

Appeal No. 15 of 1967

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

TEO BOON CHAI alias
TEY AH SIN

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 FOR RESPONDENT

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1. This is an Appeal by Special Leave from the Judgment and Order of the Federal Court of Malaysia Holden at Kuala Lumpur (Appellate Jurisdiction) (Thomson, Lord President, Malaysia, Ali Hassan, Judge, High Court, Malaya, and Raja Azlan Shah, Judge, High Court, Malaya) dated the 18th day of April 1966 by which Judgment and Order the Appellant's appeal against his convictions and sentences by the High Court in Malaya at Muar in the State of Johore (S.S. Gill, J) on the 6th day of March 1966 upon 3 charges under the Internal Security Act 1960 (No. 18 of 1960) was dismissed and his said convictions and sentences were affirmed.
2. The Appellant was charged as follows:-
- 1st Charge
- "That you at about 1.40 p.m. on the 12th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964 namely Kampong Juasak Tenang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had under your control a firearm to wit, one sten gun No. F.H. 54648 without lawful authority
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and that you have thereby committed an offence punishable under Section 57 (1) (a) of the Internal Security Act, 18/60".

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2nd Charge

"That you at about 1.40 p.m. on the 12th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 245 of 17th August, 1964, namely Kampong Juasak, Tanang, Labis, in the District of Segamat, in the State of Johore, without lawful excuse had under your control ammunitions to wit, 225 rounds of 9 mm. ammunitions and two hand grenades Chinese Type without lawful authority and that you have thereby committed an offence punishable under Section 57 (1) (b) of the Internal Security Act, 18/60".

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3rd Charge

"That you between 2.00 a.m. on the 2nd day of September, 1964 and 1.40 p.m. on the 12th day of September, 1964, in a Security Area as proclaimed by the Yang Di-Pertuan Agong vide Federal L.N. 245 of 17th August, 1964 namely Kampong Juasak, Tenang Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forced who carried firearms and ammunition in contravention of the provisions of Section 57 (1) of the Internal Security Act, 18/60 in circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian Armed Forced in a manner prejudicial to Public Security and that you have thereby committed an offence punishable under Section 58 (1) of the same Act".

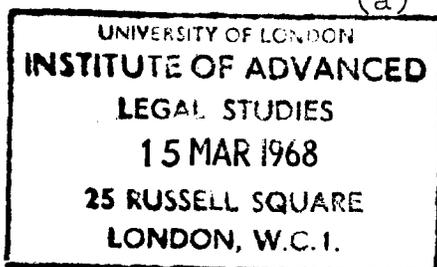
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3. The principal questions that arise in this Appeal are:

(a) whether the Appellant was a prisoner of war within the meaning of the Geneva Conventions Act 1962 (No. 5 of 1962) and as such was entitled to protection under the Geneva Convention

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Relative to the Treatment of Prisoners of War (The Third Schedule to the Act).

- 10 (b) whether in the circumstances of the case a burden lay upon the prosecution to prove that the Appellant was disentitled to be treated as a prisoner of war under the Act. It is submitted that it was for the Appellant to show that he was entitled to the protection of the Act. This he did not do.
- (c) whether, if there was any onus upon the prosecution to show that the Appellant was disentitled to be treated as a prisoner of war under the Act, such onus was discharged.

20 4. The Appellant upon arraignment claimed trial on all 3 charges. The submission was made on his behalf that he was not a Malaysian citizen and not an Indonesian citizen either and he ought therefore to be treated as a prisoner of war under the Geneva Convention. The prosecution submitted that the Court had jurisdiction as the Appellant was born and bred in Malaysia and that unless there was proof of his being a national of any other country he could not take advantage of the Convention. The Court ruled that it had jurisdiction to try the Appellant and proceeded to trial.

30 The case for the prosecution was summarised by the learned trial Judge as follows:-

40 "The evidence for the prosecution in a nutshell was that the accused was one of 41 Indonesian and 7 Chinese paratroopers, including their commander Sergeant Wagimen, who flew from Jakarta in Indonesia in a Hercules plane on 1. 9.64 at about 10 p.m. and landed in Johore during the same night, that he surrendered and was captured, together with a Bren gun and a quantity of ammunition in a bag, by a patrol of Gurkha soldiers from Platoon, 9, C Company, 1/10 Gurkha Rifles in the course of their operational duties in the jungle in the Labis area at about 9 a.m. on 15. 9.64 after they had killed two Indonesians, and

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that subsequently he made a lengthy cautioned statement in which he stated how he went to Indonesia where he received military training and from where he later returned to Malaya in an aeroplane with 47 others."

p.44 6. After his capture the Appellant was found to have on him an identity card which was produced in evidence at the trial as Exhibit P.6. This document did not form part of the Record which was before the Federal Court on the hearing of the appeal, but the references to it which appear in the Judges' Notes of Argument show that it was issued under the National Registration Regulations and that it was a "red" identity card. This is the type of identity card which, under the Regulations, is to be issued to a person not a citizen of the Federation of Malaya who is permanently resident in the Federation. 10

p.46 7. The Appellant in his statement gave the place of his birth as Kolam Ayer, Pontian, Johore. He said that his father and mother were still alive and staying at Pontian. After leaving school he had been a rubber tapper in Pontian and had stayed with his parents. One day, about 3 months before, he had met one Goh Meng who had invited him to become a soldier. He went with Goh Meng to Jalan Ayer Masin, whence he journeyed in a fishing boat to an unnamed island. Here, and later at Bondong, he received military training, along with others, and subsequently participated in the operation which led to his capture in Malaysia. He added that he would not have accepted the invitation to become a soldier if Goh Meng had told him that he wanted to take him to Indonesia. 30

8. The Appellant did not give evidence in his own defence (save on the issue of the admissibility of the statement) or call any witness on his own behalf. 40

p.19 9. On the 6th day of March 1966 the learned trial Judge convicted the Appellant and sentenced him to death on each charge.

p.28 10. By Petition of Appeal dated the 14th day of April 1966 the Appellant appealed against the said convictions and sentences to the Federal

Court of Malaysia, one of his grounds of appeal being as follows:-

10 "The Learned Trial Judge erred in law in holding out at the commencement of the trial that he had jurisdiction to hear the case. Your appellant is not a Citizen or national of this country and his nationality or identity as to his origin has not been proved in evidence. Your appellant could have been treated as a prisoner-of-war under the Geneva Convention."

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11. On the 18th day of April 1966 the Federal Court of Malaysia dismissed the Appellant's said appeal.

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The Court rejected the Appellant's contention that he was entitled to be treated as a prisoner of war in the following passage.

20 "Coming to the second ground of appeal, 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."

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40 12. It is respectfully submitted that the Geneva Convention Relative to the Treatment of Prisoners of War, which, when applicable, is given legislative effect by Act No. 5 of 1962, has no application to the facts of the present case. The Appellant was clearly a resident of and domiciled in Malaysia, where also the acts which were proved against him were committed. The Appellant was thus (assuming that there was an armed conflict to which Malaysia was a party) in the position of an inhabitant of an invaded country who lends assistance to the invader. Accordingly even if the Convention was otherwise

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applicable, nevertheless upon its proper construction, the Appellant was a defector to the enemy, and as such was not entitled to its protection. It is submitted that the long established principles of customary international law would clearly exclude the Appellant from the protection afforded to prisoners of war and that the Convention is to be interpreted in the light of these principles and as giving expression and effect to them.

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13. It is further submitted that in any event and upon any view the evidence showed prima facie the commission of offences which fell within the ordinary jurisdiction of the Court and the only question left was whether the Appellant was entitled to an immunity or exemption from the general law by reason of his having a special protected status. The offences alleged were within the territorial jurisdiction of the Court as stated by S.22(1) of the Courts of Judicature Act 1964 and the Appellant was a person subject to the enactment under which he was charged, that is to say, sections 57 and 58 of the Internal Security Act 1960.

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These sections apply to "any person" of whatever nationality, citizenship or status, and, it is submitted, whether he be civilian or military, although in an appropriate case it may be open to an accused by virtue of other legislation to show that he enjoys some special protected status. That this is so is shown, it is submitted, both by the express language and the manifest intention of the enactment. Section 58 makes it an offence to consort with a "person who is carrying or has in his possession or under his control any fire-arm, ammunition or explosive in contravention of section 57". If the members of an invading military force are to be excluded from the operation of section 57, then their carrying arms would not constitute a contravention of this section and no offence would be committed under section 58 by any person, whatever his nationality or allegiance, who consorted with them. This, it is submitted, could be contrary to and defeat the plain intention of the enactment, which would not operate to remedy the mischief aimed at where this was sufficiently open and blatant. It is

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submitted that section 57 applies to all persons who commit the offence therein defined, whatever their status may be, and that section 58 has the same application.

10 Accordingly, prima facie, the Court has its ordinary jurisdiction to try offences against these sections by whatsoever persons committed unless there is something to oust such jurisdiction. Where the Geneva Conventions Act 1962 is applicable, the effect of Article 84 of the 3rd Schedule would be to oust the jurisdiction of the Court, but it is submitted that for this consequence to follow, the facts making the Act applicable to the particular case must be clearly shown. In the present case no such facts were shown.

20 14. It is submitted that, the prosecution having proved by the evidence it adduced all the ingredients of the offences charged and that they were committed within the territorial jurisdiction of the Court, it was for the Appellant to prove the facts which gave him a protected status or conferred on him an immunity or exemption or ousted the ordinary jurisdiction of the Court. This he did not do. On the contrary, he adduced no evidence as to his status or allegiance.

30 15. It is respectfully submitted that there was no evidence before the Court that the Appellant was entitled to be treated as a prisoner of war within the meaning of the Geneva Convention (The Third Schedule of the Geneva Conventions Act 1962). There was in particular no evidence that, if there was either a "declared war" or an "armed conflict" between the Malaysia and any other Power, that other Power was a "High Contracting Party" or had accepted and applied the provisions of the Geneva Convention so as to make the Government of Malaysia bound by it and so give
40 the material provisions of the Third Schedule any legislative force.

16. It is submitted that if any duty lay upon the prosecution to show that allegiance was owed by the Appellant to Malaysia, it did this upon the evidence. This established that the offence was committed in Malaysia where, it is submitted,

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the Appellant was shown to be domiciled and ordinarily resident and from which he had only temporarily and for a short period absented himself before he committed the offences. His possession of an identity card appropriate to a person permanently resident in the Federation of Malaya was some evidence that his allegiance was to Malaya and hence to Malaysia. The Appellant's possession of the card showed not only where he resided but the status he claimed. In any event it is submitted that the possession of a civilian identity card issued in Malaysia instead of the kind of identity card which by the Geneva Conventions Act is required to be furnished to persons "liable to become prisoners of war" was some evidence that the Appellant's status was not such that upon capture he became a prisoner of war.

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17. The Respondent respectfully submits that this Appeal should be dismissed and the Judgment and Order of the Federal Court of Malaysia of the 18th day of April 1966 dismissing the Appellant's appeal against his convictions and sentences by the High Court in Malaya on the 6th day of March 1966 should be affirmed for the following among other

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R E A S O N S

1. BECAUSE the Appellant was not a prisoner of war within the meaning of the Geneva Conventions Act 1962.
2. BECAUSE the Appellant was a defector to the enemy and as such was not entitled to be treated as a prisoner of war.
3. BECAUSE the Appellant was in breach of his duty of allegiance to His Majesty the Yang di-Pertuan Agong and was accordingly upon a proper construction of the Geneva Conventions Act 1962 and by the law of nations to which such Act gives expression and effect not entitled to the protection of the Act.
4. BECAUSE it was for the Appellant to show that he enjoyed the status and privileges of a prisoner of war and this he did not do.

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5. BECAUSE no facts or circumstances were shown to oust the Court's jurisdiction to try the offences charged according to the ordinary processes of law.
6. BECAUSE there was no evidence that if there was either a "declared war" or an "armed conflict" between Malaysia and any other Power, that other Power was a "High Contracting Party" or had accepted and applied the provisions of the Geneva Convention so as to make the Government of Malaysia bound by it and so give the material provisions of the Third Schedule any legislative force.
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7. BECAUSE if there was any onus upon the prosecution to prove that the Appellant owed allegiance to His Majesty the Yang di-Pertuan Agong it discharged such onus.
8. BECAUSE if there was any onus upon the prosecution to prove that the Geneva Conventions 1962 had no application, it discharged such onus.
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9. BECAUSE the said Judgment of the Federal Court of Malaysia was right for the reasons therein stated.

MONTAGUE SOLOMON

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