal Court was in error in holding that the Respondent was a prisoner of war within the meaning of the Geneva Conventions Act 1962 (No. 5 of 1962) and as such was entitled to protection under the Geneva Convention Relative to the Treatment of Prisoners of War (The Third Schedule to the Act). In so holding the Federal Court was running counter to its own previous decisions on broadly similar facts in the cases of Teo Boon Chai alias Tey Ah Sin v. Public Prosecutor, Malaysia and Lee Hoo Boon v. Public Prosecutor, Malaysia which cases, it is submitted, were correctly decided.

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(b) That the Federal Court was in error in holding that in the circumstances of the case a burden lay upon the prosecution to prove that the Respondent was disentitled to be treated as a prisoner of war under the Act. It is submitted that it was for the Respondent to show that he was entitled to the protection of the Act and this he never did.

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(c) If, contrary to the Appellant's submission, there was any onus upon the prosecution to show that the Respondent was disentitled to be treated as a prisoner of war under the Act, such onus was discharged.

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5. The following statutory provisions are material:-

57.(1) Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control -

(a) any fire-arm without lawful authority therefor; or

(b) any ammunition or explosive without lawful authority therefor, 10

shall be guilty of an offence against this Part and shall be punished with death.

58.(1) Any person who in any security area consorts with or is found in the company of another person who is carrying or has in his possession or under his control any fire-arm, ammunition or explosive in contravention of the provisions of section 57, in circumstances which raise a reasonable presumption that he intends, or is about, to act, or has recently acted, with such other person in a manner prejudicial to public security or the maintenance of public order shall be guilty of an offence against this Part and shall be punished with death, or with imprisonment for life. 20 30

Courts of Judicature Act 1964

s.22 (1) Every High Court shall have jurisdiction to try all offences committed -

(a) within its local jurisdiction;

(b) on the high seas on board any ship or aircraft registered at any place in Malaysia;

(c) by any person who is a Federal citizen or a citizen of any State 40

in Malaysia or a subject of the Ruler of any State in Malaysia on the high seas or on any aircraft;

Evidence Ordinance

10 s.103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

s.106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Geneva Conventions Act 1962

20 s.2. In this Act, unless the context otherwise requires -

• • • • •
"protected prisoner of war" means a person protected by the convention set out in the Third Schedule to this Act;

s.4.(1) The Court before which -

30 (a) a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoner's representative.

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Third Schedule

Article 1

The High Contracting Parties undertake

RECORD

to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. 10

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. 20

Article 4 30

A. Prisoners of war, in the sense of the present Conventions, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; 40
- (2) Members of other militias and members of other volunteer corps, including those of

organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

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(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

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(d) that of conducting their operations in accordance with the laws and customs of war;

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Article 17

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Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints or both of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be shown by the prisoner of war

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upon demand, but may in no case be taken away from him.

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Article 84

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

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Article 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

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When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

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Article 100

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Prisoners of war and the Protecting

Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

10 The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has, in accordance with Article 37, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and
20 that he is in its power as the result of circumstances independent of his own will.

6. Upon the Respondent's trial, the case for the prosecution was that on the 13th September 1964 at about 6.30 a.m. two rubber tappers named Teo Teng Koon (P.W.1) and Ng Kim Foh (P.W.2) were on their way to work on motor cycles along a kampong laterite road when they saw the Respondent and an Indonesian named Iding, who were both in civilian clothes, standing on the roadside. They stopped their motor cycles and had some conversation with the Respondent and Iding, who were strangers to them after which, being suspicious, they took them to the Police Post, Tenang Kampong, Labis and handed them to Police Constable Yaacob (P.W.3). The Respondent and Iding were searched and on the Respondent were found some Malayan money and an Identity Card No. 3019104. 4, 6. 7.

40 Police Constable Yaacob (P.W.3) produced in evidence as Exhibit P.1 the identity card found on the Respondent. It was a blue identity card, stating under place of birth "China" and under classification of "race", that he was "Waga Negara Persketuan", a citizen of the Federation of Malaya. 7.

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8. Later on the 13th September 1964 the Respondent and Iding took a party of soldiers to a spot where their belongings were hidden. Each pointed out the bundle containing his own belongings. The Respondent's bundle contained arms, ammunition, civilian clothes, a camouflage uniform and other equipment.
19. 9. The Indonesian Iding (P.W.11) testified that he was a member of the Indonesian Armed Forces having joined in 1960. He came to Malaya in a Hercules aeroplane on the 1st September 1964 from Jakarta with 47 persons under the command of Lieutenant Sutikno. All 48 were dressed in camouflage military uniforms and they carried arms. They were divided into 8 sections of 6 persons each, and the Respondent was in his section. They jumped out of the plane at about 2 a.m. and at about 4 a.m. the witness met the Respondent. They remained together in the jungle for about 13 days, after which they changed into civilian clothes and walked out of the jungle on to a kampong road, from where P.W.1 and P.W.2. took them on their motor cycles to the police station. Before coming out of the jungle they had hidden their arms, ammunition and other equipment in separate piles in the place where they were subsequently found. 10 20
22. Yusias (P.W.12) gave evidence that he was an Indonesian paratrooper in the force commanded by Lieutenant Sutikno and was in the same section as the Respondent and Iding. After landing he remained in the jungle alone for 15 days, after which he met some kampong people who handed him over to the police. 30
24. Sutikno (P.W.13) testified that he was a Lieutenant in the Indonesian Armed Forces and that in February 1964 he "was given additional training at Jakarta for the confrontasi campaign against Malaysia. On 1. 9.64 at 1 p.m. I was placed in command of 47 paratroopers at Jakarta. Of the 48 of us, 34 were Indonesians and 14 Malayan Chinese. I was instructed to bring my men into Malaya for a confrontasi campaign." He identified the Respondent as one of his men. The witness described how he landed in the Tenang area, Labis in Johore State, met one of his men, with whom he remained in the jungle for about 20 40

days and was captured in a kampong. He added "our objective was to help to liberate the people of Malaya from imperialism by carrying on sabotage work in order to cripple the economy of Malaya and, if necessary, to carry on guerilla warfare in the country. My instructions to my men after landing were to look for their section leaders and then to look for me. Further instructions were to be given on regrouping."

10 10. A statement made by the Respondent to A.S.P. Chew Kok Khee (P.W.14) was held to be admissible and produced in evidence as Exhibit P.14. In 69.
this statement the Respondent said that he came over from China with his parents when he was about 2 years old and they took up residence in Pontian Kechil. He had 3 elder brothers and a younger brother. From the age of 12 to that of 14 he went to Bin Cheng Chinese School in Pontian. His father who was a rubber tapper in Pontian
20 Kechil died when he was still a young boy and shortly after he left school the Respondent became a rubber tapper. In 1955 he became a courier for communist terrorists and on the 25th February 1959 he was arrested for subversive activities and detained for a total of 6 months in Johore Bharu, Kuala Lumpur and Batu Gajah. Upon his release from prison in August 1959 he was restricted to the District of Pontian Kechil
30 where he continued tapping rubber. In April 1964, at a time when he was unemployed, he was approached by one Beh Yong who told him that he could get employment for him in Singapore. The Respondent agreed and was taken to a place near the sea where there was a boat which he agreed to board. Beh Yong then told him that he had arranged employment for him in Indonesia. In the result he was taken to an island known as Tanjong Balai where he underwent military training, and later proceeded via Jakarta to Bandeong where he
40 received further training. The rest of the statement described how he came over to Johore and was eventually captured.

11. At the conclusion of the case for the prosecution, the learned trial Judge held that there was a case for the Respondent to answer and called on him for his defence. The Respondent elected to make a statement from the dock. In 31.
this he thus described the circumstances in which he came to be a member of the force of paratroopers. 32.

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"I was an odd job labourer in Pontian. Some time in May 1964 I was unemployed. During the period of my unemployment I met a person named Mah Yong who wanted to introduce me to a job in Singapore. As I was unemployed I went with him to Singapore. At Singapore he told me that the employment was in an island off Singapore. I got into a boat with him to go to that island. I worked in that island for a few days. I do not know the name of the island. After working there for 4 or 5 days I was taken in a boat by an Indonesian to a military camp. I refused to go into the military camp. I was beaten by the Indonesians with military weapons. I was forced to join military training. I had no alternative but to join the training. In the course of my training I was given uniforms, a firearm and other military equipment. After supplying me with all the things, I was forced to board a plane. The plane took off."

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The Respondent went on to say that at midnight he was forced to jump from the plane, the destination of which he had never been informed. When he landed he met Iding whom he eventually persuaded to come out with him to surrender. He admitted consorting with Indonesians but was forced to do so in order to save his own life.

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12. No witnesses were called on the Respondent's behalf and at no time in the course of the trial was any suggestion made that he was a prisoner of war or entitled to be treated as such.

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13. On the 25th March 1966 the learned trial Judge found the Respondent guilty on all 3 charges, holding that there was overwhelming evidence against him, and sentenced him to death on each charge.

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14. Following his conviction and sentence, the Respondent appealed to the Federal Court. His Petition of Appeal did not take the point that he had the status of a prisoner of war, but leave was sought in the course of the argument to add this further ground of appeal which it was stated

would be argued in the next case. The respondent to the appeal was not called upon, but the appeal was adjourned until the next case (an appeal by one Ooi Wan Yui) was concluded.

15. The Federal Court dealt with the Respondent's appeal and also with the similar appeal of Ooi Wan Yui in a single judgment.

10 The principal judgment of the Court (with which Syed Sheh Barakbah C.J. Malaya and Ismail Khan J. concurred) was delivered by Ong Hock Thye F.J. on the 12th July 1966.

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The learned Federal Justice, dealt with both appeals upon the footing that the evidence showed that the Appellants were members of the Indonesian Armed Forces, that this raised a presumption that they were entitled to be treated as prisoners of war, that it was for the prosecution to disprove this and that it had failed to do so.

Dealing with both cases he said

20 "The appellants' claim to be prisoners of war makes it necessary to refer to the definition of that term in Article 4 of the Third Schedule to the Geneva Conventions Act, 1962, the relevant portion of which reads:

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"Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

30 (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."

40 This category includes members of volunteer corps forming part of the armed forces of a Party to the conflict and the evidence for the prosecution leaves no room for doubt that the appellants were in fact members of the Indonesian Armed Forces commanded by Lieutenant Sutikno, whether volunteers or conscripts. That being the

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case, the appellants ought prima facie to be regarded as prisoners of war unless there were circumstances which disentitled them to treatment as such."

He then considered the case of each Appellant individually. Dealing with the case of Ooi Wan Yui the learned Federal Justice said

58. "The onus clearly did not rest on him to prove that he was not a subject of His Majesty or that by reason of his past residence he was owing allegiance at the time he joined the Indonesian Armed Forces, or during the period specified in the charges against him." 10

He went on to say that long residence alone was insufficient to found allegiance citing the case of Joyce v. Director of Public Prosecutions 1946 A.C. 347, and concluded

60. "we are accordingly of the opinion that, in the case of Ooi Wan Yui, the prosecution had failed to prove that he was a person owing allegiance at any relevant time: consequently he should have been held to be a prisoner of war and entitled to the same treatment as was accorded to Lieutenant Sutikno and the Indonesians under his command none of whom were put on trial for any offence under the Internal Security Act, 1960. Moreover and in particular, the trial had failed to comply with the mandatory provisions of Articles 87, 100 and 104 of the Third Schedule to the Act of 1962. His appeal is therefore allowed and the conviction and sentence quashed." 20 30

16. That proceeding to consider the case of the other Appellant (the Respondent in this Appeal) the learned Federal Justice held that similar considerations applied, stating as follows:-

61. "We turn now to the other appellant, Ooi Hee Koi, in whose possession a blue identity card was found, stating under place of birth "China" and under classification of "race", that he is "Warga Negara Persekutuan", a citizen of the Federation of Malaya. The 40

National Registration Act, 1959, provides in section 5, that 'Subject to the provisions of any exemptions which may be granted by regulations made under section 6, every person within the federation shall be registered under and in accordance with the provisions of this Act and of any regulations made thereunder.'

10 The National Registration Regulations, 1960 (vide L.N. 151/60) provide by Regulation 5(2)(a) for the issue of 'blue bordered cards with blue printing to citizens of the Federation of Malaya'. This would seem at first sight, to conclude the matter, but is the question of Ooi Hee Koi's allegiance resolved by the mere production of his identity card?.

20 The prototype of our Act is the English National Registration Act, 1939 (2 & 3 Geo. 6, C.91). In an appeal heard by a Court of seven judges specially constituted for the purpose, Lord Goddard C.J. said in Willcock v. Muckle (5):

'This Act was passed for security purposes; it was never passed for the purposes for which it is now apparently being used', (i.e. whenever motorists were stopped or interrogated for any cause).

30 This case shows, in our opinion, that a distinction should be observed between a passport (held decisive in Joyce's case) and an identity card. The former confers rights whereas the latter imposes obligations. The former avails its non-subject holder to claim Crown protection abroad, whereas the latter is of no possible value outside the Federation. What, at all events, is crucial for the purposes of this case is that Regulation 23 provides:

40 '23(1). The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity card has been issued, or on

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any other person alleging the truth of such contents.

(2). Where any person claims that he is an exempted person the burden of proving such fact shall lie upon him.'

Proof of the truth of the allegation as to this appellant's status thus rested on the prosecution. The prosecution offered no such proof, notwithstanding that both in the identity card and the cautioned statement, the appellant's place of birth stood out plain as a pikestaff. This appellant therefore, should stand on the same footing as the other. We accordingly allow his appeal as well and quash the conviction and sentence."

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17. The Appellant respectfully submits that the Federal Court approached the matter in a wholly wrong way and that the Geneva Convention Relative to the Treatment of Prisoners of War, which, when applicable, is given legislative effect by Act No. 5 of 1962, has no application to the facts of the present case. The Appellant was clearly a resident of and domiciled in Malaysia, where also the acts which were proved against him were committed. The Appellant was thus (assuming that there was an armed conflict to which Malaysia was a party) in the position of an inhabitant of an invaded country who lends assistance to the invader. Accordingly, even if the Convention was otherwise applicable, nevertheless upon its proper construction, the Appellant was a defector to the enemy, and as such was not entitled to its protection. It is submitted that the long established principles of customary international law would clearly exclude the Appellant from the protection afforded to prisoners of war and that the Convention is to be interpreted in the light of these principles and as giving expression and effect to them.

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18. It is further submitted that in any event and upon any view the evidence showed prima facie the commission of offences which fell within the ordinary jurisdiction of the Court and the only question left was whether the Respondent was entitled to an immunity or exemption from the

general law by reason of his having a special protected status. The offences alleged were within the territorial jurisdiction of the Court as stated by S.22(1) of the Courts of Judicature Act 1964 and the Respondent was a person subject to the enactment under which he was charged, that is to say, sections 57 and 58 of the Internal Security Act 1960.

10 These sections apply to "any person" of whatever nationality, citizenship or status, and, it is submitted, whether he be civilian or military, although in an appropriate case it may be open to an accused by virtue of other legislation to show that he enjoys some special protected status. That this is so is shown, it is submitted, both by the express language and the manifest intention of the enactment. Section 58 makes it an offence to consort with a "person who is carrying or has in his possession or under 20 his control any fire-arm, ammunition or explosive in contravention of section 57". If the members of an invading military force are to be excluded from the operation of section 57, then their carrying arms would not constitute a contravention of this section and no offence would be committed under section 58 by any person, whatever his nationality or allegiance, who consorted with them. This, it is submitted, would be contrary to and defeat the plain intention of the 30 enactment, which would not operate to remedy the mischief aimed at where this was sufficiently open and blatant. It is submitted that section 57 applies to all persons who commit the offence therein defined, whatever their status may be, and that section 58 has the same application.

40 Accordingly, prima facie the Court has its ordinary jurisdiction to try offences against these sections by whatsoever persons committed unless there is something to oust such jurisdiction. Where the Geneva Conventions Act 1962 is applicable, the effect of Article 84 of the 3rd Schedule would be to oust the jurisdiction of the Court, but it is submitted that for this consequence to follow the facts making the Act applicable to the particular case must be clearly shown. In the present case no such facts were shown.

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19. It is submitted that, the prosecution having proved by the evidence it adduced all the ingredients of the offences charged and that they were committed within the territorial jurisdiction of the Court, it was for the Respondent to prove the facts which gave him a protected status or conferred on him an immunity or exemption, or ousted the ordinary jurisdiction of the Court. This he did not do. On the contrary, he adduced no evidence as to his status or allegiance and at no time during his trial did he raise the defence that he was a prisoner of war or challenge the jurisdiction of the Court, having indeed upon his arraignment pleaded guilty to one of the charges against him.

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20. It is submitted that the case of Joyce v. Director of Public Prosecutions 1946 A.C. 347 upon which reliance was placed by the Federal Court, but where the issue was whether the accused's acts outside the realm constituted any offence at all, afford little assistance in the present case, where acts expressly made criminal by the statute were carried out by the accused within the realm and the jurisdiction of the Court.

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21. It is respectfully submitted that there was no evidence before the Court that the Respondent was entitled to be treated as a prisoner of war within the meaning of the Geneva Convention (The Third Schedule of the Geneva Conventions Act 1962). There was in particular no evidence that if there was either a "declared war" or an "armed conflict" between Malaysia and any other Power, that other Power was a "High Contracting Party" or had accepted and applied the provisions of the Geneva Convention so as to make the Government of Malaysia bound by it and so give the material provisions of the Third Schedule any legislative force. The Federal Court might have been entitled, had it thought fit, to have received further evidence upon these matters by reason of section 61(1) of the Courts of Judicature Act 1964, but it was not entitled, in the Appellant's submission to take judicial notice of or to make any assumptions about them.

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22. It is further submitted that in any event, if it was incumbent upon the prosecution to show

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at the time of the acts charged, it did show this
upon the evidence. This established that the
offences were committed in Malaysia, where, it
is submitted, the Respondent was shown to be
domiciled and ordinarily resident, where he had
lived all his life and from which he had been
only temporarily absent before the offences were
committed. There was no evidence before the
Court that the Respondent had decided to emigrate
or change his allegiance. Indeed, his statement
from the dock suggested the contrary, the gist of
it being that his only purpose in leaving Pontian
was to look for employment in Singapore and that
he was made to undergo military training in
Indonesia against his will and by force. It is
submitted also that his possession of an identity
card appropriate to, and containing a description
of himself as, a citizen of Malaya, was evidence
20 that his allegiance was to Malaya and hence to
Malaysia. In the Appellant's submission the
Federal Court was wrong in thinking that any onus
rested upon the prosecution to prove the truth of
the contents of the identity card. The possession
of the card by the Respondent showed not only
where he was resident but also that he had
claimed to be a citizen of Malaya when he had
applied for it and his having it in his
possession was evidence that he still claimed to
30 be such. In any event it is submitted that the
possession of a civilian identity card issued in
Malaysia instead of the kind of identity card
which by the Geneva Conventions Act is required
to be furnished to persons "liable to become
prisoners of war" was some evidence that the
Respondent's status was not such that upon
capture he became a prisoner of war.

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40 23. In the further submission of the Appellant,
whatever the position as to onus of proof or the
allegiance owed by the Respondent, the evidence
before the Court showed clearly that the
Respondent was not a person to whom, pursuant to
Articles 2 and 4 of the 3rd Schedule, the
provisions of the Convention therein contained
were applicable. The Respondent was not engaged
in an armed conflict and did not comply with
provisos (b) and (c) of Article 4(2). On the
contrary he was engaged in a mere mission of
sabotage, in the course of which and at the time

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of his apprehension he had disguised himself by putting on civilian clothing and had concealed his arms.

51. 24. The Appellant respectfully submits that this Appeal should be allowed and the Judgment and
63. Order of the Federal Court of Malaysia of the
12th day of July 1966 should be set aside and the
Respondent's convictions and sentences in the
High Court in Malaya at Muar in the State of
34. Johore of the 25th day of March 1966 should be 10
restored for the following among other

R E A S O N S

1. BECAUSE the Respondent was not a prisoner of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE the Respondent was a defector to the enemy and as such was not entitled to be treated as a prisoner of war.
3. BECAUSE the Respondent was in breach of his duty of allegiance to His Majesty the Yang di-Pertuan Agong and was accordingly upon a proper construction of the Geneva Conventions Act 1962 and by the law of nations to which such Act gives expression and effect not entitled to the protection of the Act. 20
4. BECAUSE it was for the Respondent to show that he enjoyed the status and privileges of a prisoner of war and this he did not do.
5. BECAUSE no facts or circumstances were shown to oust the Court's jurisdiction to try the offences charged according to the ordinary processes of law. 30
6. BECAUSE there was no evidence that if there was either a "declared war" or an "armed conflict" between Malaysia and any other Power, that other Power was a "High Contracting Party" or had accepted and applied the provisions of the Geneva Convention so as to make the Government of Malaysia bound by it and so give the material 40

provisions of the Third Schedule any legislative force.

7. BECAUSE the evidence showed on the contrary that there was not an armed conflict within the meaning of Article 2 of the 3rd Schedule but that the Respondent was merely taking part in a mission of sabotage.
- 10 8. BECAUSE the evidence showed that the Respondent was not a person who fell within the definition of a prisoner of war contained in Article 4 of the 3rd Schedule and accordingly neither by the express terms of the Article nor by the law of nations to which it gives expression and effect was he entitled to be treated as such.
9. BECAUSE if there was any onus upon the prosecution to prove that the Respondent owed allegiance to His Majesty the Yang di-Pertuan, it discharged such onus.
- 20 10. BECAUSE if there was any onus upon the prosecution to prove that the Geneva Conventions Act 1962 had no application, it discharged such onus.
- 30 11. BECAUSE the Judgments of the Federal Court of Malaysia in the cases of Teo Boon Chai alias Tey Ah Sin v. Public Prosecutor and Lee Hoo Boon v. Public Prosecutor were correct for the reasons therein stated and the Federal Court should have followed these decisions in the present case.

MONTAGUE SOLOMON

Appeal No. 16 of 1967

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL FROM
THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N

THE PUBLIC PROSECUTOR

Appellant

- and -

OIE HEE KOI

Respondent

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