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No. 36 of 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

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

B E T W E E N :

LEE A BA alias LEE CHEE HUA
Appellant

- and -

THE PUBLIC PROSECUTOR
Respondent

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C A S E FOR THE APPELLANT

Record

1. This is an Appeal by special leave from an Order of the Federal Court of Malaysia, (Appellate Jurisdiction) made on the 10th November 1965, whereby the Appellant's appeal against his conviction by the High Court of Johore Bahru was dismissed. The Appellant was sentenced to death.

p. 79.

p. 78 & 15.
p. 48 & 29.

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2. The Appeal raises two principal questions. The first is whether, the Appellant was rightly convicted of being in possession of ammunition contrary to Section 57(1)(b) of the Internal Security Act, 1960, when the case against him (which the learned trial Judge, Gill, J., found to have been proved) was that he had been in possession of two hand grenade detonators. Detonators are not "ammunition" within the meaning of Section 2 of the Internal Security Act, 1960 which defines the term thus :-

p. 48 & 28.

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"Ammunition means ammunition for any firearm as hereafter defined and includes grenades bombs and other missiles whether capable of use with such a firearm or not, and any ammunition designed and adapted to contain any noxious gas or other thing."

"Firearms" is defined by the said Act to include all types of barrelled lethal weapons. Thus the essential feature of ammunition is that it is a missile, the harmful thing thrown at an enemy by hand (such as a mills bomb) by a firearm in the normal sense (such as a bullet or mortar bomb) or by a fire-arm in the extended sense (such as a blow pipe dart) but it does not include a mere ancillary part of such a missile. A detonator is not the harmful thing thrown at an enemy although it may be a component of such a thing. The concept of the missile is distinct from the concept of explosive. Guncotton and similar explosives which are used in missiles are not of themselves missiles. On the other hand, detonators, which readily explode, (and, indeed, are intended by exploding in turn to explode the larger charge which is intended to do damage) are specifically named in Section 2 of the said Act as being within the meaning of the word "explosive". Detonators are explosives, but they are not ammunition, and the Appellant was not guilty as charged.

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3. The second principal question raised by this Appeal is whether the Appellant (who in common with numerous other uniformed men of their armed services had been dispatched by the Indonesian authorities for belligerence against Malaysia in furtherance of the armed conflict then existing between Indonesia and Malaysia) was and was entitled to the privileges of a prisoner of war. This question raises for consideration the effect and application of the Geneva Convention Act, 1962, a statute whereunder the Geneva Convention relative to the treatment of prisoners of war was incorporated into the domestic law of Malaysia. Upon this question there have been conflicting decisions in the Federal Court.

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		<u>Record</u>
	4. According to an extra-judicial statement put in evidence at the trial by the prosecution the Appellant, a Hokkien - speaking Chinese, said that he was born in Johore in April 1945 and was a Malayan citizen. In May 1964 he was taken by motor boat across the sea to an apparently Indonesian Island, where he was fed and housed, and about a month later he was	P 87. P 13 P 10. P 4 P 38. P 87 P 23. P 87 P 35 P 88 P 12 P 88 P 11. P 88 P 15. P 88 P 16. P 88 P 19.
10	taken by ship to Djakarta. From Djakarta he was taken by an Indonesian soldier to a military camp, where he underwent training in the Armed Forces of the Republic of Indonesia. Then, at another place in Indonesia, he received further military training in the handling of firearms. In January 1965 he received orders to go to Malaysia, and set off with five Indonesians, but bad weather prevented them from reaching Malaysia. In February 1965 the Appellant was	P 88 P 24 P 88 P 30. P 88 P 31. P 88 P 34. P 88 P 36. P 88 P 45. P 89 P 12. P 89 P 18. P 89 P 15.
20	furnished, plainly by the Indonesian military, with a sten gun and ammunition and a handgrenade and went with four or five fully armed Indonesians under the command of an Indonesian Sergeant, to Malaya, landing in Johore. All wore military uniform. Some days after landing the Appellant's group met another group of armed Indonesians, but they separated when there was an outburst of firing, apparently by the Malaysian security forces.	
30	On the 8th March 1965, having been in the jungle for some days, sometimes eating roots and leaves, the Appellant's group arrived at the edge of the jungle where there were four or five Chinese at a hut. The Appellant divested himself of his gun, magazines, ammunition and handgrenade, and went, still in uniform but without arms, to the hut whilst the Indonesians waited at the edge of the jungle. Later the Indonesians also went to the hut, taking the	P 89 P 28. P 89 P 26. P 89 P 22. P 89 P 33.
40	arms and ammunition with them, and all were fed. At the request of the Chinese occupants of the hut, the arms and ammunition were taken out of the hut by the Indonesians and, apparently, buried.	P 89 P 38. P 18 P 29.
	5. The Appellant was taken prisoner on the	

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p 18 112.

10th March 1965 by a body of troops of the Malaysian security forces under the command of a Major Lane, together with Sujatino Bin Kartesentomo and Tarmudji Bin Djvrami, who were Indonesians. They said they belonged to the police in Indonesia, but they had landed in Malaysia with other Indonesians, apparently of the military, all of whom were armed. Three other Indonesians apparently escaped when Major Lane's troops arrived. The Indonesians who were captured by the Malaysian authorities were treated as prisoners of war.

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p 35 124.
p 37 12.p 37 117.
p 27 134.

p 18 16.

6. The Appellant having been captured by Major Lane on the 10th March, was, according to Senior Inspector Samy, told he would be charged with the offences of possession of firearms and ammunition and consorting with Indonesians, and he thereafter made a statement. The Appellant was later taken before a Court at Kota Tinggi on three charges.

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p 10 116.

(i) possession of machine gun and revolver on the 8th March 1965 (i.e. two days before his capture)

(ii) possession of 115 rounds 9 mm and two hand grenades and

(iii) consorting with armed Indonesians.

p 81 G.A.

7. On the 14th April 1965 the Respondent's deputy gave his written consent to the prosecution of the Appellant

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"accused of two offences under Sections 57 (i) (b) and 58 (i) of the Internal Security Act, 1960 committed at about 8.00 p.m. on 10th March 1965 at Federal Land Development Authority, Pasak, in the District of Kota Tinggi."

p 82, 82, G.B.

and on the same date the Respondent's Deputy preferred charges against the Appellant that on the specific date and at the specific time mentioned in the consent he had

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(i) in his possession ammunition to wit two hand grenade detonators and

(ii) consorted with members of Indonesian Armed Forces who carried firearms ammunitions and grenades...

8. The charges against the Appellant of possessing fire arms and ammunition in the sense of guns, rounds, and handgrenades - on the 8th March or any date - were not proceeded with but a new formulation charged the Appellant with possessing ammunition to wit detonators at 8 p.m. on the 10th March 1965 - that is, shortly before he was captured at about 10.30 p.m. on that day.

p 49 & 118.

p 18 & 116.

9. The prosecution having elected not to rely upon any allegation that the Appellant possessed guns and rounds of ammunition, called four witnesses to give evidence of events before the arrival of security forces. P.W. 9 Chong said that on the 10th March the Appellant retained two articles when the bulk of the Indonesian equipment was taken away and put them in a box, and that the articles were found by Inspector Tan. P.W. 10 Keong said the Appellant brought "clips of a handgrenade" to the hut on the 9th March 1965. Tarmudji and Sujatino the two Indonesian prisoners of war gave no evidence which supported the charge and the other occupants of the hut, who were not asked any material questions by Prosecuting Counsel, gave no evidence which carried the case against the Appellant any further.

p 26 & 29.

p 26 & 42.

p 33 & 12.

p 35

p 37-38, 43.

p 39 & 11.

p 40 & 28.

p 42 & 20.

10. At the close of the prosecution case there was thus evidence that two articles had been in the Appellant's hands on the 10th March 1965, and evidence that he had taken "hand grenade clips" to the hut on the 9th March 1965. Assuming that the articles which Chong saw put into a box on the 10th March were the detonators which Inspector Tan found in a box on the 10th March 1965, there was evidence for the learned

p 26 & 42.

p 33 & 12.

p 22 & 3.

Record

trial Judge to consider whether the two articles were detonators and whether the Appellant was in possession of them on the 10th March 1965.

p44 r9.

p45 r3.
p44 r33
p45 r1.

p45 r13.

11. The Respondent's case was not put in that way. After Defending Counsel had submitted that detonators are not ammunition, Prosecuting Counsel submitted that they were; he said the facts were quite clear on the evidence, suggested that the charges should be yet again amended to substitute 9th March 1965 for 10th March 1965 (a date for which no consent was given) and then argued that the Appellant and the Indonesians bore arms. If that fact were clear, it was immaterial to whether or not the Appellant was in possession of detonators; any evidence there was about possessing detonators related not to the 9th March, the date of the newest charge, but to the 10th March - a date which Counsel decided not to rely upon.

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p45 r22.
p49 r18
p59 r17.

12. The trial Judge amended the charges in accordance with Counsel's suggestion and convicted the Appellant on both charges.

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p45 r3.

p48 r10.

13. Thus the Respondent eschewed the opportunity which events afforded to him of either giving his consent to a charge relating to the 9th March 1965 or of charging possession of explosives which detonators are rather than ammunition which they are not; he submitted that detonators are ammunition and that the Appellant was in possession of detonators on the 9th March 1965.

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p25 r11.
p25 r24.

14. The Appellant's case in respect of the second question for determination upon this Appeal depends upon the fact plainly emerging from the prosecution evidence that he was a member of the party of armed Indonesians (with whom he was convicted of consorting) and who had been sent by the Indonesian authorities, in uniform, to Malaysia for belligerence.

15. The armed conflict then existing between Indonesia and Malaysia is a matter of which

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judicial notice is taken.

10 16. In a Judgment dated 12th July 1966 in the cases of Ooi Hee Koi -v- The Public Prosecutor and Ooi Wan Yui -v- The Public Prosecutor, the Federal Court, declining to follow earlier authority to the contrary, quashed Appellants' convictions, upholding their claim to be treated as prisoners of war. It is submitted that the Federal Court was correct in upholding those claims. The Federal Court also held that birth in Perak did not, as a matter of law, per se clothe a person with the status of a national of that state, and that a prisoner's national status must be affirmatively proved before it could be held that a prisoner were disentitled to the protection and privileges of the said convention as being a traitor. Similar considerations apply to a person born in Johore. There was no admissible evidence of the Appellant's nationality or citizenship, and no finding of fact relating to his personal status. The question was not canvassed.

20 17. In any event the Appellant was, (if his status were contrary to his submission material to his entitlement to the privilege of protection) not lawfully to be denied privilege and protection until, in accordance with Article 5 of the said Convention, his status had been determined by a competent tribunal. No such determination took place.

30 18. Moreover it is submitted that the applicability of the said Convention, which is a complete code, is unaffected by suggestions of personal status and allegiance, and that a person who is a member of the armed forces or auxiliaries of a party to an armed conflict falling into the hands of the other party is entitled to the protection and privilege conferred by the Convention regardless of status and allegiance, and that by Article 16 of the said Convention all prisoners of war are to be treated alike.

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Record

19. The Appellant submits that the Judgment of the Federal Court of Malaysia (Appellate Jurisdiction) was erroneous and that the conviction of and sentence upon the Appellant should be quashed for the following amongst other

R E A S O N S

- (1) BECAUSE detonators are not ammunition.
- (2) BECAUSE it was not proved that the Appellant was in possession of ammunition on the 9th March 1965. 10
- (3) BECAUSE the Respondent's consent to prosecution of the Appellant for an offence committed on the 9th March 1965 was not given.
- (4) BECAUSE the Appellant is a prisoner of war.
- (5) BECAUSE Indonesians were accorded the privileges and protection to be afforded to prisoners of war. 20
- (6) BECAUSE the Appellant's status was not determined.
- (7) BECAUSE the Appellant was a member or auxiliary of the Indonesian armed forces and was captured when engaged in belligerence pursuant to an armed conflict.
- (8) BECAUSE the Appellant was not liable to trial by the High Court.
- (9) BECAUSE no notice in accordance with Section 4 (i) of the Geneva Conventions Act 1962 were served. 30

KEITH McHALE.

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