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1967/21

Appeal No. 13 of 1967

[8]

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

LEE HOO BOON alias  
LEE CHENG HOE

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

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

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C A S E FOR THE RESPONDENT

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1. This is an Appeal by Special Leave from the Judgment and Order of the Federal Court of Malaysia Holden at Kuala Lumpur (Appellate Jurisdiction) (Thomson, Lord President, Malaysia; Harley, Ag. Chief Justice, Borneo; and Raja Azlan Shah, Judge, Malaya) dated the 26th day of April 1966 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 (S.S. Gill, Judge) on the 26th day of March 1966 upon 3 charges under the Internal Security Act, 1960 (No. 18 of 1960) was allowed as to 1 charge and his conviction and sentence thereon quashed and dismissed as to the remaining 2 charges and his convictions and sentences thereon affirmed.

pp.46. 53.

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2. The Respondent was charged as follows:-

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.N. 245 of 17th August, 1964 namely Tenang Kampong Labis, in the District of Segamat, in the State of Johore, consorted with members of

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

p. 2. 2nd Charge

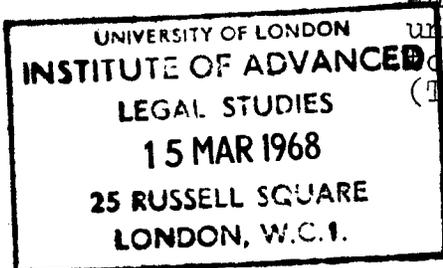
"That you between the same date, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964, namely Tenang Kampong Labis, in the District of Segamat, in the State of Johore without lawful excuse had under your control a firearm to wit a stengun without lawful authority and you have thereby committed an offence punishable under Section 57 (1) (a) of the Internal Security Act, 1960". 20

p. 2. 3rd Charge

"That you between the same dates, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 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 ammunition to wit 371 rounds of 9 mm ammunition and two hand grenades Chinese type without lawful authority and you have thereby committed an offence punishable under Section 57 (1) (b) of the Internal Security Act, 1960." 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



(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.

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.

5. The evidence for the prosecution was summarised by the learned trial Judge as follows:-

20 "This is another case arising out of the landing of Indonesian troops in the Labis area of Johore in the early hours of 2nd September, 1964...The case against the accused was that he was one of the paratroopers and that at the time of his capture by the local Security Forces at about 4 p.m. on 7. 9.64 he was carrying a Sten gun and a quantity of ammunition.

p.22.

30 Two of the Indonesian paratroopers named Sadikon (P.W.6) and Ahman Surahman (P.W.7), who are now held under detention in this country, gave evidence for the prosecution to say that they were among a body of 48 men who came to this country by an aeroplane on 1. 9.64 and that the accused was one of them. Each of them carried a firearm, ammunition and other military equipment at the time of their departure from Jakarta in Indonesia and at  
40 the time of their jumping out of the plane. The men were divided into 8 sections of 6 persons each, and they and the accused belonged to Section 7.

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Sadikon's other evidence was that he was the leader of his section and that he was No. 37 to jump from the plane, the accused being No. 39 or No. 40. The firearm which the accused carried was a Sten gun. After landing he stayed in the jungle with two others, one from his section and another from a different section, until 15. 9.64 when he was arrested. After his capture he met the accused at the Police Depot in Johore Bahru.

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Ahman Surahman also testified that he was in Section 7 and that the accused was in the same section and carried a Sten gun. The accused was No. 39 to jump from the plane and his number was 41. He saw the accused jump, carrying with him a Sten gun, two hand grenades and other things. After landing he was in the jungle for three days looking for his friends. Then he met Sadikon and a man called Sarjuni from a different section. All three of them were arrested on 15. 9.64 at about 9 p.m. After his arrest he saw the accused at the Police Station, Johore Bahru.

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Evidence about the capture of the accused was given by Captain Sanders of 1/10 Gurkha Rifles. The evidence of this witness was that at about 4 p.m. on 7.9.64 an observation post on the top of a hill near his Company Headquarters in a school reported seeing three individuals in uniform across the valley approximately 500 yards away. He and his men immediately put in an attack. There was a brief burst of fire and after a short chase they captured two Chinese and shot dead one Indonesian. One of the Chinese captured was the accused. In the vicinity from where the three individuals had been seen running, they recovered one Bren gun, two Sten guns, 6 hand grenades, a quantity of ammunition and other military equipment."

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p.56.

6. A statement made by the Appellant was admitted in evidence as Exhibit P.13. In this he described how he was one of a group of persons who were given military training, first

on an unnamed island and then at Bandeong, by Indonesians and participated in the mission deposed to by the Indonesian witnesses.

As to the circumstances in which he went to the island his account was as follows:-

"I lived in Pontian Kechil, Johore. On or about 17. 5.64 at about 2.30 p.m. while I was walking along the main road of Pontian Kechil, I met a friend by the name of CHEN TIEN SEN (at large) who told me that he would like to take me for a picnic on one of the fishing stakes. I replied that I would like to go if I was free.

p.57.

On 20. 5.64 at about 2.00 - 3.00 p.m. I met CHEN TIEN SEN again on the main road and he told me to wait for him at a nearby coffee shop. I did so as requested by him. At about 5.00 p.m. on the same day, CHEN TIEN SEN came for me. He was in the company of 4 other persons who were also from Pontian Kechil. One of them was a girl. The four persons were:-

- (a) Chong Sen (m)
- (b) Sin Sen (m)
- (c) Fang Phin (m) and
- (d) Lee Chien (f).

From Pontian Kechil 6 of us went in a car, the registration number of which I did not know. The driver of the car is known to me by sight but I do not know his name. He was a Chinese and I can recognise him. From Pontian Kechil we all proceeded to a fishing village about 1 mile south of Kukup. The car stopped near a Chinese School in the fishing village and after discharging its passengers, it drove away. The 6 of us waited near a Chinese School until about 10.00 p.m. when a fishing boat arrived at the jetty. We then went on boat the fishing boat which immediately sped towards the open sea.

We were in the boat till about 12 midnight when we arrived on a small island. There were already about 10 persons on the

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island out of whom 2 were girls. There were also 2 or 3 Indonesians on the island.

While we were here we were put on weapon training and taught how to use explosives by the Indonesians who were our instructors."

p.56. 7. The Appellant did not give evidence in his own defence and called no witnesses (except upon the separate issue of the admissibility of the statement Exhibit P.13.) 10

p.22. 8. On the 26th day of March 1966 the learned trial Judge convicted the Appellant and sentenced him to death on each charge. In his Grounds of Judgment delivered on the 30th day of March, 1966 the learned trial Judge thus referred to the submissions made on the Appellant's behalf:-

p.25 "At the end of the case for the prosecution counsel for the accused conceded that there was evidence in the case to substantiate all the three charges but that, as the accused was tricked into coming into this country by being told merely that he was going on a jumping exercise, the case came within the general exceptions contained in sections 76, 79 and 80 of the Penal Code. In my opinion none of these three sections in the Penal Code was applicable in this case in relation to the three charges against the accused." 20

p.27 9. By Petition of Appeal dated the 20th day of April 1966 the Appellant appealed to the Federal Court of Malaysia against his said convictions and sentences, one of his grounds of appeal being as follows:- 30

"The learned trial Judge had no jurisdiction to hear the case. The evidence adduced by 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, Article 100 and 104 of Third Schedule of the Geneva Conventions Act, 1962 have not been complied with the prosecution and conviction of your appellant is a nullity. 40

10 "Your appellant was born and lived in Pontian for the most part of his boyhood. He left for Indonesia and had regular training and has been described as an Indonesian infiltrator. Sadikon Bin Asharri (P.W.6) is a member of Pasokan Gerak Tjipat (Crack Army) and head of Section 7 of which the accused was a member. Ahman Surahman (P.W.7) also confirmed this. Accused in his statement (P.13) called his companion "comrade" Capt. Sanders (P.W.8) has also regarded your appellant as an enemy."

10. On the 26th day of April 1966 the Federal Court of Malaysia dismissed the Appellant's appeal against his convictions on the 1st and 2nd charges and allowed his appeal against his conviction on the 3rd charge. p.46. p.53.

20 11. In its Judgment the Federal Court referred to the contention that the Appellant was a member of the Indonesian military forces and as such was entitled to the protection of the Geneva Conventions Act 1962. The Judgment proceeded p.46.

30 "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 Johore national. p.48

That being so, in our view he is not entitled to the benefit of the Geneva Conventions.

40 With regard to the Conventions I would observe that they are a treaty, or, at any rate, an international agreement analogous to a "treaty" and treaties are not to be interpreted in the same way as ordinary contracts. What I have in mind is better said than I can say it by Professor Keith in Wheaton's Elements of International Law (6th Ed.) at page 522:-

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'The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators.'

Bearing that in mind we are entitled to conclude that the parties to the Geneva Conventions had in mind the general principles of international law and of the law of nations and on the particular point with which we are concerned here I would read a passage by Dr. Lauterpacht from Oppenheim's International Law (7th Ed.). He discusses in Chapter VI the armed forces of the belligerents in general and their privileges in particular and he concludes with the following passage (p. 268):-

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p.51.

'The privileges of members of 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.'

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In our view the Geneva Conventions are to be read in the light of that statement which after all is a statement of a principle of international law by a recognised authority and read in that light the present appellant is not entitled to the protection of the 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."

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p.52

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 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 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.

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

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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.

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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 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.

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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 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 the Appellant owed allegiance to Malaysia at the time of the acts charged, it did show 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 ordinarily resident and from which he had been only temporarily absent before the offences were committed. There was no evidence before the Court that he had decided to emigrate or change his allegiance. Indeed his own statement suggested the contrary, the gist of it being that he was tricked into leaving Johore by the pretence that he was being taken for "a picnic on one of the fishing stakes."

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p.57.

17. The Respondent respectfully submits that this Appeal should be dismissed and the Judgment and Order of the Federal Court of Malaysia of the 26th day of April 1966 dismissing the Appellant's appeal against his convictions and sentences on the 1st and 2nd charges by the High Court in Malaya on the 26th day of March 1966 should be affirmed for the following among other

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pp. 46,53.

p.22.

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 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

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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.

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. 10
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. 20
7. BECAUSE if there was any onus upon the prosecution to prove that the Appellant owed allegiance to His Majesty the Yang Di-Pertuan Agong, it discharged such onus.
8. BECAUSE if there was any onus upon the prosecution to prove that the Geneva Conventions Act 1962 had no application, it discharged such onus. 30
9. BECAUSE the said Judgment of the Federal Court of Malaysia was right for the reasons therein stated.

MONTAGUE SOLOMON.

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B E T W E E N

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Appellant

- and -

THE PUBLIC PROSECUTOR  
Respondent

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