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1967/21

[3]

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCILNo. 15 of 1967ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

B E T W E E N :

TEO BOON CHAI alias TEY AH SIN

Appellant

- and -

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED

LEGAL STUDIES THE PUBLIC PROSECUTOR

Respondent

15 MAR 1968

25 RUSSELL SQUARE  
LONDON, W.C.1.

CASE FOR THE APPELLANT

1. This is an appeal in forma pauperis by special leave of His Majesty the Head of Malaysia given on the 6th February 1967 upon a Report of the Judicial Committee dated the 9th November 1966 from the judgment and order of the Federal Court of Malaysia, dated 18th April 1966, dismissing the appeal by the Appellant from the Appellant's convictions and sentences of death passed by the High Court of Malaya at Muar in the State of Johore on 6th March 1966, upon three charges under the Internal Security Act, No. 18 of 1960.

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

(a) whether the Appellant 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 Appellant's allegiance to His Majesty the Yang di-Pertuan 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 Appellant, nevertheless the Appellant, being a member of the Indonesian 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(1). "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; "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 force 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 prisoner's 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."

(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 .....

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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:

(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.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any one 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 .....

(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, 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

"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 ....."

(xi) Article 127

"..... Any military or other authorities, who in 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 Appellant was tried on three charges, as follows :-

1st CHARGE

That you between 2.00 a.m. on 2nd day of September, and 11.00 a.m. on 15th day of September, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide F.L.N. 245 dated the 17th August, 1964, namely at Kampong Tenang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse, had in your possession a firearm, to wit, Bren Gun Mk. 1 No. 418, without lawful authority, and that you have thereby committed an offence punishable under section 57 (1) (a) of the Internal Security Act, No. 18 of 1960.

2nd CHARGE

That you between 2.00 a.m. on 2nd day of September, and 11.00 a.m. on 15th day of September, 1964, in a

Security Area as proclaimed by the Yang di-Pertuan Agong vide F.L.N. 245 dated the 17th August, 1964, namely at Kampong Tenang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse, had in your possession ammunitions, to wit 200 rounds .303 inch ammunition 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.

3rd CHARGE

That you between 2.00 a.m. on 2nd day of September and 11.00 a.m. on 15th day of September, 1964, in a Security Area, as proclaimed by the Yang di-Pertuan Agong vide F.L.N. 245 dated 17th August, 1964, namely at Kampong Tenang, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms and ammunitions in contravention of the provisions of section 57 (1) 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 public security and that you have thereby committed an offence punishable under section 58 (1) of the Internal Security Act No. 18 of 1960.

5. At the commencement of the trial it was submitted on behalf of the Appellant that he was not a Malaysian citizen and that he should be treated as a prisoner of war under the Geneva Convention.

On this issue being raised on behalf of the Appellant no evidence was called by the prosecution that he was a citizen or national of Malaysia, but it was submitted on behalf of the prosecution that unless there was proof of his being a national of any country other than Malaya, he could not take advantage of any Conventional Treaty.

The learned trial Judge accepted the submission of the prosecution and said, "I rule that the court has jurisdiction to try the accused".

6. The material facts relevant to the Appellant's case were as follows :-

(a) The Appellant 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.

(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.

(c) When he was captured the Appellant was in possession of an identity card issued to him under the National Registration Act, 1959. At the time of capture he was wearing the uniform of the Indonesian Armed Forces.

(d) In a statement made under caution to a police officer shortly after being taken prisoner, the Appellant said that he was born at Kolam Ayer, Pontian, Johore.

7. At the conclusion of the trial, on the 6th of March 1966, the learned trial judge in the High Court of Malaya at Muar in the State of Johore, found the Appellant guilty on all three charges, and sentenced him to death on all three charges.

8. The Appellant by petition of appeal dated 14th April 1966 appealed against his said convictions and sentences to the Federal Court of Malaysia.

9. The Appellant's appeal was heard and dismissed by the Federal Court of Malaysia (Thomson, L.P., Ali Hassan and Raja Azlan Shah, JJ.) on 18th April 1966. Thomson, L.P. delivered an oral judgment, in which he held, inter alia, that

"..... if the Appellant wished to avail himself or seek to avail himself of the protection of the Geneva Conventions it was for him to adduce at least some evidence on which the trial Court would find that he was entitled to be considered a prisoner of war within the meaning of these Conventions. In this he failed and we would add that there was nothing in the evidence to rebut the presumption arising from the fact that he was born in Johore, which is clear both from his statement and from his Identity Card, that he was a national of Johore and certainly not an Indonesian national."

10. The Appellant respectfully submits that the Federal Court of Malaysia was wrong in dismissing the Appellant's appeal for the following reasons:-

(a) The trial court had no jurisdiction to try the Appellant on the three charges under sections 57 and 58 of the Internal Security Act, 1960, so long as the Appellant 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 Appellant 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 Convention 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 Appellant depended on a prior examination of the Appellant's status. Since the status of protected prisoner of war did not confer any immunity or 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 Appellant 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 Appellant.

(d) The decision in the case of Joyce v. Director of Public Prosecutions (1964) 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) The production in evidence of the Appellant's identity card issued under the National Registration Act, 1959, indicating his nationality as Malayan

did not prove the truth of the contents of the identity card; see Regulation 23 of the National Registration Regulations, 1960 (L.N. 151/66).

(f) All the evidence that was adduced before the trial court relevant to the issue of the Appellant'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.

(g) Since there was, at best from the prosecution's point of view, some doubt about the Appellant's status, the status of protected prisoner of war was afforded to the Appellant 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).

(h) Once it had been shown to the trial court that the Appellant 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.

(i) By joining the Indonesian Armed Forces the Appellant 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.

11. It is further submitted for the following reasons that even if the Appellant was presumed to or did owe allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless by virtue of the provisions of the Geneva Conventions Act, 1962, and the Third Schedule thereto the Appellant retained the status of protected prisoner of war and was entitled to the protections of that status:-

(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 cannot obtain the status of protected prisoners of war if captured by their own armed forces, is restricted to spies and other non-uniformed plotters.



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

(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, since in some vital respects it reverses the previous 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).

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

#### R E A S O N S

1. BECAUSE the courts of Malaya had no jurisdiction to try the Appellant for offences, committed in connection with the activities of hostilities between Malaysia and Indonesia.

2. BECAUSE the Appellant 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.

4. BECAUSE the burden of establishing the power of the courts in Malaya to try the Appellant remained on the Respondent.

5. BECAUSE the Respondent failed to satisfy the courts in Malaya that they had jurisdiction to try the Appellant without the benefit of the protections afforded by the Geneva Conventions Act, 1962.

6. BECAUSE even if the Respondent sufficiently discharged the burden of establishing that the Appellant owed allegiance to His Majesty the Yang di-Pertuan Agong, nevertheless the Appellant remained a protected prisoner of war within the meaning of Article 4 of the Third Schedule to the Geneva Conventions Act, 1962.

7. BECAUSE even if the Appellant had at some time owed allegiance to His Majesty the Yang di-Pertuan Agong such allegiance and/or the Appellant's nationality of the Federation of Malaysia was lost on the Appellant joining the Indonesian Armed Forces.

8. BECAUSE the decision of the Federal Court of Malaysia in Ooi Hee Koi and Ooi Wan Yui v. Public Prosecutor, Federal Court, Criminal Appeal Nos. X. 9 and 12 of 1965, July 12, 1966 unreported, was right and ought to be affirmed.

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

E.F.N. GRATIAEN. Q.C.

MARK CARLISLE

MARK FERNANDO

No. 15 of 1967

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