

1967/21
[11]

Appeal No. 36 of 1966

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 A BA alias LEE CHEE HUA

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 F O R T H E R E S P O N D E N T

RECORD

1. This is an Appeal by Special Leave from a Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Thomson, Lord President, Federal Court, Malaysia; Ong Hock Thye, Ag. Chief Justice, High Court, Malaya; Suffian, Judge, High Court, Malaya,) dated the 10th day of November 1965 whereby the said Federal Court dismissed the Appellant's appeal against his conviction by the High Court in Malaya at Johore Bahru In the State of Johore (S.S. Gill, Judge High Court, Malaya) on the 5th day of October 1965 upon a charge of having in his possession in a security area without lawful excuse ammunition to wit, two handgrenade detonators without lawful authority contrary to section 57(1)(b) of the Internal Security Act No. 18 of 1960.

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2. The sole issues raised in this Appeal are as follows:-

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(a) whether the 2 handgrenade detonators which, it was the prosecution case, were found in the Appellant's possession, came within the definition of "ammunition" in section 2 of the Internal Security Act No. 18 of 1960.

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(b) whether there was evidence upon which the learned trial Judge could find that the said 2 detonators came within the said statutory definition.

(c) whether the Appellant's conviction on the charge as framed occasioned any failure of justice, it being clear, in the Respondent's submission, that the said detonators, whether or not they were "ammunition" were "explosives" within the meaning of the Act, the possession of which was equally an offence under section 57(1)(b).

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3. The Appellant was convicted by the said High Court in Malaya on the 5th day of October 1965 and sentenced to death on each of the following 2 charges:-

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"1st Charge

That you on 9th March, 1965 at about 8.00 p.m. in a Security Area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely at Federal Land Development Authority Pasak, in the District of Kota Tinggi, in the State of Johore, without lawful excuse had in your possession ammunition to wit, two handgrenade detonators without lawful authority and that you have thereby committed an offence punishable under Section 57(1)(b) of the Internal Security Act No. 18 of 1960."

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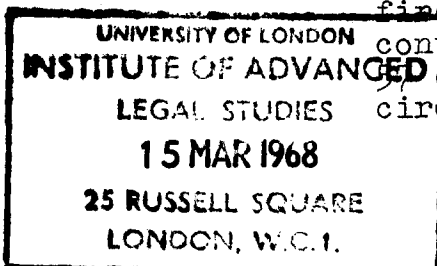
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"2nd Charge

That you on 9th March, 1965 at about 8.00 p.m. in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely at Federal Land Development Authority Pasak, in the District of Kota Tinggi, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms, ammunitions and grenades in contravention of the provisions of Section 57 of the Internal Security Act 1960 in circumstances which raised a reasonable

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presumption that you intended to act with members of the 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 said Act."

10 4. The Appellant appealed against his conviction on the 2 charges to the said Federal Court of Malaysia which on the 10th day of November 1965 dismissed his appeal in toto and affirmed each conviction. p.76

20 5. On the 11th day of July 1966 the Appellant was given Special Leave to Appeal in forma pauperis to H. M. the Yang di-Pertuan Agong from the said Judgment and Order of the Federal Court of Malaysia dated the 10th day of November 1965 in relation to the conviction on the first charge, but that leave to appeal ought not to be granted to him in relation to the other grounds mentioned in the petition. p.79

6. The following statutory provisions are relevant to this Appeal.

Internal Security Act 1960

2. In this Act, unless the context otherwise requires -

30 "ammunition" means ammunition for any fire-arm as hereafter defined and includes grenades, bombs and other like missiles whether capable of use with such a fire-arm or not and any ammunition containing or designed or adapted to contain any noxious liquid, gas or other thing;

"explosive" -

40 (a) means gunpowder, nitro-glycerine, dynamite, guncotton, blasting powder, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those above mentioned or not, used or manufactured with

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a view to produce a practical effect by explosion or a pyrotechnic effect; and

- (b) includes fog-signals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as above defined; and
- (c) includes any substance declared to be deemed an explosive by notification under section 4 of the Explosive Enactment of the Federated Malay States and 10
- (d) includes any material for making any explosive and any apparatus, machine, implement or material used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive, and any part of any such apparatus, machine or implement; 20

"fire-arm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing, and includes any component part of any such weapon as aforesaid; 30

57.(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) any fire-arm without lawful authority therefor; or 40
- (b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence against this Part and shall be punished with death.

Criminal Procedure Code

152. (i) Every charge under this Code shall state the offence with which the accused is charged.

10 (ii) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(iii) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

20 (iv) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

.....

153. (i) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

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156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

Illustrations

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(a) A is charged under Section 242 of the Penal Code with "having been

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in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit" the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defend himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material. 10

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error. 20

(d) A is charged with the murder of John Smith on the 6th June, 1910. In fact the murdered person's name was James Smith and the date of the murder was the 5th June, 1910. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of James Smith. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial. 30 40

(e) A was charged with murdering James Smith on the 5th June, 1910, and John Smith (who tried to arrest him for that murder) on the 6th June, 1910.

When charged for the murder of James Smith he was tried for the murder of John Smith. The witnesses present in his defence were witnesses in the case of James Smith. The Court may infer from this that A was misled and that the error was material.

10 166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

20 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account -

30 of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;
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unless such error, omission, . . . has occasioned a failure of justice.

40 7. The case for the prosecution was that on the 9th March 1965 at about 8 p.m. the Appellant arrived at a small kongsi house or hut in a land development area known as Pasak about 4½ miles away from Kota Tinggi town. The contractor who, together with 5 labourers, lived in the house, Chong Hian Shin (P.W.9), testified that the Appellant was dressed in khaki but was alone and unarmed. He introduced himself, asked for food and said that he was in the Indonesian army and had come to smash Malaysia. The witness described how the Appellant went away and returned

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p.21 with 4 Indonesians, 2 of whom were in military uniform. They were all carrying firearms, including this time the Appellant, who had a sten gun and also a pistol tied to his waist. The Appellant and his companions were given food and shelter for the night, but the next morning the witness went out and reported their presence to Inspector Loy (P.W.7) at Kota Tinggi police station. As a result a party of soldiers, accompanied by Inspector Loy, arrived at the house that night and arrested the Appellant and one of his companions. The other 3 Indonesians escaped. 10

p.28 8. Following the capture of the Appellant and his companion, the house was searched by Inspector Loy, who found in a wooden box placed on a sleeping wooden platform the Appellant's Identity Card, a small note book, some cash, 2 compasses and the 2 handgrenade detonators the subject of the charge. Chong Hian Shin (P.W.9) was present when the articles were found and testified that they were found on the bed of the Appellant at the area where his head rested. He himself had slept next to the Appellant the night before. He also said that he had seen the Appellant handling the 2 handgrenade detonators, wrapping them in oil paper. One of Chong's 20

p.33 labourers, Keon Tam (P.W.10), also testified that he had seen the Appellant handling 2 objects answering to the description of the detonators.

p.26 On the 11th March 1965 the police were taken by the Indonesian prisoner to the jungle edge about 300 yards from the kongsi house, where they recovered 4 rifles, a sten gun, a pistol, 7 handgrenades, 6 detonators, various rounds of ammunition and other equipment. It appeared from a statement of the Appellant, which was admitted in evidence as P27, and also from the evidence of Chong Hian Shin (P.W.9), that these things had been taken away and concealed by the 4 Indonesians some time after their arrival with the Appellant at the kongsi house. 30 40

p.16 9. The 2 handgrenade detonators were examined by Staff Sergeant Keane (P.W.4) whose evidence as to their nature and condition was as follows:-

"These two detonators were of the type used with the Indonesian handgrenades, and

they were serviceable. They were a copy of a British handgrenade known as 36 mm. handgrenade. The other six detonators were also of the same type and serviceable.

"I also examined the 7 handgrenades. They were separate from the detonators. On 31.5.65 I disposed of the handgrenades. I produce the disposal certificate (marked P.28). I knew that the detonators and grenades would be required to be produced in Court at some stage. I destroyed them because they were unsafe.

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Cross-Examined: A handgrenade does not explode without its detonator being attached. A detonator could explode by itself if hit on hard surface. There was need to destroy both the detonators and the handgrenades."

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10. At the conclusion of the case for the prosecution the defence submitted that there was no case to answer, arguing inter alia that the detonators the subject of the charge did not come within the definition of ammunition in section 2 of the Internal Security Act. The learned trial Judge on the evidence amended both charges by altering the date from "10th March 1965" (as originally laid) to "9th March 1965", held that there was a case to answer on both charges as amended and called on the Appellant for his defence. The Appellant called no evidence and did not testify or make any statement on his own behalf.

11. The learned trial Judge in his Grounds of Judgment dated the 5th October 1965 accepted the prosecution evidence as to the Appellant's possession of the 2 detonators, stating as follows:-

"I was satisfied that the accused had two handgrenade detonators in his possession when he arrived at the kongsi house on 9.3.65. I was further satisfied beyond reasonable doubt that those two detonators were found in a box on that part of the sleeping platform where the accused slept. They were found in a box which was lent to the accused by P.W.9, and what was more significant was the fact that they were

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found along with an identity card of the accused and the two compasses which, according to the evidence, were also in the accused's possession. Thus, even without taking into consideration the cautioned statement of the accused, I was satisfied that the prosecution had proved the first charge against the accused beyond any reasonable doubt. In my opinion a detonator comes within the definition of "ammunition" in Section 2 of the Internal Security Act, 1960."

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12. The Appellant appealed to the Federal Court of Malaysia, relying upon a number of grounds of appeal. No point however was taken in the Petition of Appeal or argued before the Federal Court that the handgrenade detonators the subject of the charge did not fall within the statutory definition of "ammunition".

13. The Respondent respectfully submits that, although the detonators the subject of the charge would clearly fall within the statutory definition of explosive, the trial Court was nevertheless still entitled to hold on the evidence before it that they fell also within the statutory definition of ammunition. These definitions, it is submitted, are not exclusive categories of specified things but broad and in some cases overlapping definitions which are to be applied upon the evidence in any particular case and having regard to the nature and object of the article or articles in question. In this case the learned trial Judge's finding that these handgrenade detonators were "ammunition" within the meaning of the section was a finding of fact arrived at upon the evidence before him. It is submitted that a handgrenade of the sort referred to in the evidence may be a "fire-arm" within the definition contained in section 2 of the Act, being a "weapon of whatever description designed or adapted for the discharge of" a "noxious.. thing" namely explosive, and that accordingly the explosive substances put in it (including an explosive detonator) fall within the definition of "ammunition" in the section. It is submitted that in any event there was evidence before the Court which would justify the conclusion that the detonators in question fell within the

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category of "grenades, bombs and other like missiles."

10 14. If, contrary to the Respondent's submission, the detonators could not properly have been held to fall within the statutory definition of "ammunition", it is submitted that they would clearly have come within the definition of "explosive" and so their possession would equally and inevitably have been an offence under section 57(1)(b) of the Act. If the description of the detonators in the charge as "ammunition" was erroneous, the Appellant was shown by the course of proceedings not to have been misled by the error, which was accordingly not material within the meaning of section 156 of the Criminal Procedure Code, and in the result such error has not occasioned any failure of justice.

20 15. The Respondent humbly submits that the said Judgment and Order of the Federal Court of Malaysia dated the 10th day of November 1965 should be affirmed and this Appeal dismissed for the following amongst other

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R E A S O N S

- 30 1. BECAUSE there was evidence upon which the trial Court could properly find that the detonators the subject of the charge come within the definition of "ammunition" contained in section 2 of the Internal Security Act 1960 and the learned trial Judge rightly so found.
2. BECAUSE if the description of the detonators in the charge as "ammunition" was erroneous, the error was not material and has not occasioned any failure of justice.
3. BECAUSE the Judgments of the Courts below were right for the reasons therein stated.

MONTAGUE SOLOMON

Appeal No. 36 of 1966

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THE PRIVY COUNCIL

ON APPEAL FROM
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(APPELLATE JURISDICTION)

B E T W E E N

LEE A BA alias LEE CHEE HUA

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

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