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1967/21
[6]

Appeal No. 11 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

TAN SEE BOON alias
TAN GUAN KHIM

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

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

C A S E FOR THE RESPONDENT

RECORD

10 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 Appellant's appeal against his convictions and sentences by the High Court in Malaya at Muar in the State of Johore (Azmi bin Haji Mohamed, J) on the 29th day of August 1965 upon 3 charges under the Internal Security Act 1960 (No. 18 of 1960) was dismissed and his said convictions and sentences were affirmed.

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2. The Appellant was charged as follows:-

1st Charge:

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That you between 2.00 a.m. and 10.00 a.m. on the 2nd 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 Sekari, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms and ammunition in contravention of the provisions of Section 57 (1) of the Internal Security Act, 1960, in circumstances

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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 Internal Security Act, 1960.

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2nd Charge:

That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 dated 17th August, 1964, namely at Kampong Sekari, Labis, in the District of Segamat, in the State of Johore, without lawful excuse carried a firearm to wit, one rifle, without lawful authority and that you have thereby committed an offence punishable under Section 57 (1) (a) of the Internal Security Act, 1960.

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3rd Charge:

That you at about 2.00 a.m. on the 2nd day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 dated 17th August, 1964, namely at Kampong Sekari, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had in your possession ammunitions, to wit, 200 rounds of 303 ammunition and two handgrenades, without lawful authority and that you have thereby committed an offence punishable under Section 57 (1) (b) of the Internal Security Act, 1960.

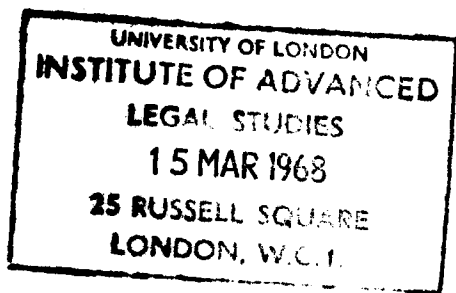
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3. The principal questions that arise in this Appeal are:

- (a) whether the Appellant 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).

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10 (b) whether in the circumstances of the case a burden lay upon the prosecution to prove that the Appellant was disentitled to be treated as a prisoner of war under the Act. It is submitted that it was for the Appellant to show that he was entitled to the protection of the Act. This he did not do, making no claim to be so entitled either at his trial or in the appeal before the Federal Court of Malaysia. On the contrary, at the hearing of the appeal he expressly disclaimed the status of a prisoner of war by withdrawing a ground of appeal in which for the first time he had raised this matter.

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

4. The Appellant at his trial raised no question as to the jurisdiction of the Court to try him or as to his status and upon arraignment claimed trial on each of the 3 charges.

30 5. The case for the prosecution was that at 9 a.m. on the 2nd September 1964 P.C. Ramli bin Ahmad (P.W.2) went to a road near Labis leading from the jungle. There he saw two men one of whom was the Appellant. He asked them for their identity cards, whereupon the Appellant ran away. The police officer arrested the other man and after a chase the Appellant was caught and taken to the police station. His captors were 2 labourers working in the rice fields nearby, Hashim bin Sulaiman (P.W.3) and Mohamed bin Gemok (P.W.4). Both Ramli bin Ahmad (P.W.2) and Mohamed bin Gemok (P.W.4) testified that the Appellant at the time of his capture was wearing a pair of shorts or pants and nothing else.

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40 6. The prosecution called an Indonesian officer, Lieutenant Sutikno bin Tjetrosurnarto (P.W.10) who said that in 1964 he trained for the "Crush Malaysia" Confrontasi Campaign and in July was sent to Pulau Karimon, an Indonesian island, to give military training to Malayan Chinese. On

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the 1st September he was ordered to take a party of parachute troops into Malaya to do sabotage work. His team consisted of 48 paratroopers including himself, of whom 14 were Malayan Chinese. They left Jakarta about 4.30 p.m. on the 1st September and landed at Medan. They left Medan at midnight, reaching Johore territory at about 2 a.m. They then proceeded to leave the aircraft by parachute, the witness jumping first. The Appellant was one of the Malayan Chinese in the party and his jumping number was 45. Each member of the party was armed and was supplied with Malayan currency.

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12 2 Indonesian soldiers who were members of the party, Karma bin Omar (P.W.8) and Sutisna Utja bin Padma (P.W.9) gave a similar account of the expedition, the latter testifying that he made his jump shortly after the Appellant.

57 7. A statement made by the Appellant was held to be admissible and was received in evidence as Exhibit P3.

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21 8. At the conclusion of the case for the prosecution the learned trial Judge held that there was a case to answer, and the Appellant elected to make a statement from the dock. This was as follows:-

I am Tan See Boon alias Tan Guan Khim.
Age 30.
I lived at Bagan Serai, Perak.
I am an odd job labourer.
I did not commit any offences.
I came from Pahang to Labis.
At the point I was arrested I had nothing with me.
As such I did not commit any offence.
That is all.
I am not calling any witness.

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24 9. On the 29th day of August 1965 the learned trial Judge convicted the Appellant and sentenced him to death on each charge.

32 10. By Petition of Appeal dated the 2nd day of October 1965 the Appellant appealed against the said convictions and sentences to the Federal Court of Malaysia.

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11. The third of the Appellant's grounds of appeal was as follows:-

10 The statement allegedly made by your appellant showed that his occupation (kerja) at the time he made the statement was "Indonesian soldier" and his place of abode (dudok-di) was Djakarta, Indonesia. The evidence of the Indonesian witnesses showed that all the members of the crew were in the uniform of the Indonesian Armed Forces.

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They also testified that they (the Indonesians) were treated as prisoners of war. Furthermore the learned trial Judge stated in his grounds as follows:-

"I understand the reason why the charges were withdrawn was because the Government decided to treat them (the Indonesians) as prisoners of war according to the Geneva Convention".

20 In the circumstances, your appellant ought to be accorded a similar treatment as that accorded to the Indonesians and it will be argued that your appellant should also be regarded in law as a prisoner of war or as a person of similar standing. On land, your appellant did not commit any act which was prejudicial to the security of Malaya.

30 Upon the hearing of the said appeal on the 10th day of November 1965 the Appellant, through his counsel, expressly withdrew the said ground of appeal.

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12. On the 28th day of December 1965 the Federal Court of Malaysia dismissed the Appellant's appeal.

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40 In its Judgment the Federal Court held that the Appellant's statement, Exhibit P3, had been wrongly admitted but that the case clearly fell within the proviso to section 60(1) of the Judicature Act because no reasonable Judge could have failed to convict the Appellant on the rest of the evidence and so there was no miscarriage of justice.

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13. It is respectfully submitted that the Appellant is not entitled to claim the protection of the Geneva Conventions Act 1962. 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 Appellant 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 Appellant 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.

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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 Appellant 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, at no time during his trial raised the defence that he was a prisoner of war or challenged the jurisdiction of the Court, and before the Federal Court disclaimed the status of a prisoner of war by withdrawing the ground of appeal in which this matter was canvassed.

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15. It is respectfully submitted that there was no evidence before the Court that the Appellant was entitled to be treated as a prisoner of war within the meaning of the Geneva Conventions (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 provision of the Third Schedule any legislative force.

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16. In the submission of the Respondent, whatever the position as to onus of proof, the evidence

10 before the Court showed clearly that the Appellant 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 Appellant 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 of his apprehension he had sought concealment by casting off his military uniform.

17. 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 Appellant's appeal against his convictions and sentences by the High Court in Malaya on the 29th day of August 1965 should be affirmed for the following among other

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R E A S O N S

1. BECAUSE the Appellant was not a prisoner of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE it was for the Appellant to show that he enjoyed the status and privileges of a prisoner of war and this he did not do.
- 30 3. 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.
- 40 4. 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.
5. BECAUSE the evidence showed on the contrary that there was not an armed conflict within the meaning of Article 2 of the 3rd Schedule

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but that the Appellant was merely taking part in a mission of sabotage.

6. BECAUSE the evidence showed that the Appellant 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. 10
7. BECAUSE if there was an onus upon the prosecution to prove that the Geneva Conventions Act 1962 had no application, it discharged such onus.
8. 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 it was held upon broadly similar facts that the Geneva Conventions Act was not applicable, were correct for the reasons therein stated. 20
9. BECAUSE the trial Court had jurisdiction and was competent to try the Appellant in the manner in which it did and rightly convicted the Appellant on the charges against him and the Federal Court of Malaysia rightly affirmed the said convictions.

MONTAGUE SOLOMON

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