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1967/21
[10]IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 16 of 1966

ON APPEALFROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :-

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

LEE FOOK LUM

Appellant

- and -

THE PUBLIC PROSECUTOR

RespondentCASE FOR THE APPELLANTRecord

- 10 1. This is an Appeal in forma pauperis by special leave granted on the 23rd May 1966 against an Order made on the 18th August 1965 by the Federal Court of Malaysia (Appellate Jurisdiction) (Lord Thompson L.P. Ong F.J., and Khan J.) whereby the Appellant's appeal against his conviction in the High Court of Malaya at Johore Bahru was dismissed. p.56, 57
p.55
- 20 2. The Appellant had been convicted by Azmi J., on the 14th January 1965, and sentenced to death upon a charge that between dawn on the 17th August 1964 and 9.10 a.m. on the 18th August 1964 in a security area he without lawful excuse, carried ammunition, to wit a hand grenade, without lawful authority, an offence punishable under Sub-Section (1) of Section 57 of the Internal Security Act, 1960. p.39
p.40
p.1, 2
- 30 3. By virtue of the Internal Security Act, 1960, Section 80, the consent of the Respondent was required before the High Court had jurisdiction to try, or to convict a person of the offence for which the Appellant was tried.
4. The Respondent (by his Deputy) gave consent in writing dated 8th November 1964 to prosecution of the Appellant for an offence under p.58

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Section 57 of the Internal Security Act, 1960,
 "committed on 18.8.64"

and, accordingly, the Appellant was liable to be tried (if at all) for an offence committed on the 18th August 1964, but not liable to be tried for an offence against Section 57 of the Internal Security Act, 1960, committed on any other day.

p.58, 59

5. Upon the 8th November 1964, the Deputy Public Prosecutor having conduct of the proceedings against the Appellant certified in writing pursuant to Regulation 4 of the Emergency (Criminal Trials) Regulations 1964 that the case against the Appellant was proper to be tried under those Regulations, and, accordingly, the summary procedure whereby trial by Judge alone (without the normal committal proceedings) came into operation, the case becoming an "emergency procedure case." 10

6. According to Regulation 5 (2) of those procedural regulations, 20

"The Public Prosecutor may, in any emergency procedure case, at any time before trial, alter or amend the charge or charges against the accused or prefer an additional charge or additional charges against him."

p.58
p.59, l.14

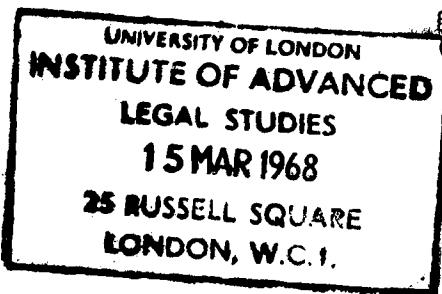
7. Annexed to the Deputy Public Prosecutor's Certificate was an "amendment charge" alleging that the Appellant was found carrying a handgrenade. 30

p.58, l.15, 16

... "Between 17th August 1964 and 9.10 a.m.
 18th August 1964..."

p.58

8. The consent required by Section 80 of the Internal Security Act, 1960, - which was a substantial rather than a procedural requirement - did not authorise the trying of the Appellant for an offence committed before the 18th August 1964, and the permissive procedural power to amend given by Regulation 5 (2) of the Emergency (Criminal Trials) Regulations 1964 was inapt to 40



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supercede or dispense with the statutory requirement for consent to a prosecution under Section 57 of the Internal Security Act, 1960.

9. When it came to the trial of the Appellant on the 2nd January 1965, there was yet a third formulation of the charge, which by then alleged an offence committed

"...between dawn on the 17th August 1964 and 9.10 a.m. 18th August 1964..."

p.1 l.23,24

10 but there was still no consent by the Respondent to the trial of the Appellant in respect of anything alleged to have been done on the 17th August 1964.

9a. By Section 57 of the Internal Security Act, 1960, it is in the absence of excuse or authority a capital offence to be in possession of a hand-grenade in a security area. There was no evidence of the publication of the proclamation (which by Section 47 of the Internal Security Act, 1960,

20 would suffice to make its terms have effect) otherwise than in the Gazette dated 17th August 1964. Presumably the Gazette is published after dawn. Until publication, there is no security area and the offence of being in possession of a handgrenade within a security area cannot be committed.

p.34 l.1

10. It appears from the evidence of Police Inspector J'afar that His Majesty proclaimed a security area in consequence of the landing of Indonesian infiltrators in the early hours of the 17th August 1964, and, accordingly, at the time of the landing and until somewhat thereafter, the area was not a security area and an offence under Section 57 of the Internal Security Act, 1964, was incapable of commission.

p.12
p.12 l.22

11. Moreover His Majesty's declaration or proclamation was stated to be with effect from the date of notification, and it was notified in the Gazette dated 17th August 1964. The area which on the 18th August 1964 became a security area was, therefore, not a security area on the 17th August, 1964, and certainly not at dawn on the 17th August, when His Majesty

p.34 l.5
p.34 l.1

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had not made his proclamation nor had it been notified.

12. Accordingly, the Appellant :

- (a) could not on the 17th August 1964 commit and
- (b) could not lawfully be tried for the commission on any date other than the 18th August 1964 (for which date alone the requisite consent had been given) of an offence against Section 57 of the Internal Security Act, 1960 yet he was convicted of such an offence, charged as having been committed between dawn on the 17th and 9.10 a.m. on the 18th August 1964, after Prosecuting Counsel had submitted to the learned trial Judge that the Appellant

"never had the intention to surrender at the time when he landed"

p.27 l.39
p.61 l.23
p.12 l.19 (which was "at daybreak" on the 16th August or "near dawn break" on the 17th August, or "during the early hours") and added

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"You will remember that the charge is possession from about dawn until time of surrender to the Malays."

13. The Court of Appeal was principally concerned with whether or not the Appellant had "lawful excuse" for possessing the handgrenade which the trial Judge found him in fact to have had. It was accepted on behalf of the Respondent that the Appellant intended to surrender, and the question was whether such an intention was or might constitute a defence in view of the terms of Section 57 which provides :

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"1. Any person who without lawful excuse the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control:

(a)....

(b) any ammunition or explosive without

p.35 l.36
p.25 l.30

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lawful authority therefor, shall be guilty of an offence...

2...

3. A person shall be deemed to have lawful excuse for the purposes of this section only if he proves:

(a) that he acquired such fire-arm ammunition or explosive in a lawful manner and for a lawful purpose: and

10 (b) that he has not at any time while carrying or having in his possession or under his control such fire-arms, ammunition or explosive acted in a manner prejudicial to public security or the maintenance of public order.

14. Prosecuting Counsel, having accepted that the Appellant intended to surrender "from about 8 a.m." (- though there was no evidence to fix the intent at that particular time, and it was proved that the intent existed earlier) made his submission that the Appellant had no intention to surrender at the time he landed. The only way in which, upon the evidence, the learned Judge could have found in favour of that submission was by rejecting the Appellant's evidence, a course which it was presumably open to the trial Judge to take but which he did not in fact take. He rejected the Appellant's evidence of why he intended to surrender, but did not reject his evidence that he did so intend.

p.25 1.30

p.25 1.31

30 15. The uncontradicted evidence, given orally by the Appellant and contained in a statement made by him under caution and put in evidence by the prosecution was that from about May 1964 until shortly before his return to Malaya on the 17th August 1964 he had been upon an Indonesian Island in a military training camp, under armed guard. The Appellant's uncontradicted evidence was :-

p.27-32
p.61
p.60 1.30
p.18 1.12

40 "Whilst on the Island...I wished to return to Malaya. I thought of attempting to

p.27 1.30-35

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escape but I had no opportunity because of the guards...

p.28 l.7-14

I was happy that on arrival at Pontian I could inform the authorities here of the landing. I tried to make an attempt. On arrival I threw away my things and ran into the jungle. I threw away my rifle ammunition and 3 handgrenades. I ran looking for a Police Station. I ran here and there but could not find a Police Station." 10

p.28 l.14-38

The Appellant said that after running away he again met some of the party with which he had landed, from whom he later ran away whilst they were sleeping and, with the intention of surrendering, came to a clearing where there was a mosque. There were three Malays there, and he asked them to take him to the Police in order to surrender. In cross-examination he said

p.32 l.10

"I did not surrender because I was afraid of the shooting. I decided to surrender that night and next morning I went and met the 3 Malays. 20

p.32 l.13

Q. You had no intention of surrendering on landing?

A. It was all the same. I had same purpose to surrender."

p.32 l.22

and in re-examination he said

"I first formed the intention to surrender when I was on the Island. I had no choice. I wanted to inform the Government." 30

16. There was evidence from prosecution witnesses that, when he sought out the Malays on the morning of the 18th August 1964, the Appellant intended to surrender. Marjunid said that the

p.7 l.3
p.7 l.37

Appellant, who was alone, went up to him and asked where the Police Station was, that he wanted to go there; Marjunid thought the Appellant, who spoke in a "gentle way" wanted to surrender. It was plain from Marjunid's evidence and the

p.8 l.5/P.7 L5
P.9-12

evidence of Mohamed Noh that the Appellant of his own volition went peaceably to seek out Marjunid 40

p.7 l.1

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and his brother, who was with him, with the already-formed intention of surrendering, and accompanied him to the Police Station in order to surrender. Marjunid's brother, Mardikut, whose statement was in the possession of prosecuting Counsel, was not called to give any different version of how the Appellant came to go to the Police to surrender from that given by Marjunid himself.

- 10 17. Accordingly, there was evidence before the learned trial Judge that, to use the Judge's own words, "the accused had intended all along to surrender with the handgrenade." There was no evidence to the contrary. Whilst it was open to the trial Judge to reject the evidence of the Appellant - or of any witness - relating to the question of surrender, he did not do so. He disbelieved some parts of the evidence both of the Respondent's witness Mohamed Noh and of
 20 the Appellant, but, in so far as he expressed his view of the Appellant's evidence upon the question of his intention to surrender, he accepted it. Thus he said of it

"...for the purpose of his case I would say, too, that I accept his story that he met 3 Malays and he decided to surrender..not perhaps with the high motive he gave that he wanted to give information... In any case, for the purpose of this trial, I am going to say that he wished to surrender himself and that is why he went to the Malays to ask them to take him to the Police Station."

- 30 18. It is submitted that "for the purpose of this trial" can only mean "at any point of time capable of being covered by the charge."

19. Beyond question, the learned trial Judge found that the Appellant wanted to surrender before he met the three Malays. That meeting
 40 was at 8.a.m. on the 18th August 1964.

20. If the learned trial Judge did find as a fact at what precise point of time the Appellant formed the intention to surrender, he did not address his mind to whether, immediately before

p.39 1.33

p.35 1.1
P.36 1.42

p.36 1.35

p.6 1.33
p.9 1.13
p.12 1.26

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that point of time, the area in which the Appellant possessed a handgrenade was a security area.

p.37 l.26
p.54 l.22-28

21. He omitted to do so because he thought (wrongly, as the Federal Court held) that lawful excuse could be constituted only by acquisition of the handgrenade in a lawful manner and for a lawful purpose as illustrated by the Court of Appeal in Wong Pooh Yin -v- The Public Prosecutor (1954) M.L.J. at page 31. 10

22. The Federal Court quoted the learned Judge's words "For this reason I would now say the fact that the accused had intended all along to surrender with the handgrenade is no longer lawful excuse for the purpose of Section 57 (3)" and went on :-

p.54 l.22

"With great respect, in our view that statement goes too far. If there had been material on which to find that he had intended all along to surrender then of course 20 that material would have had to be considered and if it had not been considered there would be a fatal flaw in the preceedings."

p.54 l.28

That was precisely this case. The Federal Court, however, instead of quashing the conviction and sentence because of the fatal flaw which existed, upheld the conviction because, they said:

"...such material as there was was considered and the Judge's finding of fact 30 was not that he had intended all along to surrender: his finding of fact was that the Appellant's intention to surrender had only come into existence when he met the 3 Malays."

23. The Court of Appeal formed an entirely erroneous view of the facts found by the learned trial Judge. They said when dealing with the question of the intention to surrender as an ingredient of "lawful excuse." 40

p.53 l.25

"In the present case the trier of fact, who

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was the trial Judge, did apply his mind to the facts in this connection, and what he found was that although at the time of his arrest the Appellant had the intention to surrender that intention only came into existence at a point of time subsequent to his landing in this country. What the trial Judge said was this:-

10 'As to the story about his being kidnapped or abducted - I think he is lying there. He must have known the purpose of the picnic and that he was to go to Indonesia.'

Then having found that for the purpose of his case he went on :-

'I would say, too, that I accept his story that he met 3 Malays and he decided to surrender -'

20 Now these are findings of fact which this Court must accept, and if they be accepted then it follows that immediately prior to that moment when he met the 3 Malays there was no question of any intention to surrender on his part and so there was no material whatsoever which would have afforded a foundation for accepting that he had made out what he was bound to make out if his defence was to succeed that he had acquired the handgrenades in a lawful manner and for a lawful purpose."

30 24. The Federal Court plainly misunderstood the Judge's finding of time sequence (which was that the intention to surrender preceded the meeting of the three Malays). They failed to appreciate that, although the Judge disbelieved the Appellant when he said he had not intentionally gone to Indonesia, he did not make any finding against the Appellant that, when he landed in Malaya on the 17th August 1964, he had not already formed the intention of surrendering; the Judge found such an intention "for the purpose of this trial." There was no finding that at any time on the 18th August 1964 or, indeed, on the preceding day, the Appellant was ever

p.37 1.6

p.38 1.40

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p.38 l.40

possessed of a handgrenade at a time when he did not intend to surrender. The Judge found that the Appellant

"would have been entitled to an acquittal on the ground that from the dawn of the day he met the three Malays and went to the Police Station he had intended to surrender, and did surrender to the Police with the handgrenade."

p.39 l.37
p.39 l.34

but he convicted because he thought that intention to surrender was not, in law a factor to consider.

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25. The remainder of the Appellant's case is concerned with the effect of the Geneva Conventions and the Geneva Conventions Act, 1962 which came into force upon the 16th April 1962, by notification in the Gazette, by the Minister, in accordance with Section 1 of the Act, and which is an Act to enable effect to be given to the Geneva Conventions which are set out in the Schedules to the Act, and which thus form part of the domestic law of Malaysia.

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26. At the times material to this Appeal a state of affairs known as Konfrontasi existed between Indonesia and Malaysia, and there was an armed conflict between them, of which judicial notice is taken in the Courts. Indonesian armed forces were sent from Indonesia to Malaya on belligerent errands, both by sea and by air.

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p.61 p.27

27. The Appellant, as appears from his statement under caution and his evidence, was given military training in Indonesia, at a military camp. With a party of armed Chinese and Indonesians who, left Indonesia by ship, with arms and in uniform, he was landed as part of the Indonesian armed forces engaged in belligerence against Malaysia. The handgrenade and detonators which came into the hands of the Malaysian forces were of Indonesian manufacture, and supplied by the Indonesian military.

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p.4 l.5

p.13 l.17

28. Since there was an armed conflict between

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Indonesia and Malaysia, and the Appellant was a member of the armed forces of a party to that conflict within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act, 1962, by Article 5, the said Convention applied to him.

29. Should there have been any doubt whether (after he had been taken prisoner upon his surrender) the Appellant were a person to whom the said Article 4 applied, he was by Article 5 entitled to enjoy the protection of the said Convention until his status had been determined by a competent tribunal. No such determination took place in the case of the Appellant.

30. Accordingly, the Appellant was entitled to the status of a prisoner of war, and to the protection of the said convention.

31. Other prisoners of war falling into Malaysian hands who had done acts which in the Appellant's case were said to be contrary to Section 57 of the Internal Security Act 1960, were accorded rights as protected prisoners of war, and were not prosecuted. The purported prosecution of the Appellant was a breach of Article 16 of the said convention, and was invalid.

32. No notice in accordance with Section 4 of the Geneva Conventions Act 1962 was served in respect of the Appellant and, accordingly, the High Court lacked power to proceed with the trial of the Appellant, and the conviction of and sentence upon him were invalid and of no legal effect.

33. Assuming without admitting that the Geneva Conventions Act, 1962 or the said Convention, were inapplicable in the case of persons owing allegiance to His Majesty, it is submitted that proof of allegiance would have to be tendered and accepted before the Court could convict the traitor.

34. There was evidence that the Appellant was born at Trong in Perak that he "came from" Taiping and that he had lived in Perak, but no

p.23, l.3,
p.9, l.4.
p.10, l.10
p.9, l.19
p.16, l.24.

evidence of his nationality was given. Mohemed Noh, who spoke Malay and lived at Pontian, in Johore, said of the Appellant that the Appellant was "of a different nationality," and the Appellant is, racially, Chinese, and his tongue is Cantonese.

35. In the case of Lee Hoo Boon v. The Public Prosecutor Ong F.J., delivering the Judgment of the Federal Court, observed that, in the case of a person who is not a "Malay" as defined by statute in 1952, birth within the state (Johore in that case) did not per se clothe the person with the status of a national, and that there was no presumption of fact when the onus of proving it was on the prosecution. Similar considerations, it is submitted, apply to the Appellant, who was not a national of Perak merely by reason of having been born there - Perak Nationality Enactment, 1952. 10

36. The Appellant submits that the Order of the High Court was wrongly made, and was of no legal effect and that the Judgment of the Federal Court was erroneous and this Appeal should be allowed and that the conviction and sentence upon the Appellant should be set aside and quashed for the following amongst other 20

R E A S O N S

- (1) BECAUSE the Appellant was a prisoner of war.
- (2) BECAUSE the Appellant was not liable to trial by the High Court.
- (3) BECAUSE the Appellant was a member of the armed forces or militia of or volunteer corps forming part of the armed forces of a party to an armed conflict. 30
- (4) BECAUSE the Appellant's status was not determined by a competent tribunal.
- (5) BECAUSE no evidence was submitted at the opening of the trial that the notification referred to in Article 104 of the Geneva Convention had been given, and because no notice as provided in Section 4 of the Geneva Conventions Act, 1962, had been served. 40

- (6) BECAUSE the Geneva Convention is a complete code allowing no exception in the case of persons owing allegiance to the detaining Power.
- (7) BECAUSE the Appellant's national status was not proved.
- (8) BECAUSE the burden was on the prosecution to prove the Appellant's national status.
- 10 (9) BECAUSE there was no finding concerning the Appellant's National status nor his allegiance.
- (10) BECAUSE some prisoners of war were, in circumstances like to those of the Appellant, not prosecuted.
- (11) BECAUSE it was not competent to try the Appellant for and not open to a Court to convict him of an offence alleged to have been committed by him before the 18th August 1964.
- 20 (12) BECAUSE the offence of which the Appellant was convicted was incapable of commission on the 17th August 1964.
- (13) BECAUSE the Appellant's defence that he had lawful excuse for carrying a handgrenade was not or not properly considered.
- (14) BECAUSE the trial Judge was wrong in holding that intent to surrender could be no defence and the Federal Court was wrong in holding that there was no evidence of such intent for the trial Judge to have considered.

KEITH McHALE.

No. 16 of 1966

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