

91344

1967/21
[5]

1.
JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL No. 10 of 1967

O N A P P E A L
 FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N:

1. NG SENG HUAT alias NG CHING KIM

2. LEE CHING SAI alias LEE BOON KHENG

Appellants

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

15 MAR 1968

25 RUSSELL SQUARE
10 LONDON, W.C.1.

- and -

THE PUBLIC PROSECUTOR

Respondent

CASE FOR THE APPELLANTS

1. This is an appeal by special leave in forma pauperis from a Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction)

RECORD
PP 55-67.

(Thomson, Lord President, Ong Hock Thye, Ag.

C.J. and Suffian Judge) dated 28th December,

1965, dismissing the Appellants' appeal from the Judgment of the Honourable Mr. Justice Gill

dated 13th October, 1965, whereby the Appellants' (hereinafter individually referred to as No. 1 and No. 2) were each of them convicted and sentenced to death on three charges under the Internal Security Act, 1960, (No. 18 of 1960).

PP 27-34.

P 341131-36.

2. The main and principal question raised by the appeal is whether the Appellants each of them was a prisoner of war and entitled to be treated as such within the meaning of, according to,

and as provided by, Article 4 of the Geneva Convention, 1949 being the Convention thereon relative to the treatment of prisoners of war as enacted and provided by the Third Schedule of the Geneva Conventions Act, 1962

20

30

2.

RECORD

(No. 5 of 1962) of Malaysia and accordingly entitled to the protections, rights, privileges and benefits thereunder and in accordance therewith.

3. The material statutory provisions are as follows:-

Geneva Conventions Act, 1962:

Section "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;

10

'the protecting power' in relation to a protected prisoner of war.....means the power or organisation which is carrying out, in the interests of the power which is a national or of whose force he is or was at any material time, a member, the duties assigned to protecting powers under the Convention set out in the Third...Schedule;"

20

Section "4(1) The Court before which -

(a) a protected prisoner of war is brought up for trial for an 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, and, if the accused is a protected prisoner of war, or the accused and the prisoner's representative.....

30

"(4) In this section the expression 'prisoners representative' in relation to a particular protected prisoner of war at a particular time means the person by whom the functions of prisoners representative within the meaning of Article 79 of the Convention set out in the Third Schedule were exercisable in relation to that prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war."

40

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

91344

THIRD SCHEDULERECORDPART IGENERAL PROVISIONSArticle 2

10

".....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....."

Although one of the Powers in conflict may not be a party to the present convocation, the powers who are parties thereto shall remain bound by it in their mutual relations

Article 4

20

"A. 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;

(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....."

Article 5

30

"The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal".

Article 7

40

"Prisoners of war may in no circumstances

RECORD

renounce in part or in entirety the rights secured to them by the present Convention,
"

"PART II -GENERAL PROTECTION OF PRISONERS OF WARArticle 16

".....all prisoners of war shall be treated alike by the Detaining Power....."

Chapter III - Penal and DisciplinarySanctionsArticle 82

10

"A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power....."

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".

20

Article 85

"Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention"

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"

30

Article 100

"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.

Article 104

10

"In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial....."

Article 127

20

".....
Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions."

4. The said three charges under the Internal Security Act, 1962, wherewith the Appellants, who were separately charged but jointly tried, were respectively charged, were as follows:

30

Against No.1 (1) That he between the 2nd September, and 13th September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964, namely Kampung Redong Ayer Panas, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Force who carried fire-arms and ammunitions in contravention of the provisions of Section 58(1) (sic) of the said Act, 18/1960, in the circumstances which raised a reasonable presumption that he intended to act with such members of the said Indonesian Armed Forces in a manner prejudicial to public security and he had thereby committed an offence punishable under section 58(1) of the said Act, namely, with death, or with imprisonment for life.

40

RECORD

(2) That between the 2nd and 11th September, 1964, in a Security Area as proclaimed, as aforesaid, without lawful excuse had in his possession a fire-arm to wit, a Bren Gun, without lawful authority and he had thereby committed an offence punishable under Section 57(1) (a) of the said Act, namely, with death

(3) That he between 2nd and 13th September, 1964, in a Security Area as proclaimed, as aforesaid, without lawful excuse had in his possession ammunition, to wit, 200 rounds of ammunition without lawful authority and he had thereby committed an offence punishable under Section 57(1) (b) of the said Act, namely, with death.

10

Against No. 2. (1) This was in all respects identical with that as against No. 1 with the exception that the fire-arm alleged to have been under his control was a sten-gun.

(2) This was identical as that against No. 1.

20

(3) This with the exception that the quantity of ammunition alleged to have been under his control was 300 rounds of sten-gun ammunition, was identical as that against No. 1.

P281 40-46
No1-Pw5 (P10915-
P12116) P29111-25
5. The event and the facts in regard to and connected with, and which led and gave rise to the said charges and the said conviction and sentence thereon of the Appellants, were that -

Pw6. (P12917-
P1587) P29126 - P
30 P28)
No2 - Pw7. (P15910-
P19124) P30 P29
- P31 P7.
Pw8. (P19126-
P22 P23) P31 P8
8-25;
P55 P120-28; P58
P1 - P59 P42.
P59 11 43-46
6. Subsequent to the said invasion and in the course thereof the Appellants were captured as also were 4 other Indonesian members of the said invasion force, all of whom, unlike the Appellants, were treated as prisoners of war under, in accordance with, and as provided by, the Geneva

30

40

No1 Exh P4 P71 - P
74118.
No2 Exh P5 P.74
119 - P77

Conventions Act, 1962, and the said Third Schedule thereof, and none of them were accordingly, proceeded against, as were the Appellants, on any of the said charges; and they were the principal witnesses (P.W.5 Yusof Sawarjo, and P.W.6 Ismail bin Marjeilai against No. 1; and P.W.7 Djambir bin Erop Ali, and P.W.8. Iber Ali against No. 2) called at the Appellants' trial on behalf of the prosecution.

RECORD

Pw5 p10 p15 - p12 p16
 Pw6 p12 p17 - p15 p17
 Pw7 p15 p10 - p19 p24
 Pw8 p19 p26 - p22 p23

10 7. It was further found by the trial Judge and the Federal Court in their respective Judgments, the uncontroverted evidence, as aforesaid, of the said ~~4~~ Indonesian members of the said invasion force and the extra-judicial statements made by each of the Appellants that each of them had -

- (a) been militarily trained entirely and in every respect by, and in association with and as a member and a completely identified part of the Indonesian regular Armed Forces,
- (b) been issued and supplied with arms and equipment of, and by, the said forces, and as a member and the said part thereof,
- (c) taken part, as aforesaid, in the said invasion, as the said member and part of the said forces,
- (d) as the said member and part of the said invasion force had worn the uniform of, and as the said member and part of the said forces issued and supplied to him as aforesaid and No. 1 had carried with him a Bren gun, 120 rounds of ammunition two sets of uniform and various other equipment and No. 2 had carried with him a sten gun, 300 rounds of ammunition and various other equipment of and issued and supplied to them by the said Armed Forces as the said members and part thereof

40 8. The Appellants submit that the facts hereinbefore set forth establish that, in terms of Article 4 of the Convention relative to the treatment of prisoners of war of the Geneva Conventions, 1949, enacted in the Third Schedule of the Geneva Conventions Act, 1962 (set forth in

P59 p14 p13 - p15
 No1 EtL P4 p71 - p74 p75
 No2 EtL P5 p74 p19 - p75

RECORD

paragraph 3 supra) wherein it is provided that "Prisoners of war, in the sense of the present Convention are persons belonging to one of the categories, who have fallen into the power of the enemy," of which category "(1)" is that of "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 force" he was a prisoner of war as so provided and therefore entitled as such to the protections, rights privileges and benefits under and in accordance with the said Convention. The purported trial of the Appellant on the said charges it is submitted, was therefore without jurisdiction and his said purported conviction and sentence thereon were without any validity or force in law whatever.

P 58, cc 29-31.

10

9. It is furthermore submitted that, by having treated the said 4 Indonesian members of the said invasion force as prisoners of war, and according to them as such the protections, rights, privileges and benefits of the said Convention, and not having, accordingly proceeded against any of them on any of the said charges and not having accorded to the Appellants the like treatment a breach of Article 16 of the said Covenant that all prisoners of war should be treated alike by the detaining power, and that no distinction of any kind should be made between them was committed.

20

10. The Appellants did not either at their said joint trial, or in their appeal to the Federal Court claim to be prisoners of war, but relied on grounds of defence and appeal unrelated to such claim.

30

11. The said question raised in this appeal as set forth in paragraph 2 supra has been judicially considered and conflicting decisions given thereon in two cases (both unreported) by the Federal Court in which the respective appellants were three others who were also members of the said invasion force and who had also been charged on the same said charges as the Appellant, and like him were convicted and sentenced to death thereon.

40

12. The first of the said cases is that of Lee Hoo Boon v. The Public Prosecutor, in which the judgment is dated 26th April, 1966, and the members of the Court were, Thomson, Lord President

Malaysia, Hasley Ag. C.J. and Raja Azlam, Judge.
 In this case the Federal Court allowed the appeal of the Appellant on the third of the said charges, and dismissed his appeal on the other two said charges. The Appellant in the said case by special leave to appeal granted by their Lordships of the Judicial Committee of the Privy Council is appealing thereto against the said dismissal of his appeal. On the said question the Federal Court in their Judgment delivered by the Lord President said:

RECORD

10

"It was argued that on the evidence the appellant was a member of the Indonesian Military Forces. He had associated himself with them. He had been trained by them. He formed part of an organised company with them. He was wearing Indonesian uniform. He was carrying Indonesian weapons. In the circumstances the appellant was entitled to the benefit of (the said Convention) to which this country is a party and which have become part of our municipal law by reason of the Geneva Conventions Act, 1962. At the trial he did not claim the protection of the said Convention but we have listened to a long and careful argument to the effect that nonetheless he was entitled to that protection."

20

Then having said -

30

"The grounds on which it has been argued that the appellant was a member of the Indonesian Military Forces have been stated".

The Lord President, as a reason for their deciding that the appellant was disentitled to his said claim and dismissing his appeal said this -

40

"There is, however, one other relevant fact and that is that on the appellant's own admission he was born in the State of Johore. There is no other evidence having any bearing on his national status and from the admitted fact that he was born in the State of Johore then in the absence of anything to the contrary it must be presumed that whatever the position as regards citizenship he is at all material times a

RECORD

Johore national, that being so, in our view he is not entitled to the benefit of the Geneva Conventions."

Then having referred to the passage at page 268 of Oppenheim's International Law (7th Edition) as follows:-

"The privileges of members of the armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, (that is their own armed forces) fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished".

10

He goes on as follows:-

20

"In our view the Geneva Conventions are to be read in the light of that statement which after all is a statement of principle of international law by a recognised authority and read in that light the present appellant is not entitled to the protection of the Conventions even if he did become a member of the Indonesian Armed Forces because he was a traitorous subject of the Ruler of the State of Johore and was engaged in assisting the Republic of Indonesia in armed conflict with this country of which Johore is part".

30

13. The Appellants had as in the case of Lee Hoo Boon each of them in an extra-judicial statement made by them stated that they were each of them born in the State of Johore, and as in the said case of Lee Hoo Boon this was the only evidence having any bearing on their respective national status.

14. The Appellants would here respectfully submit - though the point is sufficiently answered, it is submitted, in another way in the later of the said cases referred to in paragraph 15 infra - that the said Convention is a completely exhaustive code and takes no account whatever on the question whether, once a person is a

40

prisoner of war within the meaning of Article 4 of the said Convention, as hereinbefore submitted, the Appellants each of them is, such prisoner of war is a traitorous subject or not and that the said statement cited by the Federal Court in the said case of Lee Hoo Boon from Oppenheim's International Law, so far as it may have had any application hitherto is entirely superseded by the said Convention.

RECORD

10 15. In the later of said cases in the Federal Court in which the Judgment given dated 12th July 1966 was that of two appeals heard consecutively, is that of Ooi Hee Koi v. The Public Prosecutor and Ooi Wan Yui v. The Public Prosecutor. The members of the Court were Syed Sheh Barak bah C.J. Malaya (afterwards Lord President), Ong. Hock Thye F.J. and Ismail Khan J. In their Judgment delivered by Ong Hock Thye F.J. allowing the appeals of both appellants, and contrary to the decision in the said case of Lee Hoo Boon, upholding their claim to be treated as prisoners of war, and to be entitled, accordingly to be accorded the protection, rights, privileges and benefits of the said Convention he said -

30 "It was contended that the appellants were and should be treated as 'prisoners of war' within the definition in Article 4 of the Third Schedule to the Geneva Conventions Act, 1962", (set forth in paragraph 3 supra) "as such they should be entitled to all the benefits of the relevant Convention....."

40 "Except as to the circumstances of their capture, the material evidence in both cases was very much the same. They were members of an armed force of 47 paratroopers, under the command of Lieutenant Sutikno of the Indonesian Air Force who in the early hours of September, 2nd 1964, were air dropped from a Hercules plane belonging to the Indonesian Air Force over the Labis area of Johore. All the 48 members of this invasion force were in camouflage uniform of the Air Force and each carried a fire-arm, ammunition, two hand-grenades, food rations and other military equipment. The force was

RECORD

divided in 8 sections, each under a Section Commander, with Lieutenant Sutikno as overall Commander of the 48 men, 34 were Indonesians and 14 so-called Malayan Chinese. Among the latter were those Appellants"

Then having referred to the said Article 4 of the said Convention he said -

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

10

20

Then having referred to the part of the Judgment in the case of Lee Hoo Boon, as set forth in paragraph 12 supra he said, which the Appellant respectfully submits is correct and relies as he does on the whole of the Judgment as delivered by him in regard to the said Judgment in the Lee Hoo Boon case as follows:-

"With respect we do not agree with that Judgment. Lee Hoo Boon did not automatically become a citizen of the Federation of Malaya merely by reason of his being born in the State of" (Perak as it applies to the Appellant in the instant appeal) "See Articles 14(1)(a), 16, 18(1) of the Constitution of Malaya. Not being a Malay as defined in the State of "(Perak)" did not per se clothe him with the status of a national of that State "(Perak); See Sections 2, 4(c) and (f) and 5 of the Enactment" (Perak Nationality Enactment) "We do not think that any fact may be presumed when the onus of proving such fact lies on the prosecution."

30

40

And holding that the onus was on the prosecution of proving the nationality status of the Appellants and that they owe allegiance to the Federation

of Malaya, and that it had failed to do so, it is submitted it has failed to do in the case of the present Appellant), the Federal Court allowed the appeals of the Appellants and quashed their said convictions and sentences. The learned Federal Court Judge proceeded then to say -

RECORD

10

"In arriving at this decision we are not unaware that it runs counter to the previous decision "(in the Lee Hoo Boon Case) "of this Court. Nevertheless we do so without qualms. As Sir Carleton Allen says at p.245 of Law in the Making (6th Edition) 'the case of Gideon Nkambule v R (1950) A.C. 379, make it clear that in criminal matters at least, where life and liberty are at stake the Privy Council will not hesitate to reject even a recent decision of its own, if it is satisfied that all the relevant considerations and historical circumstances were not before the Court in the earlier case! We would not hesitate to follow the same principle".

20

The said view, expressed correctly, it is submitted, in regard to the onus being on the prosecution of proving the nationality status, as aforesaid is, the Appellant would respectfully submit so far as the question of nationality may be, which the Appellant submits is not, a relevant matter for consideration, put beyond all doubt by Article 5 of the said Convention (set forth in paragraph 3 supra) which is a statement in the most comprehensive and all embracing terms.

30

16. That the said Convention takes no account of whether a person, who is a prisoner of war within the meaning of Article 4 of the said Convention is a traitorous subject or not as is submitted in paragraph 14 supra the Appellants submit this is further borne out by the terms of Article 85 of the said Convention set forth in paragraph 3 supra) by which the benefits of the said Convention are even retained by prisoners of war who are prosecuted under the laws of the Detaining Power for acts committed prior to capture even if convicted thereof.

40

17. The further question in this appeal arises that if it should be held, contrary to the

RECORD

Appellants' submission hereinbefore set forth in regard to the said question set forth in paragraph 2 supra that they could have been and were rightly and properly in law tried on the said charges and as aforesaid convicted and sentenced thereon, namely, whether, their conviction and sentence of death passed on each of them on the first of the said charges made against them respectively of consorting with members of the Indonesian Armed Forces are good and sustainable in law.

10

18. It is submitted that in as much as the said members of the Indonesian Armed Forces have been treated as prisoners of war, as provided by and in accordance with the Geneva Conventions Act, 1962, and the said Convention in the Third Schedule thereof and, as such have been accorded the protections, rights, privileges and benefits thereunder and in accordance therewith, the said members of the Indonesian Armed Forces therefore could not, and have not committed the offence of carrying arms and ammunition in contravention of Section 57 of the Internal Security Act, 1960 as charged and alleged in the said charge, the said charge is wrong, and bad and unsustainable in law.

20

19. The Appellants submit the said charges and their conviction and sentence thereon are wrong and bad and invalid and without any force in law and that their appeal should be allowed and the said conviction and sentence on the said charges or alternatively on the first charge of them respectively quashed and set aside for the following among other

30

R E A S O N S

1. BECAUSE they were prisoners of war within the meaning and intent of Article 4 of the Convention in the Third Schedule of The Geneva Conventions Act, 1962.
2. BECAUSE all the acts done by each of them were acts of belligerency and done by each of them as such prisoners of war for which none of the courts of Malaya had any power or jurisdiction to try either of them.

40

3. BECAUSE there was no evidence that either of them was a national of Malaya or owed allegiance thereto. RECORD
4. BECAUSE the onus was upon the prosecution to prove that each of them was a national of Malaya and it did not discharge the said onus.
5. BECAUSE neither of them owed any allegiance to Malaya.
- 10 6. BECAUSE any allegiance either may have owed to Malaya had ceased and was transferred to Indonesia when they became members in every material respect of the Indonesian Armed Forces.
7. BECAUSE in the case of any doubt arising as to the status of whichever one of them entitled such one to the enjoyment of the protection of the said Convention until such doubt had been determined, which it never was, by a competent tribunal in accordance with and as provided by Article 5 of the said Convention.
- 20 8. BECAUSE whether either of them was a national of Malaya or not or owed allegiance to Malaya or not was irrelevant since the said Convention is a complete and exhaustive code regarding prisoners of war to which it relates and all acts done by them as such and takes no account of whether such prisoners of war are traitorous subjects or not.
- 30 9. BECAUSE each of them was entitled, as provided by Article 16 of the said Convention, to be treated as a prisoner of war in exactly the same way as the said other Indonesian members of the said invasion force were treated.
- 40 10. BECAUSE they both come within and the decision in the said Federal Court case of Ooi Hee Koi v. The Public Prosecutor and Ooi Wan Yui v. The Public Prosecutor (unreported) applies to them.

RECORD

11. BECAUSE the said case of Lee Hoo Boon (unreported) also decided in the Federal Court in so far as it is in conflict with the said case of Ooi Hee Koi v. The Public Prosecutor and Ooi Wan Yui v. The Public Prosecutor was wrongly decided and should be overruled.
12. BECAUSE their said respective convictions and sentences are wrong and invalid and bad and of no force in law whatever and this appeal should accordingly be allowed and the said convictions and sentences quashed and set aside. 10
13. BECAUSE alternatively if they were properly and lawfully charged and tried and convicted and sentenced on the second and third of the respective charges against them the charge trial, conviction and sentence on the first of the said charges was wrong, and the same was invalid and bad in and of no force in law whatever inasmuch as members of the said Indonesian Armed Forces have been treated as prisoners of war under the provisions of the said Convention. 20

S.N. BERNSTEIN

CLAUD G. ALLEN

No.10 of 1967
JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

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

B E T W E E N:

1. NG SENG HUAT alias
NG CHING KIM
2. LEE CHING SAI alias
LEE BOON KHENG

Appellants

- and -

THE PUBLIC PROSECUTOR

Respondent

CASE FOR THE APPELLANTS

GARBER VOWLES & CO.,
37, Bedford Square,
London, W.C.1.

Appellants Solicitors