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No. 32 of 1949.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA (COURT OF APPEAL).

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

BETWEEN

SAMBASIVAM — *Appellant*

AND

THE PUBLIC PROSECUTOR, FEDERATION OF MALAYA — *Respondent.*

Case for the Appellant.

1. This is an appeal, by Special Leave, against an Order of the Supreme Court of the Federation of Malaya (Court of Appeal), dated the 28th April, 1949, dismissing an appeal against an Order of the Supreme Court of Johore, dated the 22nd March, 1949, whereby, on a second trial under the Emergency (Criminal Trials) Regulations, 1948, for the offence created by Regulation 4 (1) (*a*) of the Emergency Regulations, 1948, of carrying an unlicensed firearm, to wit, a revolver, the Appellant was convicted of the said offence and sentenced to death.

Record, p. 47.
Record, p. 40.
Appx., pp. 17–19.
App., p. 16.

2. The Federation of Malaya has a regular Penal Code and a regular Criminal Procedure Code, which closely resemble the Indian Codes. At the times material to this case there were also in force, by virtue of the Emergency Regulations, 1948, and the Emergency (Criminal Trials) Regulations, 1948, provisions establishing both a wide range of additional offences, with very heavy penalties, and a procedure which deprived accused persons of much of the protection afforded by the regular Criminal Procedure Code.

Appx., pp. 16–19.

In order that this procedure should be applied to the trial of any particular case, the Public Prosecutor—which description by virtue of section 2 of the said Emergency (Criminal Trials) Regulations, 1948, includes Deputy Public Prosecutor—has to certify in writing under section 7 of those Regulations that the case is a proper one for trial under the said Regulations.

Appx., p. 17.

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3. Relevant portions of the Emergency Regulations, 1948, the Emergency (Criminal Trials) Regulations, 1948, and the Criminal Procedure Code of the Federated Malay States, are included in an Appendix hereto.

4. The main questions for determination on this appeal are concerned with :—

Appx., p. 17.

(1) The necessity of obtaining a fresh certificate from the Public Prosecutor under section 7 of the Emergency (Criminal Trials) Regulations, 1948, when an accused person—as in this case the Appellant—is tried on a charge of carrying an unlicensed firearm, after— 10

(A) a previous trial on two charges, one of which was the same as the new charge, has resulted in an acquittal by assessors on both charges, and

Appx., p. 19.

(B) the Court before which the previous trial was held has agreed with the said acquittal on one of the two charges and disagreed with that on the other charge, and accordingly—under section 198 (ii) of the (ordinary) Criminal Procedure Code—the proceedings have been stayed and a new trial falls to be held, with fresh assessors, on the one charge.

(2) the validity of a Certificate authorising a trial under the 20 said Regulations which is given neither by the Public Prosecutor nor by the Deputy Public Prosecutor (the only persons expressly empowered to issue the same) but by the Deputy Public Prosecutor acting for the Solicitor-General ;

(3) the right of an accused being re-tried under the said Regulations to test the veracity of the prosecution witnesses by cross-examination on their statements made at the first trial ;

(4) the admissibility in evidence of a statement alleged to have been made by the accused whilst lying in hospital gravely wounded and the weight to be attached thereto ; 30

(5) the question whether the Appellant can be said to have acted with a guilty mind when carrying an unlicensed firearm which appears to have been handed to him, wrapped in a towel, to be carried ;

(6) the question whether in all the circumstances the conduct of the whole proceedings amounts to a complete denial of justice.

5. The facts of the case are as follows :—

Record, pp. 35–36.

p. 35, l. 41 to p. 36, l. 40.

On the morning of the 13th September, 1948, the Appellant, an Indian Tamil clerk, was travelling on foot in the State of Johore in search of employment, casually accompanied by two Chinese 40 who were also travelling in the same direction. In the course of his journey, he found himself involved in a quarrel which arose suddenly between his Chinese companions, on the one hand, and a party of three Malays who came from the opposite direction,

on the other. The quarrel quickly developed into a fight, firearms and *parangs* (bayonet-like knives) being used by those who participated in the conflict.

From this Malay-Chinese battle, with which he was not concerned, the Appellant attempted to escape, but failed to do so, being almost paralysed by fright, and unable therefore to run. Mistaken, presumably, for a Chinese sympathiser, he was soon made the object of a vicious knife attack by one of the Malays who stabbed him repeatedly, amongst other places, in the stomach, back and head. He fell to the ground unconscious and did not recover consciousness again until after his arrival in hospital to which, as will hereinafter appear, he was transported some hours later. But, grievously wounded though he was, the Appellant was fortunate in that he did not share the fate of one of his two Chinese companions who was stabbed to death. The other Chinese managed to escape and nothing has been heard of him since.

p. 36, ll. 32–35.
p. 36, ll. 6–14.
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p. 36, ll. 7–8.
p. 27, ll. 1–5.

6. Retiring from the scene of battle, the victorious Malays successfully forestalled any independent Police investigation or any prosecution of themselves for murder or any other offence by reporting the matter to the local Penghulu (headman), describing the affray as an unprovoked attack upon them by three "Communists," of whom, in self-defence, they had killed one and seriously wounded another. They handed over to the Penghulu, amongst other articles, a revolver which they alleged had been captured from the Appellant. The Penghulu then took them to the scene of the alleged attack, where he found the Appellant lying on the ground "seriously wounded". All four then carried the Appellant to the local Police Station whence he was shortly after removed to the Muar Hospital. Such was the serious nature of his injuries that the Appellant was not discharged from the said Hospital until the 28th February, 1949—more than five months later.

Record, p. 53.
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p. 53, l. 30.
p. 30, ll. 24–27.
p. 31, ll. 30–31.
p. 36, ll. 13–14.
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7. On the 13th February, 1949, the Appellant, who as already mentioned had been in hospital ever since the assault on him on the 13th September, 1948, was taken from hospital and brought before the Committing Magistrate at Muar and charged with two offences under Section 4 (1) (*a*) and (*b*) of the Emergency Regulations, 1948, to wit (A) carrying a revolver and (B) having ten rounds of ammunition. He was committed for trial on the same day on the said charges.

Appx., p. 16.
Record, pp. 2–4.

He was then returned to hospital, from which he was discharged on the 28th February, 1949.

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8. On the 2nd March, 1949, the Appellant was tried before Mr. Justice Laville and two assessors in the Supreme Court of Johore at Johore Bahru on the said two charges, which were stated and described as follows :—

"You are charged at the instance of the Public Prosecutor, and the charges against you are :—

Record, p. 6, ll. 26–41.

"First : That you at about 10 a.m. on 13th September, 1948, at Bukit Kepong, Muar, in the State of Johore, carried a firearm, to wit, a ·38 revolver Webley No. 18282 which you were not duly

licensed to carry under any written law for the time being in force, and you have thereby committed an offence punishable under Regulation 4 (1) (*a*) of the Emergency Regulations, 1948 ;

" Second : That you at about 10 a.m. on 13th September, 1948, at Bukit Kepong, Muar, in the State of Johore, had in your possession ammunition, to wit, 10 rounds of ·38 ammunition, without lawful authority therefor, and you have thereby committed an offence punishable under Regulation 4 (1) (*b*) of the Emergency Regulations, 1948.

Sd. W. MARTIN McCALL,
Deputy Public Prosecutor.

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Dated at Johore Bahru, this 2nd day of March, 1949."

Appx., pp. 17–19.

9. This trial was held under the simplified procedure laid down by the Emergency (Criminal Trials) Regulations, 1948, mentioned in paragraph 2 of this Case. The document which purported to be a Certificate authorising such trial ran as follows :—

Record, p. 51.

" The Emergency (Criminal Trials) Regulations, 1948.

" I, William Martin McCall, Deputy Public Prosecutor, in accordance with the provisions of Section 7 of the Emergency (Criminal Trials) Regulations, 1948, hereby certify that the trial of Sivam, alias Sambasivam S/O Narayanasamy on the following charges, namely :— "

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[here followed the two charges stated substantially as set out in paragraph 8 hereof]

" is a proper case for trial under the said Regulations and I hereby designate Johore Bahru as the place where such trial shall be held.

" Dated at Johore Bahru, this 25th day of November, 1948.

" Sgd. W. MARTIN McCALL,
" Deputy Public Prosecutor
for Solicitor-General."

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Appx., pp. 19–20.

10. By Section 376 of the Criminal Procedure Code of the Federated Malay States, as amended in 1947, the Solicitor-General has the powers of a Deputy Public Prosecutor and acts as Public Prosecutor in the absence of the Attorney-General who, in respect of criminal prosecutions and proceedings under the said Code, is the Public Prosecutor.

The Appellant submits that, in the circumstances of this case, the Deputy Public Prosecutor could not act for the Solicitor-General, and that, even if he could, the Solicitor-General was not, at the date of the said Certificate, empowered to issue such a Certificate or to authorise the Deputy Public Prosecutor to sign one " for " him.

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The Appellant therefore respectfully submits that the purported Certificate was invalid, and that none of the proceedings initiated in pursuance thereof against him are of any validity.

11. At the Appellant's said first trial, the prosecution called, *inter alia*, the said three Malays as witnesses, but no mention whatever was made of an alleged Statement which, as will hereinafter appear, was alleged to have been made by the Appellant, on the 13th September, 1948, the day on which he was nearly murdered, to two investigating Police Officers who—as it was subsequently alleged—visited him in hospital very shortly after he had been admitted thereto on the evening of the same day.

Record, pp. 7-12.
Record, pp. 54-55.

To avoid confusion at a later stage of the narrative, it should be mentioned that at this first trial the prosecution sought to give evidence of a statement taken from the Appellant in hospital on the 20th September, 1948. The statement was not admitted, as the prosecution produced only what purported to be a copy of the statement, with no explanation of what had become of the original. (No attempt was made to give this statement in evidence at the second trial; see paragraph 36 hereof.)

Record, p. 15, ll. 10-20.

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12. The Appellant, at this, as in the later trial, denied that he was guilty and gave evidence on his own behalf.

Record, pp. 15-17, 35-37.

13. Following an elaborate summing-up by the learned Trial Judge (Laville, J.) both Assessors found the Appellant not guilty on both charges.

Record, pp. 18-24.
Record, p. 17, ll. 21-24.

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The learned Trial Judge was in agreement with the Assessors' finding on the second charge (possession of ammunition without lawful authority) but disagreed with their finding on the first charge (carrying an unlicensed firearm). He, therefore, acquitted the Appellant on the second charge, but ordered his re-trial on the first. This was presumably done in purported compliance with the provisions of Section 198 (ii) of the Criminal Procedure Code, mentioned in paragraph 4 (1) of this Case, which provides, *inter alia*, that—

Record, p. 17, ll. 25-28.
Appx., p. 19.

> " if the Court is unable to agree with the opinion of both assessors . . . the proceedings shall be stayed and a new trial held with the aid of fresh assessors."

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14. Thereafter, on the 21st March, 1949, the Appellant was charged in writing as follows :—

> " Sivam, alias Sambasivam, You are charged at the instance of the Public Prosecutor, and the charge against you is :—
>
> " That you at about 10 a.m. on the 13th September, 1948, at Bukit Kepong, Muar, in the State of Johore, carried a firearm, to wit—a ·38 revolver, which you were not duly licensed to carry under any written law for the time being in force, and you have thereby committed an offence punishable under Regulation 4 (1) (*a*) of the Emergency Regulations, 1948.
>
> " Dated at Johore Bahru this 21st day of March, 1949.
>
> (Sgd.) W. MARTIN McCALL,
> Dy. Public Prosecutor."

Record, p. 25.

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Record, p. 25.

15. The Appellant was thereupon tried on this charge on the said 21st March, 1949, in the Supreme Court of Johore at Johore Bahru before Storr, J., sitting with two Assessors.

Appx., p. 17.

This trial was commenced and conducted throughout under the simplified procedure of the said Emergency (Criminal Trials) Regulations, 1948, but without any fresh Certificate having been obtained under the said Section 7 thereof, and without—as far as can be ascertained from the Record—the Public Prosecutor or any other official having considered, or having been given the opportunity of considering, whether, in the light of the proceedings on the previous trial on two charges, and of the result 10 thereof, the case against the Appellant on the one charge could now be said to be a " proper one " for trial under the said Regulations.

16. Had the Public Prosecutor considered the case afresh, he would, it is submitted, have had to have regard to the following features of these proceedings :—

(A) The former trial was a trial on two charges, of carrying an unlicensed firearm and of possessing ammunition without lawful authority, whilst the proposed second trial would and could only be on a charge of carrying an unlicensed firearm, which must be regarded as presenting no danger, since the Appellant was not 20 charged with (and had indeed been acquitted of) possessing ammunition ; and

(B) at the proposed second trial the prosecution would presumably have to rely on substantially the same evidence as had been rejected at the first trial, on both charges, by both Assessors, and on one charge by the trial judge.

17. The prosecution case on this trial, so far as ascertainable from the evidence of the witnesses—mainly, the three Malays—was that during the course of the fight with the said witnesses, the Appellant had brandished an unlicensed revolver which was taken from him after he had been 30 rendered *hors de combat* by one of his adversaries armed with a knife.

Record, p. 26, ll. 2–5.
pp. 54–55.

18. In support of its case the prosecution now alleged—for the first time—that at about 9 p.m. on the evening of the said 13th September, 1948, the Appellant, although just admitted to hospital with grave injuries, was, nevertheless, in a fit condition to make, and did make, a Statement (hereinafter sometimes referred to as Statement (1)) to two Police Officers who were alleged to have visited him expressly for that purpose. It was alleged that the said Statement was made in Tamil to a Police Officer named Kasipillai Raja, who translated it into Malay for the benefit of his superior officer, a Malay Police Inspector named Abdullah bin Omar, 40 who wrote it down in English.

Record, pp. 54–55.
Record, pp. 32–34.

Record, pp. 54–55.

The said Statement was to the effect, *inter alia*, that when the fight had occurred the Appellant had in his possession a revolver which belonged to one of his two Chinese companions who had asked him to carry it.

19. It should be noted that at the first trial the prosecution had made no reference whatsoever to Statement (1)—a vital document which, if its own story is to be believed, must then have been in its possession for nearly six months ; and that it did not either on that or any subsequent occasion include in any List of Witnesses the names of the two Police Officers (Abdullah bin Omar and Kasipillai Raja) to whom, or in whose presence, Statement (1) was alleged to have been made.

Record, p. 3, ll. 20–40.

pp. 54–55.

20. At the second trial, the prosecution appears to have supplied the defence with a copy of Statement (1) but it did not, in accordance with the imperative provisions of Section 11 of the said Emergency (Criminal Trials) Regulations, 1948, supply the defence with copies of the statements made during investigation by the said two Police Officers whom it intended to call as witnesses and who, later, as such witnesses, were permitted to testify to the circumstances in which they alleged that the Statement was made to them.

Record, p. 26, ll. 2–3.

Appx., p. 18.

Record, pp. 54–55.

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Moreover, the prosecution does not appear to have furnished the defence with a List of the Witnesses it intended to call at the second trial, so that, in so far as the evidence of these two important prosecution witnesses is concerned, the defence cannot be said to have been given any reasonable opportunity of considering and answering the prosecution case.

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21. The Appellant denied (as he now denies) that he made Statement (1), and he further denied (and denies) that, at the time when it is alleged to have been made, he was, or could be, sufficiently conscious and strong to volunteer any information on any matter whatsoever or to answer any questions.

Record, p. 35, ll. 25–26.

Record, p. 36, ll. 6–11.

Record, p. 37, ll. 16–19.

He respectfully submits that, as all the prosecution evidence pointed to the grave physical injuries he was suffering from at the time of his admission into the hospital, and as the prosecution failed to give to the defence any previous indication of the nature of the testimony of the two Police Officers concerned, the onus of proving, by medical or other hospital evidence that he was mentally capable of making the said Statement lay on the prosecution, and that this onus could not reasonably be said to have been discharged by the bald assertion of the said Police Officers that there was, in their opinion, no mental incapacity. No evidence whatever was called from the hospital.

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It is respectfully submitted, further, that even if in an admitted state of weakness, pain and exhaustion, the Appellant did make a Statement, this could not, in the circumstances of this case, be used as evidence against him ; and that, even if it was admissible, it was not deserving of any weight.

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22. The prosecution relied, as already mentioned, on the oral testimony of the three Malays, which now was as follows :—

> Mohamed Said (P.W.1), in examination-in-chief, said that after he and his two fellow Malays had had some words with the Appellant's two Chinese companions, one of the Chinese fired at him with a gun, whereupon he (the witness) " slashed " him with his knife which was about a foot long.

Record, p. 26, l. 36 to p. 27, l. 2.

As to the Appellant, he said :—

Record, p. 27, ll. 2–14.

"I saw the Indian fighting with Saebun" [one of the other Malays] "I did not see anything in his hand. My attention was almost wholly taken up with the Chinese I was fighting. The Chinese I was fighting died on the spot at the same place . . . Having disposed of my Chinese I returned to the place where Saebun and the Tamil" [i.e. the Appellant] "were fighting and I saw Saebun standing and the Tamil standing. When I arrived they were not doing anything—the Indian was standing with wounds. He was standing for about 10 minutes when I was there. 10 I saw they were not doing anything but the Tamil was wounded. When I saw, Saebun was not doing anything.

Record, p. 27, ll. 14–20.

"I then took Saebun to Penghulu's house. When we left he" [the Appellant] "was standing seriously wounded. Saebun showed me a revolver and the Tamil who had been wounded. He had the revolver in his hand. Saebun said he got it from the hand of the Tamil. He did not say to me how he got, only that he got it from the Tamil. The other Chinese fired at me also. He fought with Abdul Aziz and he [Chinese] ran away. I did not see him again.

Record, p. 27, ll. 20–27.

"Leaving the Indian standing there wounded, we all then went 20 to the Penghulu's house which is from here to the Causeway (approximately ½ mile). There we told the Penghulu what happened and there Saebun handed over the revolver. We then took the Penghulu back to the place where the fight had occurred.

Record, p. 27, ll. 24–27.

"The Tamil was still there. He had fallen to the ground and looked as though he was going to die. The Penghulu called the Police and the Indian was subsequently taken to Lenga.

Record, p. 27, ll. 27–29.

"The accused is the Indian . . . It was from him Saebun said he took the revolver. He was wearing a shirt and a pair of trousers. 30

Record, p. 27, ll. 29–31.

"I did not see the accused carrying anything as he was approaching us along the path. I saw that revolver—I saw it in Saebun's hands."

Record, p. 27, ll. 38–47.

In cross-examination the witness said that both Chinese had, for no reason, fired at him from close quarters and that both had missed him; and that thereupon he had stabbed one of them and killed him in two or three minutes.

Record, p. 28, ll. 15–18.

Record, p. 28, ll. 19–32.

Record, p. 28, ll. 32–35.

Record, p. 28, ll. 48–49.

23. Saebun (P.W.2), the Appellant's assailant, said, in examination-in-chief, that the fight had followed some rude conversation between the Chinese and themselves; that, after one of the two Chinese had fired his 40 rifle at them, he had attacked the Appellant with a knife, having seen him previously draw out a revolver which was wrapped or tied up in a towel and which subsequently fell to the ground; that he had stabbed the Appellant many times; that he had stabbed him in the abdomen, back and forehead, rendering him "almost hopeless"; and that he had picked up the revolver which, later, he had handed over to the Penghulu.

In cross-examination, the witness said :—

> "After I had stabbed three times the accused fell down. After he fell down I stabbed him some more. Yes, when Mohamed Said came he found the accused lying prostrate on the ground."

Record, p. 29, ll. 2–4.

Answering the 1st Assessor, he said :—

> "I do not know if the revolver was loaded."

Record, p. 29, l. 14

24. Abdul Aziz (P.W.3), the third Malay, said, in examination-in-chief that both Chinese had fired at himself and his two companions, after one of the former had replied rudely to a greeting by one of the latter ; that (both having, presumably missed) he had then drawn a knife and chased one of the Chinese who, however, had managed to escape ; that before embarking on his fruitless chase he had noticed (having, presumably, had time to do so) that Saebun was engaged in a fight with the Appellant, who held a revolver in his right hand ; and that on returning he had learned from Saebun of his capture of the revolver.

Record, p. 29, ll. 22–25.
Record, p. 29, ll. 25–27.
Record, p. 29, ll. 27–32.

25. The cross-examination of this witness, and a note by the learned Trial Judge in relation thereto, are printed in the Record as follows :—

> "*Cross-examined—by Charry*—The pistol in the Indian's hand came from his waist. I thought it was definitely a pistol. I cannot say if he drew something from his left hand trouser pocket. I did not see. As far as I know I did not see if he took out anything from his left trouser pocket. I did not search him. I saw him draw the pistol from his waist. I did not see well if there was anything wrapped around the pistol when he drew it from his waist.

"(Charry mentions this is a re-trial. I inform him he must not mention such a thing. Intld. P.S.)"

Record, p. 29, l. 42 to p. 30, l. 6.

After this ruling, there was no further cross-examination of the witness and no re-examination.

26. In the Appellant's respectful submission, the learned Trial Judge was wrong thus to prevent the testing of the witnesses' veracity by reference to the statements he had made at the first trial, and the error was such as gravely to prejudice the Appellant's chances of a fair trial.

An examination of the said earlier statements by the witness brings to light numerous and serious inconsistencies. The witness had said, for example, earlier, that he had seen the Appellant take out a pistol from his left trouser pocket with his left hand ; that he had seen Saebun knock the revolver from the Appellant's hand and pick it up ; that he had witnessed the fight between Saebun and the Appellant which had lasted for about 5 or 6 minutes, during the whole of which time the Appellant had held a revolver in his hand, relinquishing his hold on the weapon only after he had been stabbed ; and that it was Mohamed Said (now P.W.1) (and therefore not himself) who had chased the Chinese who had escaped.

Record, pp. 11, 12.

27. Ali (P.W.4), the Penghulu of Bukit Kepong, said that shortly before 10.30 a.m. on the 13th September, 1948, the said three Malays had brought to his house some articles which, they said, they had captured

Record, p. 30.

from three " bandits " or " Communists " ; that among such articles was the revolver in question which Saebun had handed to him saying that he had " got " it from the Appellant ; that, on visiting the scene of the fight accompanied by the three Malays, he had found the Appellant " lying seriously wounded on the ground " and, about 20 to 25 feet away the dead body of a Chinese ; that all four of them had carried the Appellant to Bukit Kepong and from there to the Police Station at Lenga ; and that, at the Police Station, he had handed over the Appellant and the revolver to the Police.

Record, p. 31.

28. The Penghulu's testimony was supported by that of two Police witnesses (P.Ws. 5 and 6), whose evidence, so far as relevant, was to the effect that, on the said occasion, the Penghulu had handed over, amongst other articles, a loaded revolver ; that at the Police Station the Appellant was " in a seriously wounded condition " ; and that " O.C.P.D. Panchor arrived shortly afterwards and took accused to Muar Hospital ".

Record, pp. 32–33, 54–55.
p. 32, ll. 30–33.
p. 33, ll. 4–9.
p. 33, l. 14.
p. 32, l. 30.
p. 32, l. 34 to p. 33, l. 5.
p. 33, ll. 5–7.
p. 33, ll. 8–13.
p. 34, ll. 18–22, 31–34.
p. 34, ll. 18–22.
p. 33, ll. 7–8.
p. 34, l. 31.

29. As to the said Statement (1), Abdullah bin Omar (P.W.9), the Malay Police Inspector to whom the Statement is alleged to have been made, said that he " satisfied " himself that the Appellant was " fit to make a statement " ; that he " had permission of the medical authorities to approach " the Appellant ; that the Appellant, who was in bed, was " clear minded and knew what he was talking about " ; that his interview with the Appellant had been conducted through an interpreter, as he (the witness) did not know Tamil which language alone the Appellant spoke sufficiently well ; that the said interpreter was one Kasipillai Raja, a Police Officer ; that, through this interpreter, the Appellant had been cautioned before he expressed his willingness to make a Statement ; that the Appellant's statements had been translated to him by the said interpreter from Tamil into Malay, and he (the witness), translating from the Malay, had recorded them in English ; that the statements were partly volunteered by the Appellant and partly made in answer to cross-examination by the witness ; that, through the interpreter, the information voluntarily given by the Appellant on the 13th September, 1948, was recorded and read over to the Appellant who was able to understand it and say that it was accurate ; and that after its accuracy had been thus agreed it was signed by the witness—and not, be it noted, by the Appellant.

Record, p. 32, ll. 31–32.
pp. 54–55.

30. The said Police Inspector (P.W.9) did not explain exactly what the " medical authorities " (who were not called) had authorised him to do when they gave him the alleged permission to " approach " the Appellant, who was then, admittedly, in a grave condition ; and he did not say whether or not the Appellant could have signed the said Statement (1) which he was alleged to have been fit enough to make and the accuracy of which he was fit enough to acknowledge after a somewhat laborious process of translation and recording had, as it was alleged, been carried through.

pp. 54–55.

The prosecution did not tender in evidence that portion of the said Statement which, it was said, was made in answer to cross-examination by the Police Inspector.

31. Supporting evidence was given by the said Police interpreter, Kasipillai Rafa, D.P.C. 823 (P.W.10). In that witness's opinion the Appellant, when—as alleged—making Statement (1), understood what was being said to him and was " coherent enough to make a reply."

Record, pp. 33–34.
p. 33, ll. 27–30.

32. The said alleged Statement (1) would have been inadmissible under the general law as stated in Sections 113, 114 and 115 of the Criminal Procedure Code and Section 26 of the Evidence Ordinance, since it was not made before a Magistrate; but on a prosecution for an offence under the Emergency Regulations, 1948, it is provided, by Section 33 thereof, that any Statement, whether a confession or not, and whether oral or written, and whenever made, shall be admissible if made " to or in the hearing of any Police Officer of or above the rank of Inspector."

Appx., p. 16.

33. In the Appellant's submission, Statement (1) cannot reasonably be said to have been made " to or in the hearing of " the said Police Inspector (P.W.9) since it consisted of a series of words spoken in a language which the Inspector, admittedly, did not understand.

34. The purport of material portions of the said Statement (1), if regard is to be had to it, was to the effect that while the Appellant and the two Chinese were walking along a jungle track, one of the two Chinese produced from out of a sack two guns with barrels sawn off, and a loaded revolver; that each of the Chinese armed himself with a gun, the revolver being handed over to the Appellant with the advice that he should use it in case " anyone tried to obstruct " their " way "; and that the Appellant put the revolver in his left trouser pocket.

Record, pp. 54–55.
p. 55, ll. 15–26.

35. Subsequent events were thus described in the said Statement (1):—

> " We then proceeded on the track for another one mile where we happened to pass three Malays who came from the opposite direction. After passing us five or six steps the three Malays rushed on us. The three Malays were armed with *parangs*. One of the Malays rushed on Ah Kow who then tried to shoot him. The Malay then cut him with his parang. The other two Malays attacked me and the other Chinese. Before I could pull out my revolver from my trouser pocket to shoot him I was punched by the Malay several times. I felt giddy and fell down. The Malay took possession of my revolver and then cut me with his parang several times. I did not know what had happened to the other Chinese. The Malays had taken the guni sack and escaped.
>
> " At about 3.00 or 4.00 p.m. some Malays came to the scene and arrested me. I was then taken to Muar Hospital."

Record, p. 55, ll. 28–39.
p. 55, ll. 40–41.

36. The fantastic incredibility of the prosecution story of this alleged statement—told for the first time six months after the statement is alleged to have come into existence—is increased by the considerations—

(A) that police officers who went to take any such statement would of necessity know that all their efforts would be wasted unless it should subsequently seem proper to the prosecuting

authorities—as it did ten weeks later—to invoke the simplified procedure which alone might possibly render the statement admissible ;

Record, pp. 54–55.

(B) that the statement, said to have been made on the very day on which the Appellant had been so grievously wounded, contained the names of seven places, an account of events said to have taken place on five different days, the names of four people, four addresses at which the Appellant was said to have stayed, and seven different points of time indicated precisely by hours ; and it even described his removal from the scene of the affray, several hours after the affray, as "at about 3.00 or 4.00 p.m. some Malays came to the scene and arrested me." How much more detailed narrative may have been contained in that part of the statement which consisted of his alleged replies to cross-examination is not known, since that part of the statement was excluded from evidence and is not printed in the Record ;

Record, p. 55, ll. 40–41.

Record, p. 15.

(C) that one week after this alleged Statement was taken, another police officer (Krishnan) attended at the hospital and took a statement from the Appellant, as mentioned in paragraph 11 hereof, in which so far as can be seen no mention whatever was made of the earlier alleged statement ; and

(D) that at the first trial no mention was made of Statement (1) and at the second no mention was made of Statement (2).

Record, p. 35, ll. 25–26. p. 36, ll. 17–18.

37. The Appellant's defence, briefly, was that he had not, at any time, had in his possession or carried a revolver and, as already stated, that he had not, and could not have, made the said Statement (1).

Record, p. 35, ll. 25–26. p. 35, ll. 32–38.

38. Giving evidence on his own behalf, the Appellant, in examination-in-chief, denied that he had made Statement (1) and, after referring to his casual meeting with the said two Chinese (one of whom he had known previously) and of his subsequent journey in their company to a place called Segamat in search of employment, said :—

p. 35, l. 38 to p. 36, l. 9.

"At the time I was carrying that bag D.2 wherein I had all my clothing. Apart from that I did not carry anything else. I carried it in my hand. I do not remember which hand—my right or left. On the way we met 3 Malays. On meeting, the Malays asked where they were going. On hearing that, one of the Chinese said in Malay, 'What do you care ?' Whilst these words were being exchanged I continued to walk leaving them behind, and then they all had a fight. Then I heard somebody firing gun-shots. Immediately after I heard the shot I saw one of the 2 Chinese overtaking me—he was running away—and then I started to run when P.W.2, Saebun, attacked me with a knife. First I was hit on my forehead and then in my abdomen and then I became unconscious and fell down. I regained full consciousness at the Muar Hospital. That is all. I regained consciousness about 2 or 3 days after the attack."

39. Continuing, the Appellant said, in examination-in-chief :— Record, p. 36, ll. 9–15.

"I have seen Inspector Abdullah several times. He used to visit me at the Hospital very frequently. I was bedridden the whole time. I do not know the total number of wounds I had but I had 4 very serious ones and the worst one was in my abdomen. Since the incident I was in hospital and discharged on the 28th February, 1949. I am still in the gaol hospital. Externally my wounds are all right but I still have pains internally in my abdomen.

10 "It is not true that I was carrying P.1" [the said revolver] "and tried to shoot P.W.2, Saebun." p. 36, ll. 17–18.

It must be borne in mind that the Appellant was not charged with any assault or other act of violence, or with any attempt to fire on anyone, but only with the bare possession of an unlicensed firearm and not with having any ammunition.

40. In cross-examination, the Appellant said :—

"As soon as I heard the shot I was very frightened and I was about to run. As I was very frightened I could not run—my legs would not help me. I could only walk . . . No, P.1, the revolver was not in my possession. If Saebun says it was, it is not true. I know of no reason why Saebun should say so and I did not know him, but perhaps as he dealt me some very severe blows he is saying so to protect himself and telling an untruth. Yes, the same thing applies to Abdul Aziz P.W.3, as he also assaulted me. Record, p. 36, ll. 32–40.

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"I cannot say whether the revolver P.1 was a plant by the Malays or whether one of the Chinese had it, but I am sure I did not have it. I cannot assign any reason why I was attacked. It is not true that they assaulted me because I was in possession of the revolver and they were justified in their attack . . . p. 36, ll. 40–44.

30 "Yes, I never made the Statement, P.2, to the Inspector. I do not remember having given a Statement and even if I had given one I do not know what I would have said. I do not remember if I made the Statement, P.2, or not. I say I did not make the Statement . . . p. 37, ll. 15–19.

"No, I do not suggest that P.2 was ante-dated by the Police. I disagree with it. I do not remember the date. What I say is that that Inspector Abdullah, P.W.9, and that Detective P.W.10 never came and took a Statement from me . . . I am not suggesting P.W.9 and P.W.10 are lying. I did not make a Statement and I cannot agree with it." p. 37, ll. 24–33.

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41. In re-examination, the Appellant said :— Record, p. 37, ll. 34–38.

"So far as I am aware I only made one Statement to the Police and that was roughly about 2 months after the incident. I made that Statement to 2 Indian Police Officers. The name of one is Krishnan. I do not know what time I reached the Muar Hospital on the 13th. I do not know what happened after I got to the Hospital."

Record, pp. 40–44.

p. 41, l. 30 to p. 42, l. 23; p. 43, ll. 1–21

42. In his summing-up, the learned Trial Judge (Storr, J.) referred to the evidence of the said three Malays, and to the said Statement (1). To the prejudice of the Appellant, he failed to refer to the entire absence of medical or hospital evidence to show that the Appellant (who, at the time, was, admittedly, in a grave condition) was mentally and physically capable of making Statement (1).

Record, p. 43, ll. 37–45.

p. 44, ll. 7–16.

43. The learned Trial Judge referred to the said Statement (1) (which the Appellant had denied making) as being " more or less a retracted confession " which, assuming that the Assessors were satisfied that it was made and that it was true, would be corroborated " in some way " by the evidence of the said three Malays if they were believed. 10

44. In the Appellant's respectful submission the learned Judge was in error in dealing with the said Statement (1) as if it were a " confession " which was retracted, and which could be corroborated by the evidence of the three Malays. For, even assuming that Statement (1) was made, it did not, on a true interpretation of Section 4 (1) (*a*) of the Emergency Regulations, 1948, confess to, or admit, any conduct amounting to the offence of " carrying " an unlicensed firearm which, it is submitted, cannot include the mere carrying of an unlicensed firearm without any guilty mind. And there could not, it is submitted, be any corroboration of the said Statement (1) by the evidence of the three Malays, for their testimony, apart from serious discrepancies, was anything but independent, they, obviously, being persons who might themselves have been called upon to face serious criminal charges but for the version of the fight that they gave. 20

Appx., p. 16.

Record, p. 40, ll. 1–10.

45. The Assessors were of opinion that the Appellant was guilty of the offence charged, and by his Order, dated the 22nd March, 1949, the learned Trial Judge, concurring in the Assessors' opinion, convicted the Appellant and sentenced him to death.

Record, p. 47.

46. The Appellant appealed against his conviction and sentence to the Supreme Court of the Federation of Malaya (Court of Appeal), which Court, by its Order, dated the 28th April, 1949, dismissed the appeal, no reasons being assigned for the dismissal. 30

Record, pp. 49–50.

47. Against the said Order of the Supreme Court (Court of Appeal), dated the 28th April, 1949, this appeal to His Majesty in Council is now preferred, the Appellant having been granted Special Leave to appeal by Order-in-Council, dated the 29th September, 1949.

The Appellant humbly submits that the appeal should be allowed, with costs, for the following among other

REASONS

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(1) BECAUSE in the absence of a Certificate from the Public Prosecutor authorising the Appellant's second trial under the Emergency (Criminal Trials) Regulations, 1948, the Court was incompetent to entertain the second prosecution.

(2) BECAUSE the Certificate purporting to authorise the Appellant's trial was, in any event, not a valid certificate.

(3) BECAUSE the said Statement alleged to have been made by the Appellant on the 13th September, 1948, was, in the circumstances of this case, inadmissible in evidence.

(4) BECAUSE even if the said Statement was admissible it was not, in the circumstances of this case, deserving of any weight.

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(5) BECAUSE the said Statement was not made " to or in the hearing of " the Police Inspector concerned.

(6) BECAUSE the learned Trial Judge was in error in regarding the said Statement as a " retracted confession."

(7) BECAUSE the learned trial Judge was wrong to regard the testimony of the said three Malays as sufficiently corroborative of relevant matters contained in the said Statement.

(8) BECAUSE the said Judge was in error in forbidding during the course of the cross-examination of an important prosecution witness, the Appellant's Counsel to mention the fact that this was a re-trial, and in thus preventing the veracity of that and other witnesses being tested by reference to the earlier statements they had made.

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(9) BECAUSE on a true interpretation of Section 4 (1) (*a*) of the Emergency Regulations, 1948, a person who merely carries (as a mere carrier) an unlicensed firearm cannot be guilty of the offence charged unless there also be evidence (which was here non-existent) that he was carrying the weapon in circumstances which raised a presumption that he was consciously and with a guilty mind carrying it with a view to using it as a weapon.

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(10) BECAUSE in all the circumstances the trial of the Appellant constituted a fundamental departure from justice.

D. N. PRITT.

R. K. HANDOO.

APPENDIX.

THE EMERGENCY REGULATIONS, 1948.

In exercise of the powers conferred on the High Commissioner by Section 4 of the Emergency Regulations Ordinance, 1948, the Officer Administering the Government hereby makes the following Regulations :

Short Title.

1. These Regulations may be cited as the Emergency Regulations, 1948.

*   *   *   *   *

Firearms, ammunition and explosives.

4. Any person who carries or who has in his possession or under his control—

(*a*) any fire-arm, not being a fire-arm which he is duly licensed to carry or possess under any other written law for the time being in force ; or 10

(*b*) any ammunition or explosives without lawful authority therefor, shall be guilty of an offence against these Regulations and shall on conviction be punished with death.

*   *   *   *   *

Admission of statements in evidence.

33.—(1) Where any person is charged with any offence against these Regulations or with any offence specified in the Schedule to these Regulations, any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such 20 person to or in the hearing of any police officer of or above the rank of Inspector shall, notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit :

Provided that no such statement shall be admissible or used as aforesaid—

(*a*) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a 30 person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him ; or

(*b*) in the case of a statement made by such person after his arrest, unless the Court is satisfied that, before making such statement, a caution was administered to him in the following words or

words to the like effect: " It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence at your trial."

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which paragraph (1) of this Regulation applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

10 (3) This Regulation shall apply in relation to any person tried after the commencement of these Regulations whether or not the proceedings against such person were instituted and whether or not the relevant statements were made before such commencement.

* * * * *

Effect of Regulations.

38. The provisions of these Regulations shall be in addition to and not in derogation of the provisions of any other written law and, in the event of conflict between any provisions of these Regulations and any provision of any other written law, the provisions of these Regulations shall prevail.

THE EMERGENCY (CRIMINAL TRIALS) REGULATIONS, 1948

Short title and commencement.

1. These Regulations may be cited as the Emergency (Criminal 20 Trials) Regulations, 1948, and shall come into operation on the nineteenth day of July, 1948.

Interpretation.

2. In these Regulations, unless the context otherwise requires—

" emergency procedure case " means any case certified as a proper case for trial under these Regulations in accordance with Regulation 7 of these Regulations;

" Public Prosecutor " includes a Deputy Public Prosecutor;

* * * * *

Ordinary procedure to apply subject to variation effected by Regulations.

3. The provisions of these Regulations shall have effect notwithstanding anything to the contrary contained in any written law, but except in so far as the same may be varied by these Regulations or by any 30 other Regulations made under the Emergency Regulations Ordinance, 1948, the ordinary practice and procedure of the Courts shall apply to emergency procedure cases tried under these Regulations.

* * * * *

Certifying of case as an emergency procedure case.

7. Where a person is charged with any offence against any written law and the Public Prosecutor certifies in writing that the case is a proper one for trial under these Regulations, such case shall be tried and disposed of in accordance with the provisions of Regulations 8 to 12 inclusive of these Regulations.

No preliminary enquiry in emergency procedure cases.

8.—(1) No preliminary enquiry shall be held in respect of an emergency procedure case, but the Magistrate or District Judge before whom the accused person is brought shall, upon production of the certificate referred to in Regulation 7 of these Regulations, and whether or not a preliminary enquiry has already been commenced, forthwith commit the accused for trial by the High Court at such place, whether within the same State or Settlement or not, and upon such charge as may be designated by the Public Prosecutor.

(2) The provisions of Section 144 of the Criminal Procedure Code of the Federated Malay States or Section 155 of the Criminal Procedure Code of the Straits Settlements, as the case may be (which relate to the naming and summoning of witnesses for the defence) shall apply to and be complied with in emergency procedure cases. 10

(3) Bail shall not be granted to an accused person committed for trial under this Regulation.

(4) The Public Prosecutor may, in any emergency procedure case, at any time before trial, alter or re-draw the charge or charges against the accused or frame an additional charge or additional charges against him.

Record, depositions, etc., to be forwarded.

9. Upon committal of the accused for trial in an emergency procedure case the record of the proceedings (including, in any case where a preliminary enquiry has been commenced, any depositions taken and any exhibits produced) shall be forwarded to the Registrar at the place to which the accused has been committed for trial to be dealt with and used, so far as may be, in accordance with the ordinary practice and procedure of the Courts. 20

Date for trial.

10. When an emergency procedure case has been committed for trial as aforesaid, the Registrar shall forthwith fix a date for the trial of such case :

Provided that the Public Prosecutor may at any time before trial, by notice served on such Registrar, direct the transfer of the case to an Assize at any other place in the Federation, and the record shall thereupon be forwarded to the Registrar at such place, who shall proceed to fix a date for the trial as aforesaid. 30

Statements of witnesses to be supplied to accused.

11. In every emergency procedure case the prosecution shall, not less than two clear days before the date fixed for the trial of the case, furnish to the accused person or his advocate and solicitor, if any, a copy of the statements made to the police during the police investigation of all persons whom it is intended to call as witnesses for the prosecution at the trial.

Notice of appeal.

12.—(1) Where, in any emergency case, the accused is convicted, it shall be the duty of the presiding Judge, immediately after passing sentence, to ask such convicted person if he wishes to appeal against his conviction or sentence or both, and a note of the reply to such question shall be entered in and form part of the record. 40

(2) If the reply to such question is in the affirmative, such reply shall operate as oral notice of appeal and the record of the proceedings shall forthwith be forwarded to the Registrar of the Court of Appeal in Kuala Lumpur.

(3) If the reply to such question is in the negative or is indefinite the person convicted may nevertheless give formal notice of appeal in the manner and within the time prescribed by the ordinary law relating to appeals from the High Court in criminal matters.

* * * * *

Summoning of jurors and assessors.

19. During the continuance in force of these Regulations the provisions 10 of Section 247 of the Criminal Procedure Code of the Federated Malay States and of Section 241 of the Criminal Procedure Code of the Straits Settlements (which relate to the summoning of jurors and assessors) shall cease to have effect, but jurors and assessors shall be summoned in any manner the High Court may direct.

* * * * *

Application of Regulations.

21. The provisions of these Regulations shall apply to cases arising before the commencement of these Regulations as well as to cases arising after such commencement, and whether or not any proceedings have been commenced in respect of any such case.

THE CRIMINAL PROCEDURE CODE
20
(CAP. 6).

CONCLUSION OF TRIAL.

Opinion of assessors.

197. When the case for the defence and the reply (if any) of the officer conducting the prosecution are concluded, the Court may sum up the evidence for the prosecution and defence and shall require each of the assessors to state his opinion orally and shall record such opinion.

Judgment.

198.—(1) If the Court agrees with the opinion of both assessors, or where the assessors are of different opinions with the opinion of one assessor, the Court shall give judgment accordingly.

New trial.

(ii) If the Court is unable to agree with the opinion of both assessors, 30 or of the one remaining assessor as provided by Section 188, the proceedings shall be stayed and a new trial held with the aid of fresh assessors.

Sentence.

199. If the accused is convicted the Court shall pass sentence according to law.

* * * * *

Public Prosecutor.

376.—(i) The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

(ii) The Solicitor-General shall have all the powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in the case of the absence or inability to act of the Attorney-General.

(iii) The Chief Secretary may appoint fit and proper persons to be Deputy Public Prosecutors. Subject to the general control and direction of the Public Prosecutor, a Deputy Public Prosecutor so appointed shall have and may exercise all and singular the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or other written law excepting only any rights or powers exercisable by the Public Prosecutor personally. 10

(iv) The rights and powers vested in or exercisable by the Public Prosecutor by Sections 68 (ii), 381, 385 and 386 of this Code shall be exercisable by the Public Prosecutor personally.

No. 32 of 1949.

In the Privy Council.

ON APPEAL

from the Supreme Court of the Federation of Malaya (Court of Appeal).

BETWEEN

SAMBASIVAM - *Appellant*

AND

THE PUBLIC PROSECUTOR FEDERATION OF MALAYA *Respondent.*

Case for the Appellant.

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The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers, Abbey House, S.W.1. WL2505-8462