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JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

No. 12 of 1967

1967/21
[]

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N: HO MING SIANG alias HO SUNG

Appellant

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

- and -

THE PUBLIC PROSECUTOR

Respondent

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CASE FOR THE APPELLANT

1. This is an appeal by special leave in forma pauperis from a Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Thomson, Lord President, Syed Sheh Barak bah, C.J. and Ong Hock Thye, Judge Federal Court) dated 27th January, 1966, dismissing the Appellant's appeal from the Judgment of the Honourable Mr. Justice Gill, in the High Court of Malaysia, at Muar, dated 29th October, 1965, whereby the Appellant was convicted and sentenced to death on three charges under the Internal Security Act, 1960, (No. 18 of 1960).

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2. The main and principal question raised by this appeal is whether the Appellant 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 Conventions, 1949, being the Convention thereof relative to the treatment of prisoners of war as enacted and provided by the Third Schedule of and the Geneva Conventions Act, 1962 (No. 5 of 1962) of Malaysia and entitled to the protections, rights, privileges and benefits thereunder and in accordance therewith.

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pp. 58-71.

pp. 25-34.

p. 34. 11. 22-24.

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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;

'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;" 10

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..... 20

"(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." 30

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THIRD SCHEDULE

PART I

GENERAL PROVISIONS

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Article 2

".....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.....

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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

"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....."

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Article 5

"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".

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Article 7

"Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention,"

"PART II -

GENERAL PROTECTION OF PRISONERS OF WAR

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Article 16

".....all prisoners of war shall be

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treated alike by the Detaining Power....."

Chapter III - Penal and Disciplinary

Sanctions

Article 82

"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".

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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"

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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"

"Judicial Proceedings"

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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.

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"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

10 ".....
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 Appellant was charged were as follows:-

20 (1) That the Appellant between 2.00 a.m. on the 2nd September, 1964, and 6.00 a.m. on the 11th September, 1964, in a Security Area proclaimed by the Yang di-Pertuan Agong vide F.L.N.245 of 17th August, 1964, namely Tenang, Kampong, 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 contra-
vention of the provisions of section 57(1) of the said Act, in that he intended to act with such members of the said Indonesian
30 Armed Forces in a manner prejudicial to public security and that he had thereby committed an offence punishable under section 58(1) of the said Act, namely, with death, or imprisonment for life.

40 (2) That the Appellant at about 2.00 a.m. on the 2nd September, 1964, in a Security area proclaimed as aforesaid, without lawful excuse carried a firearm, to wit a Lee Enfield Rifle without lawful authority and that he had thereby committed an offence punishable under Section 57(1)(a) of the said Act, namely, with death.

(3) That the Appellant about 2.00 a.m. on the 2nd September, 1964, in a Security Area proclaimed as aforesaid without

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lawful excuse had in his possession 200 rounds of ammunition without lawful authority and that he had thereby committed an offence punishable under Section 57(1) (b) of the said Act, namely, with death.

P.25 122 - p26
P6; p58 17-23.

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 Appellant, as found by the learned Trial Judge and the Federal Court, were that -

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During the night of the 1st/2nd September, 1964, an organised detachment of paratroopers of the Indonesian Armed Forces of which the Appellant was a member of the total number of 48 comprising 34 Indonesians and, including the Appellant, 14 Malayan Chinese, under the command of an Indonesian, Lieutenant Sutikno, invaded Malaya in a Hercules plane belonging to the said Armed Forces from which they all parachuted down at Kampong Tenang near Labis in the State of Johore.

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6. Subsequent to the said invasion and in the course thereof the Appellant was captured as were also the said Lieutenant Sutikno and two other Indonesian members of the said invasion force, all of whom, unlike the Appellant, were held as prisoners of war under, in accordance with and as provided by the Geneva Conventions Act, 1962, and the said Third Schedule thereof, and none of them were, accordingly proceeded against as was the Appellant on any of the said charges and they were the principal witnesses called at his trial on behalf of the prosecution.

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P.w.6. (P10 P11-P13
P32) p.26, p.6-P
27 P7.

P.w.5. (P.7 P8 - P.10.
P10) p.27 P8-24.

P.w.7. (P.13 P33 -
P.15 P7) p.27

P.25-29;
P.60 P13 - P.61 P5;
P.61, P.6-19;
P.61, P.20-29,

P.61, P.29-32, - Exh P1.
P.74 P11 - P 79.

7. It was further found by the trial Judge and the Federal Court in their said respective Judgments on the incontroverted evidence as aforesaid, of the said Lieutenant Sutikno and the said two other Indonesian members of the said invasion force and the extra-judicial statement made by the Appellant that he had -

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(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 had, issued and supplied to him as aforesaid, and had carried a rifle, 200 rounds of ammunition and various equipment issued and supplied to him as aforesaid.

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8. The Appellant submits 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 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.

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P63 r 24 -
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9. It is furthermore submitted that, having treated the said Lieutenant Sutikno and the said two other 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 Appellant 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.

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10. The Appellant did not at his trial, or in his appeal to the Federal Court, claim to be a prisoner of war, but relied on grounds of defence and appeal unrelated to the said claim, and it was a matter which did not, form part of the Judgment of the trial Judge or that of the Federal Court.

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. 10

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: 20 30

"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." 40

Then having said -

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"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 -

10 "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
20 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:-

30 "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".

He goes on as follows:-

40 "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

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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".

13. The only difference in the case of the Appellant in this appeal from that of the said case of Lee Hoo Boon is that in an extra judicial statement made by him he stated that he was born in the State of Perak, and, as in the said case of Lee Hoo Boon this was the only evidence having any bearing on his national status. 10

14. The Appellant would here respectfully submit - though the point is sufficiently answered, as 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 prisoner of war within the meaning of Article 4 of the said Convention as hereinbefore submitted the Appellant 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. 20

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 40

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....."

10 "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 20 hand-grenades, food rations and other military equipment. The force was 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 -

30 "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 40 regarded as prisoners of war unless there were circumstances which disentitled them to treatment as such"

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

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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."

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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 -

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"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".

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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.

10 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 Appellant submits 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.

20 17. The further question in this appeal arises that if it should be held, contrary to the Appellants submissions hereinbefore set forth in regard to the said question set forth in paragraph 2 supra, that he could have been and was rightly and properly in law tried on the said charges and as aforesaid convicted and sentenced thereon, namely, whether his conviction and sentence of death passed on him on the first of the said charges of consorting
30 with members of the Indonesian Armed Forces are good and sustainable in law.

40 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.

19. The Appellant submits that the said charges

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and his said conviction and sentence thereon are bad invalid and without any force in law whatever and this appeal should be allowed and the said conviction and sentence on the said charges or alternatively on the first said charge quashed and set aside for the following among other

R E A S O N S

1. BECAUSE he was a prisoner of war within the meaning and intent of Article 4 of the Convention in the Third Schedule of the Geneva Conventions Act, 1962 10
2. BECAUSE all the acts done by him were acts of belligerency and done by him as such prisoner of war for which none of the Courts of Malaya had any power or jurisdiction to try him.
3. BECAUSE there was no evidence that he was a national of Malaya or owed allegiance thereto.
4. BECAUSE the onus was upon the prosecution to prove that he was a national of Malaya and it did not discharge the said onus. 20
5. BECAUSE he owed no allegiance to Malaya.
6. BECAUSE any allegiance he may have owed to Malaya had ceased and was transferred to Indonesia when he became a member in every material respect of the Indonesian Armed Forces.
7. BECAUSE in the case of any doubt arising as to his status entitled him 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. 30
8. BECAUSE whether he 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 40

all acts done by them as such and takes no account of whether such prisoners of war are traitorous subjects or not.

9. BECAUSE he 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 Lieutenant Sutikno and the said other Indonesian members of the said invasion force were treated.
10. BECAUSE he comes 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 him.
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 his said conviction and sentence are wrong and invalid and bad and of no force in law whatever and this appeal should accordingly be allowed and the said conviction and sentence quashed and set aside.
13. BECAUSE alternatively if he was properly and lawfully charged and tried and convicted and sentenced on the second and third of the said charges the charge and histrial conviction and sentence on the first of the said charges was wrong and the same was invalid and bad 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.

S.N. BERNSTEIN

CLAUD G. ALLEN

JUDICIAL COMMITTEE OF THE No.12 of 1967
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B E T W E E N:

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Appellant

- and -

THE PUBLIC PROSECUTOR
Respondent

CASE FOR THE APPELLANT

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

Appellants Solicitors