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under Section 57 (1) (a) of the Internal Security Act, 18/60."

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2nd Charge

"That you at about 1.40 p.m. on the 12th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely Kampong Juasak, Tanang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had under your control ammunitions to wit, 225 rounds of 9 mm. ammunitions and two hand grenades Chinese Type without lawful authority and that you have thereby committed an offence punishable under Section 57 (1) (b) of the Internal Security Act, 18/60".

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3rd Charge

"That you between 2.00 a.m. on the 2nd day of September, 1964 and 1.40 p.m. on the 12th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964 namely Kampong Juasak, Tenang, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms and ammunition in contravention of the provisions of Section 57 (1) of the Internal Security Act, 18/60 in 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 same Act".

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

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INSTITUTE OF ADVANCED
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25 RUSSELL SQUARE
LONDON, W.C.1.

(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.)

10 (b) whether in the circumstances of the case a burden lay upon the prosecution to prove that the Appellant was disentitled to be treated as a prisoner of war under the Act. It is submitted that it was for the Appellant to show that he was entitled to the protection of the Act. This he did not do and neither at his trial nor in the appeal before the Federal Court of Malaysia, made any claim to be so entitled.

(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.

20 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 claimed trial on each of the 3 charges.

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

30 The undisputed facts were that at about 1.30 p.m. on the 12th of September, 1964, the accused and an Indonesian were seen by witnesses walking on the road in the direction of Pekan Ayer Panas near Labis in the District of Segamat. One of the witnesses, Mean bin Haji Sidek (P.W.3.), noting the accused and the Indonesian to be strangers, went to the nearby Police Post to make a report. Shortly afterwards, a police constable, Ramly, and a group of Gurkha soldiers were rushed to the scene where the accused and an Indonesian named Mahmud bin Embun were arrested. Soon after their arrest both were searched and on the person of the accused were found \$60/- in one dollar notes and an Identity Card, which showed that the accused was a resident of Pontian. Interrogation by members of the Special Branch as well as by those of the Criminal Investigation Department followed in the usual way and in consequence thereof, the Indonesian, Mahmud bin Embun, led Inspector Annuar of the Criminal Investigation

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Department and a party of soldiers, under the charge of Capt. David Herman, to a jungle fringe about half a mile off the Main Road in Labis. This was on the 14th September. There, on information given by the Indonesian, Inspector Annuar found 4 bundles hidden in a bush. Two of those bundles were alleged by the Indonesian to belong to the accused person. In one of these bundles the Inspector found a sten-gun No. 54648, three sten-gun magazines, 225 rounds of 9 mm. ammunition and two hand grenades. The ballistic experts testified to the effect that the 9 mm. ammunitions were capable of being used by the sten-gun and the two hand grenades were of Chinese make complete with two detonators. The sten gun, ammunition and hand grenades were tested and found to be serviceable. Apart from the evidence of the arrest of the accused and the Indonesian, Mahmud bin Embun, and of the recovery of the arms and ammunitions by the police, the prosecution also called 3 Indonesian soldiers as witnesses and also produced a statement recorded from the accused person purported to have been made under caution. One of the Indonesian soldiers called as a witness was Lieut. Sutikno, who was in command of the 47 others flown from Jakarta by plane to be dropped by parachutes on to Malayan soil. This witness gave an account of the circumstances as to how and when they left Indonesia for Malaya. Although he was certain that there were 14 Chinese among the 48 persons in the plane, he was unable to identify the accused as one of them. He further testified that the 48 persons were divided into 8 sections each consisting of 6 persons. M. Tabri, who was called as a witness in this case, was one of the section leaders. He stated in his evidence that 48 persons left Jakarta in the afternoon of the 1st of September, 1964, by plane for Medan where, after a short rest, they were flown to Malaya. At about 2 a.m. on the 2nd of September they were dropped by parachutes. According to him, all in the plane were carrying arms and ammunitions and each was given \$300/- in one dollar notes, Malayan

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10 currency. He said that the accused belonged to his section and was carrying a sten-gun and two hand grenades. He claimed to have met the accused two days before leaving Jakarta. The third Indonesian witness, Mahmud bin Embun (P.W.9), who was arrested together with the accused on the 12th of September, stated that he was in the same section as the accused and that while in the plane the accused was sitting in front of him. His evidence was to the effect that he saw the accused armed with a sten-gun and hand grenades not only while in the plane but also on the ground after they had jumped out. According to this witness, he and the accused remained in the jungle for about 10 days after which they decided to go out and look for food. He said that while all the Indonesians were armed with 20 G.3 guns the 14 Chinese were carrying either rifles or sten-guns. On being shown the sten-gun, which was produced in Court as an exhibit, he was able to say that it was similar to the weapon which he saw the accused have. He went on to say that before leaving the jungle he and the accused changed into civilian clothings, wrapped up all their weapons and other personal 30 belongings in bundles and hid them in an undergrowth near the fringe of the jungle. Not long after leaving the jungle they were captured or arrested by members of the Security Forces.

5. The evidence of Mahmud bin Embun (P.W.9) as to the Appellant being in civilian clothes at the time of his capture was confirmed by other prosecution witnesses, namely Mean bin Haji Sidek (P.W.3), Kassim bin Tambah (P.W.4) and Ya'acob bin Abdul Majid (P.W.5)

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40 6. Evidence as to the finding of the Appellant's Identity Card (referred to by the learned trial Judge) was given by Ya'acob bin Abdul Majid (P.W.5), who testified

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According to his Identity Card his name is Lee Ah Kim. I searched the accused's person, I found an Identity Card, cash \$60/-, all in

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one dollar denomination, Malayan currency. These were all that I found on the accused. . . I handed Identity Card and accused to Inspector Liew at 2.30 p.m. same day

BY COURT

I recorded Identity Card number in my diary. (Witness asks leave to refer to diary. Leave granted. Refers to diary, Intld. A.H.). The number was J.021623. The new number 3226140. (Prosecution shows Identity Card. Intld. A.H.) This is the card. (P.2).

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Inspector Lim Kooi Loon (P.W.12) said "At V.C.P. Post I was given the accused's Identity Card. P.C. Ya'acob gave me the Card. P.2 was the card".

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7. The Appellant's statement described how he received military training in Indonesia and took part in the mission deposed to by the Indonesian witnesses.

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

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Sometime in the middle of May, 1964, TAN THENG SING, a committee member of the Socialist Front in Pontian, approached me and asked whether I would like to have a job with a salary of \$200/- to \$300/- per month. As I am earning about \$100/- then I agreed as it would be a greater help to my parents. He did not tell me the type of job and the place I am to work though I asked him but he merely say that I will find out later.

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On the 22. 5.64 or 23. 5.64, at about 7.00 p.m. when I just returned from work at the pineapple plantation at 6 m.s. Jalan Kukup, and told me to get ready to go to the job he spoke to me and to wait at Batu 36 Jalan Pontian/Johore at the roadside at about 10.00 p.m. There, 2 girls and another man will join me. Then we were to go to Ayer Masin and wait there. The 2 girls (Oong Lee Mei and Lee Geoh Moi) and the man whom I am to meet came in a car, the driver

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I did not know. We left Ayer Masin the same night, after about $\frac{1}{2}$ hour waiting in a fishing boat and the boatmen I did not know. We arrived at Tanjong Balai, Indonesia at about past 2 a.m. the following morning.

8. The Appellant did not give evidence and called no witness in his defence.

10 9. On the 21st day of February 1966 the learned trial Judge convicted the Appellant and sentenced him to death on each charge. p.21

10. By Petition of Appeal dated the 7th day of April 1966 the Appellant appealed to the Federal Court of Malaysia against his said convictions and sentences. The grounds of appeal were as follows:- p.33

20 1. That the learned Judge was wrong in insisting on proceeding with the trial of the Accused on the basis of the Accused either accepting Mr. Elias Majid to defend him or defending himself.

2. That the Accused was not given a fair opportunity to present his defence.

3. That the learned Judge erred in not sufficiently cautioning himself on the dangers of accepting accomplice evidence without corroboration.

4. That the learned Judge erred in accepting the accomplice evidence before him.

30 11. On the 27th day of April 1966 the Federal Court dismissed the Appellant's appeal. p.40

40 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)

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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.

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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.

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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

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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.

10 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.

20 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
30 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.

40 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.

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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 offence was committed in Malaysia where, it is submitted, the Appellant was shown to be domiciled and ordinarily resident, and from which he had only temporarily absented himself before the offences were committed. His possession of an identity card appropriate to and describing him as "a resident of Pontian" was some evidence that his allegiance was to Malaysia. The possession of the card by the Appellant showed not only where he resided but also the status he claimed. In any event it is submitted that the possession of a civilian identity card issued in Malaysia instead of the kind of identity card which by the Geneva Conventions Act is required to be furnished to persons "liable to become prisoners of war" was some evidence that the Appellant's status was not such that upon capture he became a prisoner of war. 10 20

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. 30

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 April 1966 dismissing the Appellant's appeal against his convictions and sentences by the High Court in Malaya on the 21st day of February 1966 should be affirmed for the following among other 40

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R E A S O N S

1. BECAUSE the Appellant was not a prisoner of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE the Appellant was a defector to the enemy and as such was not entitled to be treated as a prisoner of war.
- 10 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.
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.
- 20 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.
- 30 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.
7. BECAUSE the evidence showed on the contrary that there was not an armed conflict within the meaning of Article 2 of the 3rd Schedule but that the Appellant was merely taking part in a mission of sabotage.
- 40 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 3rd Schedule and accordingly neither by the express terms

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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.
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. 10
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 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. 20

MONTAGUE SOLOMON.

Appeal No. 14 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

LEE SIANG alias
LEE AH KIM alias
LEE BOK KIM

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

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