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1.

JUDICIAL COMMITTEE OF THE  
IN THE PRIVY COUNCIL No. 13 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 :

LEE HOO BOON alias LEE CHENG HOE  
Appellant

- and -

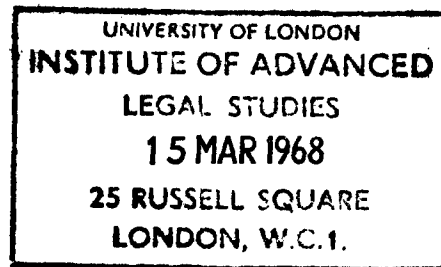
PUBLIC PROSECUTOR FOR MALAYSIA  
Respondent

CASE FOR THE APPELLANT

1. This is an appeal by special leave of the Judicial Committee of the Privy Council to appeal in forma pauperis, given on 9th November 1966, from an Order of the Federal Court of Malaysia (Appellate Jurisdiction), dated 26th April 1966, which dismissed an appeal by the Appellant from the Appellant's convictions and sentences of death passed by the High Court of Malaya at Muar in the State of Johore on 26th March 1966 upon three charges under the Internal Security Act 1960 (No. 18 of 1960).

2. The questions raised by this appeal are as follows:-

(a) Whether the Appellant was entitled to the jurisdictional and procedural protections afforded him by the Geneva Conventions Act 1962 (No. 5 of 1962) as being a prisoner of war within the meaning of Article 4 of the Third Schedule thereto; (b) whether the burden of proving the Appellant's allegiance to His Majesty the Yang di-Pertuan Agong lay on the prosecution or on the defence; and (c) whether,



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p. 54, l. 19 - p. 56, l. 15.

p. 53, l. 8 - p. 54, l. 18.

p. 26 - ll 16-19.

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even if the Appellant was a citizen of Malaysia (or in the absence of contrary evidence deemed to be a citizen of Malaysia), the Appellant being a member of the Indonesian Armed forces and having "fallen into the power of the enemy" was nevertheless entitled to be regarded as a prisoner of war.

3. The relevant statutory provisions are as follows:-

Geneva Conventions Act 1962

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(a) 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 of which he is a national, or of whose forces 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;"

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(b) Section 4(1) "The Court before which -

(a) a protected prisoner of war is brought up for trial for any 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 section (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

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(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

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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 the prisoner was, at or last before that time, detained as a protected prisoner of war

(c) Third Schedule

10 (i) 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....

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

(ii) Article 4

30 "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 the militias or volunteer corps forming part of such armed forces...."

(iii) Article 5

40 "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

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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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(iv) Article 7

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

(v) Article 6

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

(vi) 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...."

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(vii) 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".

(viii) 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...."

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(ix) Article 100

"Prisoners of war and the Protecting Power

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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(x) Article 104

"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...."

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(xi) Article 127

....

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

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4. The Appellant was tried on three charges as follows:-

*P. 1, p. 19 - p. 2, p. 38.*

1st Charge

That you between the 2nd day of September 1964 and the 7th day of September 1964, in a Security area as proclaimed by the Yang di-Pertuan Agong, vide Federal L.M. 245 17th August 1964, namely Tenang Kampong Labis, in the District of Segamat in the State of Johore, consorted with members of Indonesian Armed Forces who carried firearms and ammunitions in contravention of the provisions of section 57 of the Internal Security Act 1960, in circumstances which raised a reasonable presumption that you intended to act with such members of the Indonesian Armed Forces in a manner prejudicial to the public security and thereby committed an offence punishable under section 58(1) of the Internal Security Act 1960.

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*P. 1, p. 19 - p. 2, p. 15.*

2nd Charge

That you, between the same dates, in a

*p. 2, pp. 16-26.*

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Security Area as proclaimed by the Yang di-Pertuan Agong, vide Federal L.N. No. 245 of 17th August 1964, namely Tenang Kampong Labis, in the District of Segamat, in the State of Johore, without lawful excuse had under control a firearm, to wit, a Sten gun without lawful authority and thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act 1960.

3rd Charge

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P. 2, pp 27-39.

That you, between the same dates, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide Federal L.N. No. 245 of 17th August 1964, namely Tenang Kampong Labis, in the District of Segamat, in the State of Johore, without lawful excuse had in possession ammunition, to wit, 371 rounds of 9mm. ammunition and two hand grenades, Chinese type, without lawful authority, and thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act 1960". The appellant was tried before Mr. Justice Gill on 14th and 15th August 1965 and 26th March 1966, on which latter date he was convicted on all three charges 20

5. The material facts relevant to the Appellant's case were as follows:

P. 15, pp 7-8.  
P. 19, p. 9.

P. 15, pp 22-37

P. 18, pp 6-33.

P. 15, pp 12-21.

P. 21, p. 20 - p. 22, p. 20.

(a) The Appellant was a member of an armed force of 48 Paratroopers under the command of Lieutenant Sutikno of the Indonesian Air Force, who in the early hours of September 2, 1964 were dropped by air over the Labis area of Johore from a Hercules plane belonging to the Indonesian Air Force. 30

(b) All the 48 members of the invasion force were in camouflage uniform of that Air Force, and each carried a firearm, ammunition, two hand grenades, food rations and other military equipment. The force was divided into eight sections (each under a section commander) with Lieutenant Sutikno as overall commander 40

(c) The Appellant was not in possession of an identity card when captured. In a

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statement made under caution to a police officer shortly after being taken prisoner on 8th September 1964 the Appellant said that he lived in Pontian Kechil, Johore in which State it appeared that he had been born

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p. 56, l. 16 - p. 60, l. 13.

p. 57, ll. 15 - 17.

10 (d) The Appellant's statement told how he left Malaya for Indonesia at the end of May 1964 where he underwent military training in the Indonesian Armed Forces preparatory to being parachuted together with other members of the Indonesian Armed Forces into Johore on 1st/2nd September 1964.

p. 57, l. 35 - p. 58, l. 9.

p. 57, ll. 15 - 26.

p. 57, l. 27 - p. 58, l. 24.

6. The Appellant at his trial elected to remain silent and to say nothing in his defence.

p. 26, ll. 14 - 16.

7. The learned trial judge in the High Court of Malaya at Muar in the State of Johore dealt with the Appellant's statement, and concluded:

20 "The evidence implicating the accused was the evidence of the two Indonesian witnesses, the evidence of Captain Saunders and the accused's own cautioned statement.... I was satisfied on all that evidence that both at the time of landing from the plane and just before his capture the accused had under his control a Sten gun and a quantity of ammunition. Moreover at the time of his capture he was in the company of one armed Indonesian who was shot dead".

p. 25, ll. 29 - 43.

30 The learned trial judge found the Appellant guilty on all three charges, convicted him and sentenced him to death on each charge. At no time during the Appellant's trial was any point made about the applicability of the Geneva Conventions Act 1962.

p. 26, ll. 15 - 19.

40 8. The Appellant, by petition of appeal dated 20th April 1966, appealed against his said convictions and sentences to the Federal Court of Malaysia upon, inter alia, the following ground:

pp. 27 - 33.

"The learned trial judge had no jurisdiction to hear the case. The evidence adduced by

p. 27, l. 30 - p. 28, l. 6.

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the prosecution and the defence has the effect of giving your Appellant the status of a protected prisoner of war under the Geneva Conventions Act 1962, and as the mandatory provisions of section 4, Articles 100 and 104 of the Third Schedule of the Geneva Conventions Act 1962 have not been complied with the prosecution and conviction of your Appellant is a nullity".

9. The Appellant's appeal was heard by the Federal Court of Malaysia (Thomson L.P., Malaysia, Harley Ag.C.J. Borneo and Raja Azlan Shah J) on 25th and 26th April 1966 and judgment was delivered at the conclusion of the argument on 26th April 1966. The judgment of the court was delivered by Lord President Thomson. The learned Lord President, after allowing the Appellant's appeal on the third charge, dismissed the Appellant's appeal on the two other charges and said:

*pp 46-52.*

*p. 50, ll 12-18.*

*p. 50, l 38 - p 51, l 4.*

"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 tried with them. He was wearing Indonesian uniform. He was carrying Indonesian weapons.... 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 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 Johore national. That being so, in our view, he is not entitled to the benefit of the Geneva Convention".

The learned Lord President then went on to hold that the Geneva Conventions constituted international treaties and were not to be interpreted in the same way as ordinary contracts. The Lord President cited a passage from Oppenheim's International law Volume II on War (7th Ed.) to the effect that 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 may be, and always are, treated as criminals.

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The learned Lord President was accordingly of the opinion that the appellant was not entitled to the protections of the Geneva Conventions Act 1962 "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".

P. 22, P. 5-11.

10. The Appellant respectfully submits that the Federal Court of Malaysia was wrong in dismissing the Appellant's appeal for the following reasons:

(a) The Appellant did not automatically become a citizen of the Federation of Malaya by reason of his being born in the State of Johore. (see Articles 14(1)(a), 16 and 18(1) of the Constitution of the Federation of Malaya). Not being "Malay as defined in the Johore Nationality Enactment 1952, the Appellant's birth within the State of Johore did not per se clothe him with the status of a national of that State: (see sections 2, 4(c) and (f) and 5 of the enactment).

(b) The onus of proving allegiance to His Majesty the Yang di-Pertuan Agong rested throughout on the prosecution, and it did not rest on the Appellant to prove that he was not a subject of His Majesty. Nor could it be established by reason of his past residences that the Appellant was owing allegiance at the time he joined the Indonesian Armed Forces, or during the period specified in the charges against him.

(c) The trial court had no jurisdiction to try the Appellant on the three charges under sections 57 and 58 of the Internal Security Act 1960 so long as the Appellant was entitled to the status of a protected prisoner of war. This is not to deny that, subject

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to the compliance with the requirements of the Geneva Conventions Act 1962, the Appellant might be put on trial for one or more of the offences with which he was charged. The provisions of the Internal Security Act 1960 must be read in conjunction with the jurisdictional and procedural safeguards afforded to the prisoners of war as defined in the Geneva Conventions Act 1962. The passage in the judgement of Thomson L.P. that traitorous subjects of a belligerent are treated as criminals, is not inconsistent with them being accorded the status of prisoners of war. Protection under the Geneva Conventions Act 1962 does not deprive the Detaining Power of the right to try persons for criminal offences; the Geneva Conventions Act 1962 simply prescribes the methods by which such offenders may be tried. 20

(d) Article 85 of the Third Schedule to the Geneva Conventions Act 1962 confers the status of protected prisoner of war even for "acts committed prior to capture", thereby recognising that jurisdiction to try persons for offences committed during hostilities can only exist subject to compliance with the provisions of the Geneva Conventions Act 1962.

(e) The jurisdiction of the High Court of Malaya to try the Appellant depended on a prior examination of the Appellant's status. Since the status of protected prisoner of war did not confer any immunity or exemption from being prosecuted - Article 82 says specifically that "a prisoner shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power"; (see also Articles 87 and 104) - it was not for the Appellant to adduce evidence that he was entitled to the protections of the Geneva Convention Act 1962 but a matter for the court to satisfy itself that it had complied with the requirements of its jurisdiction to try the Appellant. 30 40

(f) The decision in the case of Joyce v. Director of Public Prosecutions (1946) A.C. 347 is not strictly in point since the issue of allegiance in that case referred to the commission of the offence of treason and did not involve any question of the English Court's jurisdiction to try the accused.

10 (g) All the evidence that was adduced before the trial court relevant to the issue of the Appellant's status clearly indicated that he was a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962, unless and until evidence was adduced by the prosecution to show otherwise.

20 (h) Since there was, at best from the prosecution's point of view, some doubt about the Appellant's status, the status of protected prisoner of war was afforded to the Appellant until such status had finally been determined by a competent tribunal, which determination never took place: (see Article 5 of the Third Schedule to the Geneva Conventions Act 1962)

30 (i) Once it had been shown to the trial court that the Appellant was a member of the Indonesian Armed Forces in armed conflict with Malaysia (see Article 2 of the Third Schedule to the Geneva Conventions Act 1962), there was sufficient evidence to bring Article 5 of the Third Schedule to the Geneva Conventions Act 1962 into play.

40 (j) By joining the Indonesian Armed Forces the Appellant owed allegiance to and/or became a national of the republic of Indonesia, thereby ceasing to owe allegiance to His Majesty the Yang di-Pertuan Agong.

11. It is further submitted, for the following reasons, that even if the Appellant was presumed to, or did, owe allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless by virtue of

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the provisions of the Geneva Conventions Act 1962, and the Third Schedule thereto, the Appellant retained the status of protected prisoner of war and was entitled to all the protections afforded by that status:-

(a) The rule of customary international law, that the traitorous subjects of a belligerent who fight in the armed forces of the enemy are always treated as criminals and cannot obtain the status of protected prisoners of war if captured by their own armed forces, is restricted to spies and other non-uniformed plotters. Traitorous subjects of a belligerent who fight in the armed forces of the enemy, while remaining liable to prosecution for treason, are entitled to be the jurisdictional and procedural safeguards afforded to protected prisoners of war. 10

(b) Citizenship in the country of either party to an armed conflict does not affect the status of a person who is a member of the armed forces of one party and falls into the hands of the enemy. The development in international law is towards recognising political affiliations rather than national allegiances. 20

(c) The Geneva Convention relative to the Treatment of Prisoners of War (1949) is a complete code of legal rules, both fundamental and detailed, for the protection of prisoners of war throughout the period of their captivity and is substitutive of customary international law, since in some vital respects it reverses the previous international law. By including in Article 85 "acts committed prior to capture", the convention reverses the rule that prisoners of war accused of war crimes lost their status as prisoners of war: see *Re Yamashita* 327 U.S.1 (1946). 30

(d) Since the Appellant was serving in the Indonesian Armed Forces under compulsion - the learned trial judge concluded that "he had placed himself in a situation in which he was obliged to carry out the orders of his superiors" - he was a victim of events and not a criminal, which distinction is the basis of the prisoner of war 40

convention.

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12. The Appellant respectfully submits that this Appeal should be allowed for the following, among other,

R E A S O N S

- 10 1. BECAUSE the courts of Malaya had no jurisdiction to try the Appellant for offences, committed in connection with the activities of hostilities between Malaysia and Indonesia.
2. BECAUSE the Appellant was a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962.
3. BECAUSE the courts of Malaya failed to comply with the requirements of the Geneva Conventions Act 1962.
- 20 4. BECAUSE the burden of establishing the power of the courts in Malaya to try the Appellant remained throughout, on the Respondent.
5. BECAUSE the Respondent failed to satisfy the courts in Malaya that they had jurisdiction to try the Appellant without the benefit of the protections afforded by the Geneva Conventions Act 1962.
- 30 6. BECAUSE even if the Respondent sufficiently discharged the burden of establishing that the Appellant owed allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless the Appellant remained a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962
- 40 7. BECAUSE even if the Appellant had at some time owed allegiance to His Majesty the Yang di-Pertuan Agong such allegiance and/or the Appellant's nationality of the Federation of Malaysia was <sup>lost</sup> ~~not~~ on the Appellant joining the Indonesian Armed Forces.

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8. BECAUSE the decision of the Federal Court of Malaysia in Ooi Hee Koi and Ooi Wan Yui v. Public Prosecutor, Federal Court, Criminal Appeal Nos. X.9 and 12 of 1966, July 12, 1966 unreported, was right and ought to be affirmed.
9. BECAUSE the decision of the Federal Court of Malaysia in the instant appeal was wrong and ought to be reversed.

L.J. BLOM-COOPER.

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