

21, 1956

19 FEB 1957

IN THE PRIVY COUNCIL

No. 2 of 1956

1005

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ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA  
IN THE COURT OF APPEAL AT KUALA LUMPUR

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B E T W E E N

SUBRAMANIAM son of MUNUSAMY ... .. Appellant

and

THE PUBLIC PROSECUTOR ... .. Respondent

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C A S E for the APPELLANT

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10 1. This is an appeal, by Special Leave, against  
 an order of the Supreme Court of the Federation  
 of Malaya (Court of Appeal at Kuala Lumpur) dated  
 the 12th September, 1955, dismissing an appeal  
 against the Judgment and Order of the High Court  
 at Johore Bahru dated 2nd August, 1955, whereby  
 the Appellant was found guilty of the charge of  
 being in possession of 20 rounds of .303 ammunition  
 without lawful authority and was sentenced to  
 death under Regulation 4(1)(b) of the Emergency  
 20 Regulations, 1951.

2. It was common ground that on the 29th April,  
 1955, at a place in the Rengam District in the  
 State of Johore the Appellant was found in a  
 wounded condition by certain members of the  
 security forces; that when he was searched there  
 was found around his waist a leather belt with 3  
 pouches containing 20 live rounds of .303  
 ammunition; but that no weapon of any description  
 was found upon him or in the immediate vicinity.  
 30 The defence put forward on behalf of the Appellant  
 was that he had been captured by bandits, that at  
 all material times he was acting under duress and  
 that at the time of his capture by the security  
 forces he had formed the intention to surrender

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P. 32

PP. 22-24,  
28-29

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with which intention he had come to the place where he was found. The principal grounds of the present appeal are as follows :-

- (a) When the Appellant was giving evidence of his capture by the bandits the learned Trial Judge ruled (it is submitted wrongly) that all evidence as to his conversation with the bandits was hearsay and, therefore, inadmissible  
P.15 LL.36-38
- (b) Although the learned Trial Judge put to the Assessors a specific question as to duress he misdirected them by saying "I must tell you I cannot find any evidence of duress myself" 10  
P.24,LL.21-24  
P.28,LL.13-14
- (c) In the course of his Judgment the learned Trial Judge misdirected himself by saying "I can find no evidence from which duress can be said to have been proved by the defence". It is submitted that there was ample evidence upon which the Court could have found that the defence of duress was established.  
P.29,LL.10-12
- (d) The learned Trial Judge failed to direct either the Assessors or himself that although the burden of proof of duress rested upon the Appellant such burden of proof was less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt. 20
- (e) Although Regulation 4 of the Emergency Regulations, 1951, has been amended by the addition thereto on the 30th December, 1954, of Clause (2 A), the learned Trial Judge wholly misconceived the law applicable to this case in that he failed to direct either the Assessors or himself as to the meaning of "lawful excuse" in the amended Regulation. 30
- (f) The learned Trial Judge failed to direct the Assessors or himself as to whether, having regard to the appeals made by the Government to bandits to surrender their arms and ammunition and to the evidence that the Appellant had produced a piece of silver paper and said this was his passport, the Appellant could be said to have a "lawful excuse" within the meaning of the said amended Regulation. 40

The material sections of the Emergency Regulations and the Penal Code and examples of the appeals made by the Government are annexed hereto.

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3. On the 2nd May, 1955 a police inspector recorded a statement made by the Appellant in hospital through an interpreter who afterwards deposed that the statement was taken by means of question and answer and that it took about an hour to record. It included the following passage :-

P.12,LL.15,  
16,35

"On 2nd March 1955 at about 4.00 p.m. whilst I was returning from Yong Peng Town to Yong Peng Estate, about half a mile from Kankar Bahru Village, I met three male Chinese CTs, one of them called me and spoke to me in Malay and asked me where I was going. I told him that I was returning to the estate. The CT told me not to go. The three CTs were armed with pistols. The CTs told me to follow them. One walked in front and two followed me from behind. We walked about ten days through jungle and at last arrived on top of a hill, where I met about a hundred CTs consisting of five male Indians, ten female Chinese and the rest all male Chinese. They were all armed with various type of weapons"

P.37,L.31  
to  
P.38,L.3

4. The Crown called four members of the security forces who deposed to the finding of the Appellant in a wounded condition and to the fact that the belt with the live ammunition was found upon him. Their testimony, so far as is now relevant, was to the effect that although the Appellant was wounded on the head, neck, back, right arm and right hand he was, nevertheless, conscious and able to walk, and, in fact, did walk for a part of the journey to the base camp, and on the following day, from the base camp out of the jungle; and that when approached by the security force he had shouted out "Don't shoot, don't shoot, I am a rubber tapper and not a bandit" or words to that effect in broken English.

PP.3,4,7,8.

5. The Crown also called Police Inspector Frank David and an interpreter named Muthu Narasingam to depose (inter alia) as to the taking of the statement referred to in paragraph 3 hereof. In the course of cross-examination the interpreter said:-

P.3,LL.25-46  
P.4,LL.39-42  
P.6,LL.5-11  
P.8,LL.14-20  
P.9,LL.23-36

"The Statement was made by questions and answers: yes, I interpreted the questions to the accused in Tamil and interpreted his answers to Insp.in English and it was recorded"

P.3,LL.27.29

PP.10-11  
PP.11-12

6. The Appellant deposed that before his capture by the bandits he had been employed as a rubber tapper on the Yong Peng Estate. On the day in

P.12,LL.15-17

PP.14-20

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- P.14,L.29  
to  
P.15,L.13
- question he went to see a friend named Perumal. He did not remember how long he had stayed with Perumal but stated "I stayed there a day at least". He then described how he had returned in a bus to Yong Peng and started to walk back to his estate. When he had walked about half a mile a Chinese came up from behind him and stopped him. The Chinese pointed a pistol and said "I am a Communist". He was then joined by two others one of whom was armed with a pistol and the other with a rifle. In addition two of the three had "knives like sickles". They informed the Appellant that he could not return home and led him away. One of them walked in front of the Appellant and the other two behind. The record of the Appellant's evidence next proceeds as follows :-
- P.15,LL.26-27
- "At the time they led me they told me the leader was quite close and told me to hurry so that I could give my explanation and return. When we had walked a short distance I got frightened and stopped: I still proceeded although I was frightened; I did not meet the leader that day."
- P.15,LL.30-43
- "Court: I tell Murugason" Appellant's Counsel "hearsay evidence is not admissible and all the conversation with bandits is not admissible unless they are called Intld.P.S."
- "I made a complaint eventually, but they did not allow me to return; at that time I did not do any work in the jungle. Yes I walked in jungle; they did not allow me to move freely; they did not have any trust".
- It is submitted that the learned Trial Judge was wrong in holding that evidence of what was said to the Appellant by the bandits was hearsay and inadmissible and that by his said ruling the learned Trial Judge excluded evidence which was, or might have been, of the highest importance to the defence.
- P.16,LL.1-6
7. The Appellant further deposed that the leader of the bandits would not allow him to return to his home, that their number was great, that they kept watch at night and that he tried to get away but could not. He explained that one of the bandits had handed him the belt to wear and that every evening it was taken away from him. He did not use the ammunition himself, the others would use it. As regards his capture by the security
- P.16,LL.16-18
- P.16,LL.27-29

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Record

forces he deposed that at the time he was wounded he had been given a paper and was reading it. When he was sitting there he thought to himself that if the soldiers came up he would surrender. He had not been wounded in the leg and could have gone away if he had wanted to. When the soldiers came up he lifted his left hand to surrender. He added the following evidence :-

P.16,LL.48-49

P.17,LL.7-15

10 "I could not refuse wearing the belt; if I had refused they would have done anything to me" P.17,LL.20-22

In cross-examination the Appellant said :-

"Yes I was in fear at that time; I thought they would do something to me; they had surrounded me and I could not run away; no I did not see them after that; I described their clothes to the police, but not about their figures because nobody asked me" PP.17-18

20 The Appellant was cross-examined regarding a passage in his statement to the police in which he had said that after training he had been given a rifle and 28 rounds of ammunition. He replied that he had said this when he was in pain as the result of an operation and when he was suffering from loss of memory. In re-examination he said that when the statement was recorded he was suffering from headache and giddiness; that his hand was wounded; and that he could not lift it and there was pain. P.18,LL.2-19  
P.20,LL.19-21

30 8. At the conclusion of the Appellant's evidence the learned Judge recorded that he was satisfied that the charge was in order although it omitted the words "without lawful excuse", and that Counsel for the Defence had stated that he was not raising the point. It is submitted that the charge was defective and should have been amended and that the defect could not be cured by the consent of Counsel for the Defence. P.20,LL.26-30

40 9. Joseph s/o Raman gave evidence as to the circumstances in which the Appellant had left the Yong Peng Estate in order to start his own painting in a shop. This witness also deposed that the Appellant was a very good worker and that his conduct was good and that he was liked by others there. PP.20-21  
P.21,LL.5-6

Kulanthavelu s/o Karuppandan deposed that the Appellant had stopped work and was perfecting his art of drawing and that he was going to start P.21,LL.24-27

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on his own.

P.21,LL.30-41 The last witness for the Defence was Perumal who deposed that the Appellant had come twice to his estate and had come once to him that year. The witness added:-

P.21,LL.37-41 "He did not stay with me; he stayed for about 2 or 3 hours; when he came to me I asked Where are you coming from, and he said Yong Peng, and I asked what work he was doing and he said Tapping rubber; he said he was working" 10

This witness was not cross-examined and no questions were put to him by the Court.

P.24 10. The learned Trial Judge put the following questions to the Assessors :-

(1) Are you satisfied that the accused Subramaniam s/o Munusamy, was in possession of 20 rounds of .303 ammunition on 29th April, 1955, in the Rengam District of the State of Johore without lawful authority? 20

(2) If your answer is "Yes", in your opinion was the accused, when he was in possession of the 20 rounds of .303 ammunition, acting under duress?

(3) In your opinion, had the accused formed an intention to surrender when he reached the place where he was captured?

PP.25-28 The learned Judge then proceeded to sum-up to the Assessors. In dealing with the second question he directed them as follows :- 30

P.27,L.47 to P.28,L.14 "'If your answer is 'Yes', in your opinion was the accused, when he was in possession of the 20 rounds of .303 ammunition, acting under duress?' You have heard the question of duress raised by the learned Counsel for the defence. Section 94 of the Penal Code reads as follows: (Reads). Gentlemen, that section means that fear to be an excuse for doing an offence, in this case of carrying ammunition, must be the fear of immediate death, and that fear, according to the direction of the law laid down by the Court of Appeal, must be imminent, extreme and persistent. The accused said he was taken 40

into the jungle by force and he was afraid to escape, while in the jungle, for fear of being killed; but you will remember when he was captured there was nobody else with him and he was not in fear of being killed. I must tell you I cannot find any evidence of duress myself".

10 In dealing with the third question the learned Judge directed the Assessors that it was entirely for them to say whether the Appellant had formed an intention to surrender when he came to the place where he was found with a belt round his waist and 20 rounds of ammunition in its pouches. P.28,LL.15-29

11. Both Assessors answered the first question in the affirmative and the learned Judge agreed with the Answer. Their Answers to the second and third questions and the learned Judge's decision in relation thereto were as follows :- P.22,LL.29-31

"Question No.2

20 1st Assessor: I am doubtful. From the pros. evidence he was under constant watch of C.Ts. in the jungle, so it may be interpreted as that he was acting under duress. From statement given in hospital, he stated he was on patrol duty to collect foodstuffs; that means he was acting with full awareness of his work. Comparing these 2 we are unable to find a satisfactory solution; so we are doubtful. P.22, L.32 to P.23, L.18

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2nd Assessor: I am doubtful. Having been in the jungle, he was at the mercy of the communists; had he not obeyed them he would have risked his life, but the duress has not been proved; that is why I say it is doubtful".

40 The learned Judge said that he was unable to accept these Answers.

"Question No.3

1st Assessor: Yes. When security forces reached them, he raised his hands up and shouted 'Johnny, I am not P.23,LL.19-43



Record

a terrorist; I am a tapper' In order that the security forces would not shoot him he took a silver paper to attract the attention of the security forces; if he wanted to remove the belt he could have done it without much difficulty since one of his hands was not injured; he was not completely disabled by the shots and it was given in evidence that he could walk; so I think by raising his hand he was showing a sign to surrender.

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2nd Assessor: Yes. He had a good record of service and was a good man, as testified by his colleagues; having been a good man, it was quite impossible for him to join hands with terrorists; so he was making an effort to escape".

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P.23,L.44  
to  
P.24,L.2

The learned Judge said that he could not agree with these Answers. He found the Appellant guilty of the charge, convicted him and sentenced him to death.

12. The learned Judge also delivered a Judgment which included the following passage :-

P.29,LL.3-12

"The question of duress was raised by the learned Counsel for the defence. Although I cannot find any evidence of duress, I put to the Gentlemen Assessors a question on that point. My second question was: (Reads question). The first Gentleman Assessor replied: (As in Notes) and the second Gentleman Assessor replied (as in Notes). With these answers I am unable to agree. I can find no evidence from which duress can be said to have been proved by the defence".

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P.29,LL.20-35

As regards the third question the learned Judge stated that he could find no evidence that the Appellant had the intention to surrender until he was surrounded and covered by the security forces. He went on to say that considering the evidence as a whole he was unable to accept the story of the Appellant. His story did not tally with the story of Perumal since he said that he stayed with Perumal for a day at least on the 6th February, 1955, but Perumal said the Appellant stayed with

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him for only two or three hours. Further, the statement he gave to the police differed from the evidence he gave in Court, that his explanation that the difference arose from loss of memory could hardly be accepted. The learned Judge, therefore, convicted the Appellant as aforesaid and sentenced him to death.

P.29,LL.36-37  
P.24,L.2

10 13. The Appellant appealed to the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur. Counsel for the Appellant stated there was nothing he could urge in support of the appeal and accordingly, by an Order of the Supreme Court, dated the 12th September, 1955, the appeal was dismissed without argument.

P.31,LL.16,31  
P.32,L.7  
P.32,LL.24-30

14. By an Order-in-Counsel dated 25th January, 1956, Special Leave was granted to the Appellant to appeal to Her Majesty in Counsel.

PP.33-34

20 15. The Appellant humbly submits that grave and substantial injustice has been done and that the said Order of the Supreme Court should be set aside and his conviction quashed and that this appeal should be allowed, with costs, for the following amongst other,

#### R E A S O N S

(1) Because the learned Judge erred in holding that the evidence of "all the conversation" between the Appellant and the bandits was inadmissible unless the bandits were called.

30 (2) Because by so holding the learned Judge excluded evidence which was, or might have been, of the highest importance to the defence

(3) Because the learned Judge misdirected both the Assessors and himself as to the evidence of duress.

(4) Because the learned Judge failed to direct the Assessors or himself as to whether there was evidence of "lawful excuse" within the meaning of Regulation 4(2A).

40 (5) Because the learned Judge erred in overruling the Assessors on their Answer to the third question.

DINGLE FOOT.

R.K.HANDOO.

A N N E X U R EEMERGENCY REGULATIONS, 1951.

Fire-arms  
ammunition  
and  
explosive

4. (1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control -

(a) any fire-arm, without lawful authority therefor; or

(b) any ammunition or explosive without lawful authority therefor,

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shall be guilty of an offence and shall on conviction be punished with death.

(Amended by L.N. 363/1-7-52)

(2) A person shall be deemed to have lawful authority for the purposes of this Regulation only if he -

(a) is a police officer or a member of Her Majesty's Naval, Military or Air Forces or of any Local Force established under any written law or any person employed in the Prisons Department of the Federation and in every such case is carrying or is in possession of or has under his control such firearm, ammunition or explosive in or in connection with the performance of his duty; or

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(b) is a person duly licensed, or authorised without a licence, under the provisions of any written law for the time being in force to carry, possess or have under his control such firearm, ammunition or explosive; or

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(c) is a person exempted from the provisions of this Regulation by an Officer-in-Charge of a Police district or is a member of any class of persons so exempted by the Commissioner of Police by notification in the Gazette:

Provided that no person shall be deemed to have lawful authority for the purpose of this Regulation or to be exempt from this Regulation if he carries or has in his possession or under

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## ANNEXURE (Continued)

his control any such firearm, ammunition or explosive for the purpose of using the same in a manner prejudicial to public safety or the maintenance of public order.

\* (2A) A person shall be deemed to have lawful excuse for the purpose of this Regulation only if he proves -

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(a) that he acquired such firearm ammunition or explosive in a lawful manner and for a lawful purpose; and

(b) that he has not at any time while carrying or having in his possession or under his control such firearm, ammunition or explosive, acted in a manner prejudicial to public safety or the maintenance of public order.

(3) A person charged with an offence against this Regulation shall not be granted bail..

\*  
Added by  
Emergency  
(Amendment),  
Regulation,  
1955, made on  
30th Dec.1954  
& published  
in the  
Federation of  
Malaya Gazette  
on the 3rd  
Jan.1955

THE PENAL CODE

20

OF THE FEDERATED MALAY STATES  
(F.M.S. Cap. 45)

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94. Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Act to which  
a person is  
compelled by  
threats

Explanation 1 - A person who, of his own accord or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.

## ANNEXURE (Continued)

Explanation 2 - A person seized by gang-robbers, and forced by threat of instant death to do a thing which is an offence by law - for example, a smith compelled to take his tools and to force the door of a house for the gang-robbers to enter and plunder it - is entitled to the benefit of this exception.

GOVERNMENT INVITATIONS TO SURRENDER

Over a considerable period of time before the date (the 29th April, 1955) when the Appellant was apprehended the Government of Malaya had been issuing leaflets and Press statements inviting terrorists to surrender and to bring their own or other weapons and ammunition with them. The following are examples :-

- I. 1954 18th September Leaflet 3338/HPW/38 10  
Order 416/54
- (Sec.(1)) Carrying signature of Lt.Gen.G.K. Bourne, Director of Operations on behalf of the High Commissioner of the Federation of Malaya. 20
- "This is a New Safe Conduct Pass".
- "1. You may surrender without weapons but bring out weapons if you can.
2. You will be rewarded if you bring the weapons of others".
- II. 1955 7th March
- "Straits Times"
- Publication of the Federation Government's New System to encourage terrorists to surrender which was announced on the 6th March, 1955, mentioning, inter alia, that: 30
- 4 million leaflets in Chinese announcing the new scheme had been dropped in terrorist areas, and  $\frac{1}{2}$  million leaflets in Tamil and Malay

## ANNEXURE (Continued)

were to be dropped in specific areas.

The Scheme offered rewards for inducing a terrorist to surrender. Surrendering terrorist themselves were now better rewarded.

The leaflets dropped, carrying the signature of Sir Geoffrey Bourne, Director of Operations, informed the terrorists that:

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"Not one person who has voluntarily surrendered himself since 1949 has been executed. On the contrary the great majority have started a new life in happy reunion with their families".

The leaflets also stated that rewards would be paid for the surrender of ammunition.

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