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1967/21
[5]

Appeal No. 10 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 1. NG SENG HUAT alias NG CHING
KIM
2. LEE CHING SAI alias LEE BOON
KHENG

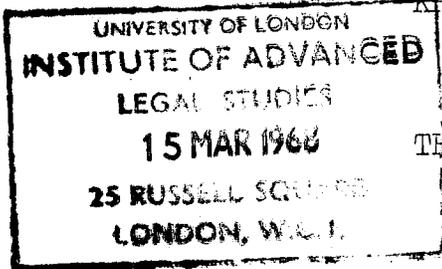
Appellants

- and -

THE PUBLIC PROSECUTOR

Respondent

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C A S E FOR THE RESPONDENT

RECORD

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1. This is an Appeal by Special Leave from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Thomson, Lord President, Malaysia, Ong Hock Thye, Ag. Chief Justice, Suffian, Judge) dated the 28th day of December 1965 by which Judgment and Order the Appellants' appeals against their convictions and sentences by the High Court in Malaya at Muar in the State of Johore (S.S. Gill, J.) on the 27th day of September 1965 each upon 3 charges under the Internal Security Act, 1960 (No. 18 of 1960) were dismissed and their said convictions and sentences were affirmed.

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2. The charges against the 1st Appellant were as follows:-

"1st Charge

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That you between the 2nd day of September, 1964 and the 13th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964, namely Kampong Redong Ayer Panas, Labis, in

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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 58(1) of the Internal Security Act 18/1960, 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 you have thereby committed an offence punishable under section 58(1) of the Internal Security Act, No. 19/1960. 10

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2nd Charge

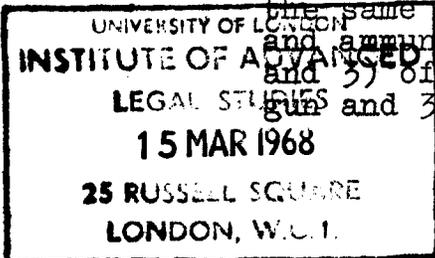
That you between the 2nd day of September, 1964 and the 13th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964, namely Kampong Redong Ayer Panas, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had in your possession a firearm, to wit, a Bren Gun, without lawful authority and you have thereby committed an offence punishable under section 57(1) of the Internal Security Act, No. 18/60. 20

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3rd Charge

That you between the 2nd day of September, 1964 and the 13th day of September, 1964 in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964, namely Kampong Redong Ayer Panas, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had in your possession ammunition, to wit, 120 rounds of ammunition, without lawful authority and you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, No. 18/1960." 30 40

The charges against the 2nd Appellant were the same in every respect except that the firearm and ammunition that he was accused (in Charges 2 and 3) of having under his control, were a sten gun and 300 rounds of ammunition.



3. The principal questions that arise in this Appeal are:

(a) whether the Appellants were prisoners of war within the meaning of the Geneva Conventions Act 1962 (No. 5 of 1962) and as such were entitled to protection under the Geneva Convention Relative to the Treatment of Prisoners of War (The Third Schedule to the Act).

10 (b) whether in the circumstances of the case a burden lay upon the prosecution to prove that the Appellants were disentitled to be treated as prisoners of war under the Act. It is submitted that it was for the Appellants to show that they were entitled to the protection of the Act. This they did not do and neither at their trial nor in the appeal before the Federal Court of Malaysia, made any claim to be so entitled.

20 (c) whether, if there was any onus upon the prosecution to show that the Appellants were disentitled to be treated as prisoners of war under the Act, such onus was discharged.

4. The Appellants at their trial raised no question as to the jurisdiction of the Court to try them or as to their status. Each however, 30 objected to the counsel assigned to him and each, while claiming trial on the 1st charge, refused to plead to the 2nd and 3rd charges. A plea of not guilty was recorded on each charge and the trial proceeded, the Appellants being tried jointly.

5. The case for the prosecution was that the 2 Appellants were arrested on the 13th September 1964 at about 2 p.m. near Sungei Tenang bridge in Kampong Tenang area in the Labis district, 40 Johore. They were first seen by Ahmad (P.W.1) and Yassin (P.W.2) who were then having a conversation at the junction of Jalan Petar and Jalan Kepoh. The two witnesses followed the Appellants and pointed them out to a police patrol party which was waiting near a bridge in a

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p. 4 police vehicle. Corporal Mohamed Ysain (P.W.3) who was in charge of the police party asked the Appellants for their identity cards. The 1st Appellant did not produce an identity card. The 2nd Appellant produced an identity card, tendered in evidence as Exhibit P1, which bore the name of Lee Ching Sai and number Pontian (J) 013592. The Corporal searched the two Appellants and found on them packets containing one-dollar notes in Malayan currency. He then took the Appellants to Labis Police Station where he handed the money and the identity card to Inspector Liew Kooi Loon (P.W.4). Ahmad (P.W.1), Yassin (P.W.2) and Inspector Liew Kooi Loon (P.W.4) all testified that the Appellants were wearing civilian clothes. 10

p.10
p.12
p.15
p.19 6. The prosecution called 4 Indonesian witnesses, Yusof Suwarjo (P.W.5), Ismail Marjuki (P.W.6), Djamhir bin Erop Ali (P.W.7) and Iber Ali (P.W.8) who said that they had been members of an armed party which had left Jakarta by air on the night of the 1st September 1964, had flown to Malaysia and had landed by parachute. The members of the party were in uniform but carried civilian clothes. The Indonesian witnesses identified the Appellants as members of the party and testified that they had duly landed with their arms and ammunition. 20

7. Statements made by the Appellants were held to be admissible and were produced in evidence as Exhibits P4 and P5 respectively. 30

p.72 The 1st Appellant in his statement (P4) described how one day in May he was asked by a man named Hock Soon of Pontian whether he wanted a job looking after some fishing stakes. He agreed and went with Hock Soon to the stakes, which were in the sea off Pontian. Then he was taken to the Indonesian island of Balai. There and later at Jakarta and Bandung he underwent military training and eventually took part in the expedition described by the Indonesian witnesses. After landing, he spent some days in the jungle, but, when his rations were exhausted, he hid his gun and ammunition and his uniform and came out. On emerging from the jungle he was arrested. 40

The 1st Appellant gave his home address as Pontian Johore, stating as follows:-

"I was born in Pontian Johore in 1946. Educated at Pei Chun School Pontian up to Form two. I left school in 1962. After leaving school I worked as a rubber tapper on my father's small holding.

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I am not married yet. I live with my parents at the above address. My parents are still alive."

10 The statement of the 1st Appellant concluded:-

"I now said that I had been cheated. I do not want to go anywhere now. I want to be the subject of this country. I have tasted the life of a soldier I do not like it at all. I do not know who were the commanders giving the orders after assembling."

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20 The 2nd Appellant in his statement (P5) described how in May 1964 at Pontian Village he met a man named Tien Song who promised him a job. Three days later he went with another man named Chin Meng to a beach at Ayer Masin where with 2 others he was picked up by a motor boat and taken to the island of Balai. There and later at Jakarta he underwent military training and eventually took part in the expedition described in the other evidence. He landed in the jungle, where he spent some days, emerging eventually after hiding his gun and ammunition and his
30 uniform.

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The 2nd Appellant stated that he was born in Pontian in 1941, adding

"My mother is still living my father was dead. I am a bachelor. I am a rubber tapper. I am working under one named Tua Bak in a small holding.

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40 I was educated in Pei Chun School, Pontian. I studied for three years and was in standard three when I left school. My father could not afford to allow me to continue my study because he had no money. I left school at the age of 12 years."

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The statement of the 2nd Appellant concluded:-

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"I know that I have committed a grave offence against this country by going over to Indonesia and I regretted very much."

8. At the close of the prosecution case the learned trial Judge held that there was a case to answer on all the charges.

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Each of the Appellants then made a statement from the dock in which he said that the prosecution evidence against him was wholly false. No further evidence was called on behalf of either Appellant.

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9. On the 27th day of September 1965 the learned trial Judge convicted both Appellants and sentenced each to death on each of the charges against him.

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10. By Petition of Appeal dated the 28th day of October 1965 the Appellants appealed against the said convictions and sentences to the Federal Court of Malaysia. No point was taken in any of the grounds of appeal as to the Appellants (or either of them) being entitled to be treated as prisoners of war.

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11. On the 28th day of December 1965 the Federal Court of Malaysia dismissed the Appellants' appeals.

12. It is respectfully submitted 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 Appellants were clearly residents of and domiciled in Malaysia, where also the acts which were proved against them were committed. The Appellants were thus (assuming that there was an armed conflict to which Malaysia was a party) in the position of inhabitants of an invaded country who lend assistance to the invader. Accordingly even if the Convention was otherwise applicable, nevertheless upon its proper construction, the Appellants were defectors to the enemy, and as such were not entitled to its

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protection. It is submitted that the long established principles of customary international law would clearly exclude the Appellants 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.

10 13. 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 Appellants were entitled to an immunity or exemption from the general law by reason of their 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 Appellants were persons subject to the enactment under which they were charged,
20 that is to say, sections 57 and 58 of the Internal Security Act 1960.

30 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 status. That this is so is shown, it is submitted, both by the express language and the manifest
40 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 his control any firearm, 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 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.

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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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14. 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 Appellants to prove the facts which gave them a protected status or conferred on them an immunity or exemption or ousted the ordinary jurisdiction of the Court. This they did not do. On the contrary, they adduced no evidence as to their status or allegiance and at no time during their trial did they raise the defence that they were prisoners of war or challenge the jurisdiction of the Court.

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15. It is respectfully submitted that there was no evidence before the Court that the Appellants were entitled to be treated as prisoners 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.

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16. It is submitted that if any duty lay upon the prosecution to show that allegiance was owed by the Appellants to Malaysia, it did this upon the evidence. This established that the offences were committed in Malaysia where, it is submitted, the Appellants were shown to be domiciled and ordinarily resident, and from which

they had only temporarily been absent before the offences were committed. There was no evidence before the Court that they had decided to emigrate or change their allegiance. Indeed their own statements indicated the contrary, suggesting that they resided in Malaysia and had been tricked into going to Indonesia.

10 17. In the further submission of the Respondent, whatever the position as to onus of proof or the allegiance owed by the Appellants, the evidence before the Court showed clearly that the Appellants were not persons to whom, pursuant to Articles 2 and 4 of the 3rd Schedule, the provisions of the Convention therein contained were applicable. The Appellants were not engaged in an armed conflict and did not comply with provisos (b) and (c) of Article 4(2). On the contrary they were engaged in a mere mission of sabotage, in the course of which and at the time
20 of their apprehension they had disguised themselves by putting on civilian clothing and had concealed their arms.

18. The Respondent respectfully submits that this Appeal should be dismissed and the Judgment and Order of the Federal Court of Malaysia of the 28th day of December 1965 dismissing the Appellants' appeals against their convictions and sentences by the High Court in Malaya on the 27th day of September 1965 should be affirmed for the
30 following among other

R E A S O N S

1. BECAUSE the Appellants were not prisoners of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE the Appellants were defectors to the enemy and as such were not entitled to be treated as prisoners of war.
3. BECAUSE the Appellants were in breach of their duty of allegiance to His Majesty the Yang di-Pertuan Agong and were accordingly
40 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.

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4. BECAUSE it was for the Appellants to show that they enjoyed the status and privileges of prisoners of war and this they 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.
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 provisions of the Third Schedule any legislative force. 10
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 Appellants were merely taking part in a mission of sabotage. 20
8. BECAUSE the evidence showed that the Appellants were not persons 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 were they entitled to be treated as such. 30
9. BECAUSE if there was any onus upon the prosecution to prove that the Appellants owed allegiance to His Majesty the Yang di-Pertuan Agong, it discharged such onus.
10. BECAUSE if there was an onus upon the prosecution to prove that the Geneva Conventions Act 1962 had no application, it discharged such onus.
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 in which 40

it was held upon broadly similar facts that the Geneva Conventions Act was not applicable, were correct for the reasons therein stated.

12. BECAUSE the trial Court had jurisdiction and was competent to try the Appellants in the manner in which it did and rightly convicted the Appellants on the charges against them and the Federal Court of Malaysia rightly affirmed the said convictions.

MONTAGUE SOLOMON

Appeal No. 10 of 1967

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THE PRIVY COUNCIL
ON APPEAL 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

- and -

THE PUBLIC PROSECUTOR

Respondent

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