

1967/21
[7]

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM

Appeal No. 12 of 1967

THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N

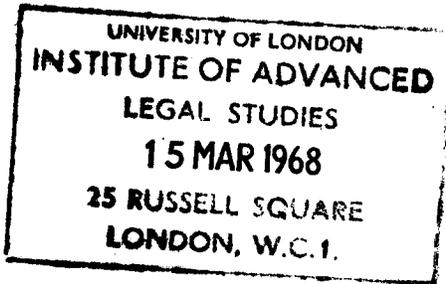
HO MING SIANG alias
HO SUNG

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent



10

C A S E FOR THE RESPONDENT

RECORD

1. This is an Appeal by Special Leave from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) Thomson, Lord President, Syed Sheh Barakbah, Chief Justice, Malaya, Ong Hock Thye, Judge Federal Court) dated the 27th day of January 1966 by which Judgment and Order the Appellant's appeal against his convictions and sentences by the High Court in Malaya at Muar (S.S. Gill, J.) on the 24th day of October 1965 upon 3 charges under the Internal Security Act 1960 (No. 18 of 1960) was dismissed and his said convictions and sentences were affirmed.

58

25

20

2. The Appellant was charged as follows:-

1st Charge

2

30

"That you between 2.00 a.m. on the 2nd day of September, 1964 in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide FLN. 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 ammunitions in contravention of the provisions of Section 57(1) of the Internal Security Act, 1960, in

RECORD

circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian Armed Forces in a manner prejudicial to public security and that you have thereby committed an offence punishable under Section 58(1) of the said Act."

2

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 vide FLN. 245 of 17th August, 1964 namely Tenang Kampong, Labis, in the District of Segamat, in the State of Johore, without lawful excuse carried a firearm, to wit, a LEE ENFIELD RIFLE, without lawful authority and that you have thereby committed an offence punishable under Section 57(1)(a) of the Internal Security Act, 1960."

10

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 FLN. 245 of 17th August, 1964 namely Tenang Kampong, Labis in the District of Segamat, in the State of Johore, without lawful excuse had in your possession 200 rounds of ammunitions without lawful authority and that you have thereby committed an offence punishable under Section 57(1)(a) of the Internal Security Act, 1960."

20

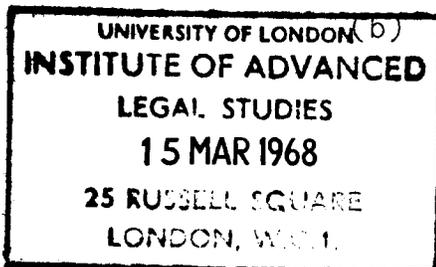
30

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.)

40

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, and neither at his trial nor in the appeal before the Federal Court of Malaysia, made any claim to be so entitled.

10 (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.

The case for the prosecution was thus outlined by the learned trial Judge:-

20 The evidence for the prosecution was that a force of 48 paratroopers under the command and inclusive of Lieutenant Muda Sutikno (P.W.6) of the Indonesian Armed Forces took off from Jakarta in an Indonesian plane at about 4.30 p.m. on 1. 9.64 for Medan where they rested for some time and from where they left by plane for Malaysia at about 12 midnight. At about 2 a.m. on 2. 9.64 this body of 48 men jumped down from the plane and landed in Johore, Malaya. Two of the Indonesian paratroopers in the plane were Seman bin Pawiro (P.W.5) and Bakir bin Akir (P.W.7). These three Indonesians are now under detention in Malaya as prisoners of war. All three of them gave evidence to say that every member of the force wore a uniform and carried, apart from other equipment, a firearm, ammunition and two handgrenades. They further said that the accused was one of the men in the plane . . .

30

40

25

The accused was arrested on information received on 13. 9.64 at about 9 p.m. in Taiping.

5. A statement made by the Appellant was held to

RECORD

admissible and produced in evidence as Exhibit P.2.

In this statement the Appellant said:-

75

"I was born in Pondok Tanjong, Taiping, Perak. I am single and stay with my parent at 189, Pokok Assam, Taiping, Perak.

During May this year 1964, a person I know as Tan Chit San, a friend, told me that he was going to take me to a certain place for a visit for about two weeks. I was taken to Pantai Remis, Perak and asked to go into a 'sampan'. There were about 17 others all Chinese. After some distance from the shore all of us boarded an Indonesian boat. We were all taken to a small island at Pulau Balai. I would not know whether this is an Indonesian Island or Malaysian. We stayed on this island for one week. Here we were doing some Physical Exercises under an Indonesian Instructor

10

20

After one week we were all taken to Bandoeng. It is a training camp for Paratroopers. I do not know the name of this camp. We were undergoing Military Training and how to jump down by parachutes. I was issued with a Lee Enfield Rifle of 7.62 mm. calibre and was not issued any bullets while under training.

The statement went on to describe how after completing his training the Appellant took part in the operation which led to his capture. Following his parachute descent from the aeroplane, he made contact with an Indonesian paratrooper and 2 others of the attacking party, staying with them in the jungle until the 10th September 1964. The statement concluded:-

30

78

When our rations were finished the group sent me out to buy food.

At 6.00 a.m. 11. 9.64. dressed in civic I came out to a road side. I paid only sixty cents from the place to Segamat by bus. I took another bus to Gemas and then by taxi to Tampin. From Tampin I boarded a taxi to

40

Kuala Lumpur and arrived Ipoh at about 4.00 p.m. 11. 9.64. I took a taxi from Ipoh to Taiping. I used the money that was given to me by the others as I lost my money in the flight. Cash \$300/- were given to each of us on the plane. I stayed at home in Pokak Assam.

10 On 13. 9.64 at about 9.00 p.m. I was arrested by Police. I am finally sent to this place. I was arrested outside my house when I was going into a taxi to go to a Hospital to see a neighbour who just died.

6. Evidence of the arrest of the Appellant was given by Shaid bin Haji Hussin (P.W.1), a police constable stationed at Pokak Assam Police Station, Taiping. His testimony was as follows:-

20 I know and can recognise a person named Ho Ming Siang. He was residing at 189, Jalan Aun Chuan, Pokok Assam, Taiping. He is in Court today. He is the accused. I know his father named Ho Tak (Identified).

4

30 On 13. 9.64 at about 6.30 p.m. I was on duty in Pokok Assam. I received certain information. On receipt of this information I returned to Pokok Assam Police Station and called a Corporal and two Constables. With the Corporal and the other Constables I went near the house of the accused and laid an ambush.

On reaching near the house I positioned myself in front of the house. One P.C. was at the back of the house, the other P.C. on the right side of the house and the Corporal on the left of the house. I saw a bright light inside the house, but at that time I could not see the persons in the house. At about 8.30 p.m. the Corporal left the place.

40 At about 9.00 p.m. I saw a person coming out of the side. I looked and observed and saw that he was the accused. I followed him. On reaching the town he stopped a car. I arrived at the car. The accused

RECORD

opened the left front door of the car. Having satisfied myself that he was the accused, I stopped him and asked for his Identity Card. I checked the name in the Identity Card. It was Ho Ming Siang alias Ho Sung. I arrested him and took him in that car to Pokok Assam Police Station.

7. The learned trial Judge held that there was a case to answer on all three charges.

8. The Appellant elected to give evidence on his own behalf. The substance of his evidence was that the prosecution case was wholly false, that he had not taken part in the operation described by the Indonesian witnesses and that he had in fact never left the country. His evidence was thus summarised by the learned trial Judge. 10

31 The defence of the accused was an alibi, as he denied that he went to Indonesia some time in May and boarded a plane on 1. 9.64 as he had said in his cautioned statement. He said he was in Taiping in May 1964 as he had stood as a candidate for the election in Matang Ward on 25th April, 1964. In relation to this election he had submitted a return to the Elections Office on 11th July, 1964. This return contained a form of declaration which he made on 10th July, 1964. He was also present in Taiping on 13th June, 1964 when a by-election took place. The candidate for this by-election was Lim Cheng Ho (D.W.3), and he was Lim Cheng Ho's election agent. In respect of this election also a return was filed, and he again swore a declaration before a Commissioner for Oaths in August, 1964. 20 30

The accused went on to say that after the second election he went to Kuala Lumpur to look for work and returned to Taiping at the end of June, 1964. About a week later he went to Penang to look for a job and returned home four or five days later. On both occasions he failed to get employment. He next went to Kulim and then kept on going out to look for work and coming home. 40

Two weeks before his arrest on 13. 9.64 he went to visit one Ho Chuan in Kampar and stayed with his mother Chin Moy for four or five days. He repeated his story that the whole of his statement which was read out in Court represented what he was coached in Ipoh to say. He added that what he had said in his statement was untrue, and so was the evidence of the three Indonesian witnesses.

10

9. The Appellant called a number of witnesses to support his case that he had not gone to Indonesia but had been in Malaysia at all material times.

10. On the 24th day of October 1965 the learned trial Judge convicted the Appellant on each charge, holding that "the evidence for the defence created no doubt . . . as to the truth of the prosecution case," and sentenced him to death.

20

34

11. By Petition of Appeal dated the 18th day of November 1965 the Appellant 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 Appellant being entitled to be treated as a prisoner of war.

35

On the 27th day of January 1966 the Federal Court dismissed the Appellant's appeal.

58

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 Appellant was clearly a resident of and domiciled in Malaysia, where also the acts which were proved against him were committed. The Appellant was thus (assuming that there was an armed conflict to which Malaysia was a party) in the position of an inhabitant of an invaded country who lends assistance to the invader. Accordingly even if the Convention was otherwise applicable, nevertheless upon its proper construction, the Appellant was a defector to the enemy, and as such was not entitled to its

30

40

RECORD

protection. It is submitted that the long established principles of customary international law would clearly exclude the Appellant from the protection afforded to prisoners of war and that the Convention is to be interpreted in the light of these principles and as giving expression and effect to them.

13. It is further submitted that in any event and upon any view the evidence showed prima facie the commission of an offence 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.

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

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.

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 and at no time during his trial did he raise the defence that he was a prisoner of war or challenge the jurisdiction of the Court.

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 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.

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

RECORD

only temporarily absented himself before the offences were committed. There was no evidence that he had decided to emigrate or change his allegiance, and, it is submitted, the evidence before the Court, including his own statement, showed the contrary.

17. In the further submission of the Respondent, whatever the position as to onus of proof or the allegiance owed by the Appellant, the evidence 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 disguised himself by putting on civilian clothing and had concealed his arms.

10

20

58

18. The Respondent respectfully submits that this appeal should be dismissed and the Judgment and Order of the Federal Court of Malaysia of the 27th day of January 1966 dismissing the Appellant's appeal against his convictions and sentences by the High Court in Malaya on the 24th day of October 1965 should be affirmed for the following among other

R E A S O N S

30

1. BECAUSE the Appellant was not a prisoner of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE the Appellant was a defector to the enemy and as such was not entitled to be treated as a prisoner of war.
3. BECAUSE the Appellant was in breach of his duty of allegiance to His Majesty the Yang Di-Pertuan Agong and was accordingly upon a proper construction of the Geneva Conventions Act 1962 and by the law of nations to which such Act gives expression and effect not entitled to the protection of the Act.

40

4. 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.
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.
- 10 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.
- 20 7. BECAUSE the evidence showed on the contrary that there was not an armed conflict within the meaning of Article 2 of the Third Schedule but that the Appellant was merely taking part in a mission of sabotage.
- 30 8. 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 Third Schedule and accordingly neither by the express terms of the Article nor by the law of nations to which it gives expression and effect was he entitled to be treated as such.
9. BECAUSE if there was any onus upon the prosecution to prove that the Appellant owed allegiance to His Majesty the Yang di-Pertuan, it discharged such onus.
- 40 10. BECAUSE if there was any onus upon the prosecution to prove that the Geneva Conventions Act 1962 had no application, it discharged such onus.
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

RECORD

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.

12. 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.

10

MONTAGUE SOLOMON.

Appeal No. 12 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

HO MING SIANG alias
HO SUNG
Appellant

- and -

THE PUBLIC PROSECUTOR
Respondent

C A S E F O R T H E R E S P O N D E N T

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, E.C.2.

Respondent's Solicitors.