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[27]

1.

JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

No. 17 of 1967

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

BETWEEN :

THE PUBLIC PROSECUTOR FOR MALAYSIA
Appellant

- and -

OOI WAN YUI alias WONG KAM CHIN
Respondent

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

CASE FOR THE RESPONDENT

Record

1. This is an appeal by special leave of the Judicial Committee, given on 20th December 1966, from an Order of the Federal Court of Malaysia, dated 12th July 1966, which allowed an appeal by the Respondent from the Respondent's convictions and sentences of death passed by the High Court of Malaya at Muar in the State of Johore on 26th March 1966 upon three charges under the Internal Security Act 1960 (No.18 of 1960);.

P 72, f. 8.—
P 73, f. 45.

P 71, f. 1. —
P 72, f. 7.

P 39, ff 24-26.

2. The questions raised by this appeal are as follows:

(a) whether the Respondent was entitled to the protections afforded him by the Geneva Conventions Act 1962 (No.5 of 1962) as being a prisoner of war within the meaning of Article 4 of the Third Schedule thereto; (b) whether the onus of establishing the Respondent's allegiance to His Majesty the Yang di-Pertuan

30 Agong lay on the prosecution or on the defence; and (c) whether, even if the onus of establishing non-allegiance to His Majesty the Yang di-Pertuan Agong lay upon the Respondent, nevertheless the Respondent, being a member of the Indonesian

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Armed forces and having "fallen into the power of the enemy", was entitled to be regarded as a prisoner of war.

3. The relevant statutory provisions are as follows:

Geneva Conventions Act 1962

(a) Section 2 "In this Act, unless the context otherwise requires -
"protected prisoner of war" means a person protected by the convention set out in the Third Schedule;

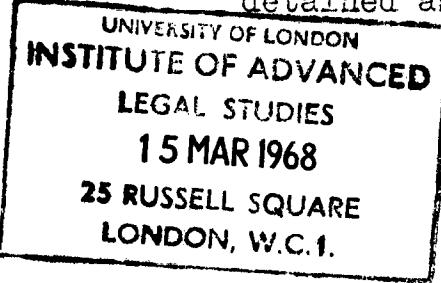
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"the protecting power", in relation to a protected prisoner of war...., means the power or organisation which is carrying out, in the interests of the power of which he is a national, or of whose forces he is, or was at any material time, a member, the duties assigned to protecting powers under the convention set out in the Third.... Schedule;"

(b) Section 4(1) "The court before which -

(a) a protected prisoner of war is brought up for trial for any offence....shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

(4) In this section the expression "prisoners' representative" in relation to a particular protected prisoner of war at a particular time means the person by whom the functions of prisoners' representative within the meaning of Article 79 of the convention set out in the Third Schedule were exercisable in relation to that prisoner at the camp or place at which the prisoner was, at or last before that time, detained as a protected prisoner of war



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Record(c) Third Schedule

(i) Article 2 "...the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them....

10 Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations..."

(ii) Article 4

"A. Prisoners of war, in the sense of the present convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

20 (1) Members of the armed forces of a Party to the conflict as well as members of the militias or volunteer corps forming part of such armed forces..."

(iii) Article 5

" The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation"

30 Should any doubt arise as to whether persons, having committed a belligerant act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal"

(iv) Article 7

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present convention..."

Record(v) Article 16

".... all prisoners of war shall be treated alike by the Detaining Power...."

(vi) Article 82

"A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power..."

(vii) Article 85

"Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, 10 the benefits of the present Convention."

(viii) Article 87

"Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts...."

(ix) Article 100

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"Prisoners of war and the Protecting Power shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power...."

(x) Article 104

"In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial...."

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(xi) Article 127

....

Any military or other authorities, who in

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time of war assumed responsibilities in respect of prisoners of war, must possess the text of the convention and be specially instructed as to its provisions "

4. The Respondent was tried on three charges as follows :

P 2.

1st Charge

That you between the 2nd day of September 1964 and the 7th day of September 1964, in a

- 10 Security area as proclaimed by the Yang di-Pertuan Agong, vide Federal L.N.245 17th August 1964, namely Tenang Kampong Labis, in the District of Segamat in the State of Johore, consorted with members of Indonesian Armed Forces who carried firearms and ammunitions in contravention of the provisions of section 57 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 1960.

2nd 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.No.245 of 17th August 1964, namely Tenang Kampong Labis, in the District of

- 30 Segamat, in the State of Johore, without lawful excuse had in your possession firearms, to wit, one sten gun No.MK2 FG 5174, without lawful authority and that you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act 1960.

3rd 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-

- 40 Pertuan Agong, vide Federal L.N.No.245 of 17th August 1964, namely Tenang Kampong Labis, in the District of Segamat, in the State of Johore,

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without lawful excuse had in your possession ammunition, to wit, 353 rounds of 9 m.m. ammunition, and two hand grenades without lawful authority and you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act 1960".

P.39.11.22 -26.

P.36, P.28- P.37.P5.

The Respondent was convicted and sentenced to death on each of the three charges (During the hearing the 2nd charge had been amended without objection by the defence by the deletion of the words "No.MK2FG5174 after the words "sten gun").

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5. The material facts relevant to the Respondent's case were as follows :

P.13. P.29-34.

P.14, P.10-15

P.15, P.21-26.

P.26, P.18-22

P.22, P.19-28.

(a) The Respondent was a member of an armed force of 48 Paratroopers under the command of Lieutenant Sutikno of the Indonesian Air Force, who in the early hours of September 2, 1964 were dropped by air from a Hercules plane belonging to the Indonesian Air Force over the Labis area of Johore.

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P.15, P.27-33

P.22, P.41-42

P.23, P.6-11.

(b) All the 48 members of the invasion force were in camouflage uniform of that Air Force, and each carried a firearm, ammunition, two hand-grenades, food rations and other military equipment. The force was divided into eight sections (each under a section commander) with Lieutenant Sutikno as overall commander.

P.33, P.25.

P.34, P.10.

P.78-84.

(c) The Respondent was not in possession of any identity card when captured. In a statement made under caution to a police officer shortly after being taken prisoner, the Respondent said that he was 29 years old, that he was born in the Lam Wua District of Fukien, China where he lived with his mother until he was 12 years old. In 1948 his father took his family to Trong in Malaya.

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(d) The Respondent's statement told how he left Malaya for Indonesia at the end of May 1964 where he underwent military training in the Indonesian Armed Forces preparatory to being parachuted together with other members of the Indonesian Armed Forces into Johore on 2nd September 1964.

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P-37/14-1-38-128

6. The Respondent at his trial elected to make a statement from the dock in which he told how he and some friends had been captured by an Indonesian boat crew, taken into detention for one week, and then subjected to military training from Indonesian soldiers. Although he had thought of escaping from the military camp he was prevented by the heavy guard of Indonesian sentries.

10 7. The learned trial judge in the High Court in Malaya at Muar in the State of Johore dealt with the Respondent's statement, and concluded:

P-46, PP 7-20

"In his cautioned statement the accused had stated in no uncertain terms the reason for his going to Indonesia and receiving military training there....There was no evidence whatsoever that the accused made any attempt to come out of the jungle in order to surrender to the Security Forces. The fact that he was not told what the destination was was irrelevant to the charge. He had placed himself in a situation in which he was obliged to carry out the orders of his superiors".

20 The learned trial judge found the Respondent guilty on all three charges, convicted him and sentenced him to death on each charge. At no time during the Respondent's trial was any point made about the applicability of the Geneva Conventions Act 1962.

P-46, PP 20-22.

30 8. The Respondent, by petition of appeal dated 2nd May 1966, appealed against his said convictions and sentences to the Federal Court of Malaysia upon, inter alia, the following ground:

PP-49-50.

40 "In any event the evidence adduced by the prosecution and the defence has the effect of giving your appellant the status of a protected prisoner of war within the meaning of the Geneva Conventions Act 1962 and ought to be treated as such".

P-50, PP 28-33.

9. The Respondent's appeal was heard by the Federal Court of Malaysia (Syed Sheh Barakbah C.J.

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Malaya, Ong Hock Thye F.J. and Ismail Khan J.) on 9th and 11th May 1966 together with a similar appeal of one Ooi Hee Koi and judgment was reserved until 12th July 1966. The principal judgment of the Court (with which Syed Shah Barakbah C.J., Malaya and Ismail Khan J. concurred) was delivered by Ong Hock Thye F.J. dealing with both appeals. The learned Federal Judge cited Article 4 of the Third Schedule to the Geneva Conventions Act 1962 and concluded:

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p. 62, 136 - p. 63, 12.

"The category includes members of volunteer corps forming part of the armed forces of a party to the conflict and the evidence for the prosecution leaves no room for doubt that the Appellants were in fact members of the Indonesian Armed Forces commanded by Lieutenant Sutikno whether volunteers or conscripts. That being the case, the appellants ought prima facie to be regarded as prisoners of war unless there were circumstances which disentitled them to treatment as such".

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The learned Federal Judge said of the Respondent:

p. 66, 1145.

"....as against uncontroverted evidence that he was born in China, there was not an iota of evidence to prove that he owed allegiance to His Majesty the Yang di-Pertuan Agong.... The onus clearly did not rest on him to prove that he was not a subject of His Majesty or that by reason of his past residence he was owing allegiance at the time he joined the Indonesian Armed Forces or during the period specified in the charges against him."

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p. 68 1129-38.

The learned Federal Judge was accordingly of the opinion that the prosecution had failed to prove that he was a person owing allegiance at the relevant time, and that the Respondent was entitled to be treated as a prisoner of war. Since none of the mandatory provisions of the Geneva Conventions Act 1962 had been complied with, the Respondent's appeal was allowed and the conviction and sentence quashed. And the Federal Court of Malaysia, on 12th July 1966,

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p. 70, 11 10-13.

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so ordered.

10. The Respondent respectfully submits that the Federal Court of Malaysia was right in allowing the Respondent's appeal for the following reasons:-

(a) The trial court had no jurisdiction to try the Respondent on the three charges under sections 57 and 58 of the Internal Security Act 1960 so long as the Respondent was entitled to the status of a protected prisoner of war. This is not to deny that, subject to the compliance with the requirements of the Geneva Conventions Act 1962, the Respondent might be put on trial for one or more of the offences with which he was charged. The provisions of the Internal Security Act 1960 must be read in conjunction with the procedural and other safeguards afforded to the prisoners of war as defined in the Geneva Conventions Act 1962.

(b) Article 85 of the Third Schedule to the Geneva Conventions Act 1962 confers the status of protected prisoner of war even for "acts committed prior to capture", thereby recognising that jurisdiction to try persons for offences committed during hostilities can only exist subject to compliance with the provisions of the Geneva Conventions Act 1962.

(c) The jurisdiction of the High Court of Malaya to try the Respondent depended on a prior examination of the Respondent's status. Since the status of protected prisoner of war did not confer any immunity of exemption from being prosecuted - Article 82 says specifically that "a prisoner shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power" (see also Articles 87 and 104) - it was not for the Respondent to adduce evidence that he was entitled to the protections of the Geneva Convention Act 1962 but a matter for the court to satisfy itself that it had complied with the requirements of jurisdiction over the Respondent.

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(d) The decision in the case of Joyce v. Director of Public Prosecutions /1946/A.C.347 was not strictly in point, since the issue of allegiance in that case referred to the commission of the offence of treason, and did not involve any question of the English court's jurisdiction to try the accused.

(e) All the evidence that was adduced before the trial court, relevant to the issue of the Respondent's status, clearly indicated that he was a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962, unless and until evidence was adduced by the prosecution to show otherwise.

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(f) Since there was, at best from the prosecution's point of view, some doubt about the Respondent's status, the status of protected prisoner of war was afforded to the Respondent until such status had finally been determined by a competent tribunal, which determination never took place (see Article 5 of the Third Schedule to the Geneva Conventions Act 1962)

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(g) Once it had been shown to the trial court that the Respondent was a member of the Indonesian Armed Forces in armed conflict with Malaysia (see Article 2 of the Third Schedule to the Geneva Conventions Act 1962), there was sufficient evidence to bring Article 5 of the Third Schedule to the Geneva Conventions Act 1962 into play.

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(h) By joining the Indonesian Armed Forces, the Respondent owed allegiance to and/or became a national of the Republic of Indonesia, thereby ceasing to owe allegiance to His Majesty the Yang di-Pertuan Agong by virtue of section 132(6) of the Federation of Malaya Agreement 1948 (G.N.6. of 1948).

11. It is further submitted for the following reasons that, even if the Respondent was presumed to, or did, owe allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless by virtue of

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the provisions of the Geneva Conventions Act 1962 and the Third Schedule thereto the Respondent retained the status of protected prisoner of war and was entitled to the protections of that status:

- 10 (a) The customary international law rule, that the traitorous subjects of a belligerent who fight in the armed forces of the enemy are always treated as criminals and are not entitled to the status of protected prisoners of war if captured by the armed forces of their own country, is restricted to spies and non-uniformed plotters;

(b) Citizenship of the country of either party to an armed conflict does not affect the status of any person captured in the course of that conflict

20 (c) The 1949 Convention is a complete code of legal rules, both fundamental and detailed, for the protection of prisoners of war throughout the period of their captivity and is substitutive of customary international law. By including in Article 85 "acts committed prior to capture", the convention reverses the rule that prisoners of war accused of war crimes lost their status as prisoners of war: see Re Yamashita 327 U.S.1. (1946).

30 (d) Since the Respondent was serving in the Indonesian Armed Forces under compulsion - the learned trial judge concluded that "he had placed himself in a situation in which he was obliged to carry out the orders of his superiors" - he was a victim of events and not a criminal, which distinction is the basis of the prisoner of war convention.

12. The Respondent respectfully submits that this Appeal should be dismissed for the following, among other,

REASONS

1. BECAUSE the courts of Malaya had no jurisdiction to try the Respondent for

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offences committed in connection with the activities of hostilities between Malaysia and Indonesia.

2. BECAUSE the Respondent was a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962.
3. BECAUSE the courts in Malaya failed to comply with the requirements of the Geneva Conventions Act 1962. 10
4. BECAUSE the burden of establishing the power of the courts in Malaya to try the respondent remained on the Appellant.
5. BECAUSE the Appellant failed to satisfy the courts in Malaya that they had jurisdiction to try the Respondent without the benefit of the protections afforded by the Geneva Conventions Act 1962.
6. BECAUSE, even if the Appellant sufficiently discharged the burden of establishing that the Respondent owed allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless the Respondent remained a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act 1962. 20
7. BECAUSE, even if the Respondent had at some time owed allegiance to His Majesty the Yang di-Pertuan Agong, such allegiance and/or the Respondent's nationality of the Federation of Malaysia was lost on the Respondent joining the Indonesian Armed Forces. 30
8. BECAUSE the decision of the Federal Court of Malaysia in Lee Hoo Boon v. Public Prosecutor, Federal Court, Criminal Appeal No. X.11 of 1966, April 26, 1966, unreported, was wrong and ought to be reversed.

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9. BECAUSE the decision of the Federal Court
of Malaysia in the instant appeal was right
and ought to be affirmed.

E.F.N. GRATIAEN.

L.J. BLOM-COOPER.

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IN THE PRIVY COUNCIL No. 17 of 1967

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