IN THE PRIVY COUNCIL No.2 of 1956

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N:-

SUBRAMANIAM son of MUNASAMY ... ~~Petitioner~~ Appellant

-and-

THE PUBLIC PROSECUTOR ... Respondent

10 CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by Special Leave granted by Order in Council dated the 25th day of January 1956, from the Judgment of the Supreme Court of the Federation of Malaya (Mathew, C.J., Wilson and Abbott, JJ.) dated the 12th day of September 1955, dismissing the Appellant's appeal against his conviction in the High Court of Johore Bahru (Storr J. sitting with two Assessors) whereby the Appellant was found guilty of being in possession 20 of 20 rounds of ammunition contrary to Regulation 4(1)(b) of the Emergency Regulations, 1951 and sentenced to death. p.33 p.32 pp.28-29

2. The Appellant was charged with being in possession of the said ammunition on the 29th April, 1955, without lawful authority therefor and thereby committing an offence under the said Regulation 4(1)(b). p.1.1.20

3. The relevant portions of Regulation 4 provide:-

"4 (1) Any person who without lawful excuse, 30 the onus of proving which shall be on such person, carries or has in his possession or under his control :-

"(a) any firearm, without lawful authority therefor; or

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

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

"(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.

.....

"(b) is a person duly licensed or authorised without a licence

"(c) is a person exempted from the provisions of this Regulation

"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 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 purposes of this Regulation only if he proves -

"(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".

4. The evidence called by the Prosecution was that on the 29th April a Patrol of the East Yorkshire Regiment was engaged on a "follow-up" operation in the jungle, that is, they were going to search a bandit camp where an engagement had occurred earlier in the same day between another patrol and some bandits. The patrol found the camp deserted but saw a trail of blood which they followed down to a stream. Just on the other side of the stream they found the

dead body of a Chinese bandit. They searched the body and found an automatic pistol, two rounds of ammunition, a grenade and some documents. The patrol then continued their search. Two of the soldiers saw an Indian crouching behind a tree. They approached him, covering him with their guns,. and the Indian stood up and said, "Dont shoot; I am not a bandit, I am a rubber tapper". This man was the Appellant. The Appellant then gave one of the soldiers a piece of silver paper which he said was his passport. He was searched and found to be wearing a belt containing 20 rounds of ammunition. He was also found to be wounded on the head, arm and neck. A Stretcher was made for him and he was carried a short distance but as the going was heavy he was made to walk with the help of two soldiers. He was taken by the patrol to their camp and eventually taken to Hospital, where on the 2nd May 1955 he was seen by Police Inspector David (P.W.5) and an Interpreter (P.W.6) to whom he made a statement after caution. Some attempt seems to have been made by Counsel for the Defence at the trial to exclude this statement apparently on the ground that the Appellant was not fit enough to understand the caution or make a statement but this was overruled by the Judge and the statement was admitted in evidence.

Ex.p.3 pp.36-39

p.13.l.27

5. The Appellant's statement can be divided into three parts.

(1) The Appellant first described how he came to join the Communist forces as follows :-

"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 C.T.s, 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 C.T. 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.

P.38 l.3

(2) The Appellant then described his activities with the Communists until the date of his capture as follows :-

p.38 l.3 "I resided in this place" (the Communist camp mentioned in (1) above)"for a month where I was given training. After this training I was given a rifle and twenty eight rounds of ammunition. On the 10th April, 1955, I left the camp with twelve others, consisting of four Indians and the rest Chinese. The section was commanded by Cheng Nya who was armed with a Sten gun. Our mission was to collect foodstuffs, but we were not informed of our destination. After ten days march we camped at the place where I was shot. We were at this camp for
p.38. l.15. two days when we were attacked by security forces".

(3) In describing the day on which he was captured, the Appellant said:-

p.38. l.15. " I was shot at about 10.00 a.m. When I was shot one of the Chinese CTs took away my rifle but did not take my ammunition. My ammunition which was in a pouch was around my waist. The pouch was held with a belt and in the pouch were 20 rounds. The eight rounds were in the magazine in the rifle which was taken away by the Chinese CT. After I was shot I was unconscious and when I recovered, I remember sitting under a tree, and shortly afterwards the security forces arrived. I raised my left hand and said in English 'I no communist'. I cannot remember if I gave anything to the security forces. I remember the security
p.38 l.29 forces removing my pouch containing the ammunitions ".

6. The Appellant elected to give evidence on his own behalf and called three witnesses. For convenience the story told by the Appellant in his evidence can be divided into three parts as in Paragraph 5 above.

7. The Appellant first gave an explanation of how he came to be on the road from Yong PengTown to Yong Peng Estate on the day when he joined the Communists. He admitted that he left his employment as a rubber tapper at Yong PengEstate in the early part of February in order to get work as a painter. He said that after he left his employment he went to Singapore and then returned to the Estate for a day. Then he went to visit a friend Perumal S/O Narayanasamy (D.W.4)

at an estate known as the Consolidated Eastern Plantation Limited near Rengam. The Appellant said he could not remember how long he had stayed with Perumal but it was at least a day. The Appellant's story was that it was on his return from his visit to Perumal to the Yong Peng Estate that he met the Communists. As to this meeting the Appellant said that he was asked to halt by a Communist, who pointed a revolver at him and was then joined by two other Communists, one of whom had a pistol and the other a rifle. They told the Appellant that he could not return home. After some argument between the Communists the Appellant was told to follow them to their leader who was quite near and who would hear the Appellant's "explanation", which meant, according to the Appellant, his reasons for wanting to go home. The Appellant said that he was frightened and offered the Communists his fountain pen and wrist watch, which they refused. The Appellant also said that after he had walked a short distance he got frightened and stopped but that he still proceeded although he was frightened. The Appellant said that he saw the leader on the next day and that eventually he made a complaint presumably to the leader but that he was not allowed to return. The Judge told Counsel for the Appellant that in his view all the Appellant's conversations with the bandits was not admissible unless the bandits were called. It does not appear from the Record that the Appellant's Counsel made any attempt to object to the Judge's ruling on this point or offer any explanation of the ground on which he submitted that such conversations were relevant. It does not appear to have been suggested to the Judge that the Appellant desired to give evidence of threats made to him by the bandits in the course of such conversations. Further, it is clear from the Record that the Judge did permit the Appellant to give evidence of conversations between him and the bandits both before and after his ruling.

8. As to the period before his capture the Appellant said that he was given menial work and objected to the leader about the work and asked to be sent home but that he was not allowed to go. He said that he was given training, but with a round stick, not a rifle, and that he was never given a rifle because the bandits did not trust him. He also said that he was followed when he went to carry water and that he could not leave because the bandits kept p.18 l.36

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watch at night. He said that he tried to get away once by suggesting that he should be made a sentry but that this was refused because he did not know how to shoot.

In explanation of how he came to be in possession of a belt containing ammunition he said that he was given the belt about ten days before his capture and that he had to hand over the belt and ammunition to his leader every night. He said that the ammunition from his
P.16 1.37 belt was distributed by the leader of the group among the members for their use. He said that the ammunition amounted to ten rounds and sometimes more depending "on the use; by use meant sometimes they went on a tour of des-
p.16 1.32 truction". He also said that when the group was attacked he would be told to retreat first. The Appellant also said that he could not refuse to wear the belt and added "if I had refused they would have done anything to me". The Appellant did not specify what he feared would be done to him. He said that the only
p.20 1.1 punishment he had received was being tied up for an hour because he refused to eat cooked snakes. The Appellant at no time stated that he was in fear that he would be killed instantly if he refused to carry the ammunition.

9. Referring to the day when he was captured the Appellant said that he was wounded about 10 or 11 a.m. when he was reading a paper. He went on to say :-

p.16 1.50 "I did not notice whether the other comrades were wounded or not or whether they ran away; they might have done. When I was shot in the head I went giddy and so I went a little distance and drank a little water. Because I was bleeding the flies were swarming round my head, so I covered my head with my shirt and sat near the roots of a tree in the shade. When I was sitting there I thought to myself, if the soldiers came up I would surrender; I was not wounded in the leg; I was able to walk; yes I could have gone away if I had wanted to. After some time - I can't say how long - soldiers came up to me; yes this belt (P1) was on me at that time; yes I could have taken it off; I did not take it off. When the soldiers came up I lifted my left hand to surrender. When I raised my left hand, soldiers came and took off my belt; also my wrist watch. I was a little giddy and

can't remember what language I spoke; I said I was not a communist and I also told them I was a rubber tapper; whatever came I spoke". p.17 l.20

Under cross-examination the Appellant said :-

"Yes I said I could still walk after I was injured on 29.4.55; yes I knew security forces were still in the area. I saw one of my party was carried and he was dead; there were four of us there when that man was killed; I do not know where the other two went; shooting was going on and I was wounded; if I had walked out then I would have been shot, so I waited till it subsided; I was then myself wounded; I could use one hand; the other was wounded, I could have then thrown the belt away, but I did not do so, because I thought if I told the truth I would be pardoned". p.20 l.6 p.20 l.1[illegible]

10. The Appellant called three witnesses. The first Joseph s/o Raman (D.W.2) under whom the Appellant had worked at the Yong Peng Estate. This witness gave evidence of the Appellant's good character and confirmed that the Appellant had left his employment of his own accord in February 1955 saying that he wished to paint. The second witness Kulanthavelu s/o Karuppandan (D.W.3) was also from the estate. He also confirmed that the Appellant had a good character. This witness said that he still had some of the Appellant's belongings, e.g. clothes, cooking utensils and some pictures. The third witness was Perumal s/o Narayanasamy (D.W.4). He was the Appellant's friend whom the Appellant said that he has visited just before he joined the Communists. This witness confirmed that the Appellant had paid him a visit about 5 or 6 months ago. He said that the Appellant did not stay with him. He was only there about two or three hours and that the Appellant told him that he was rubber tapping and was in work. As by the 2nd March the Appellant had given up rubber tapping and had been out of work for about a month it looked as though D.W.4 was referring to a visit paid by the Appellant on an earlier occasion.

11. In the course of the learned Trial Judge's summing up to the Assessors he said:-

"When you are considering the evidence in this case, if there are any points on which you have a reasonable doubt, then you must give the benefit of that doubt to the accused. p.25 l.15

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But you must bear in mind that a reasonable doubt does not mean a fantastic doubt; it is not the type of doubt where you can say "I was not there; I did not see; how do I know"? It is the sort of doubt you come across in your
p.25 l.24 every day affairs".

12. The Trial Judge formulated three questions for the Assessors :-

p.24 l.15 "(1) Are you satisfied that the accused, Subramaniam s/o Munusamy, was in possession of 20 rounds of .303 ammunition on the 29th April, 1955, in the Rengam District of the State of Johore without lawful authority?

"(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"?

13. On the second question the Trial Judge said in the course of his summing up :-

p.27 l.50 "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 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".

Section 94 of the Penal Code reads as follows :-

"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".

14. On the third question the Trial Judge directed the Assessors as follows :-

"On the question of surrender, the accused told you that he formed the intention to surrender after he was wounded; of course he also said that he wanted to escape while he was in the jungle under training. It is a question of fact and it is for you to say whether he had formed an intention to surrender when he came to that place with the belt round his waist and 20 rounds of ammunition in its pouches. I must point out to you that if he had the intention to surrender he would have shouted out to the security forces before they found him out. However, it is entirely a matter for you to decide". p.28 l.17 p.28 l.28

15. The Assessors answered the questions as follows :-

"Question No.1 p.22 l.27

Answer

1st Assessor: Yes

2nd Assessor: Yes

Court: I agree with the answer

"Question No.2

1st Assessor: I am doubtful. From the pros. evidence he was under constant watch of CTs 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 two we are unable to find a satisfactory solution; so we are doubtful.

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.

Court: I am 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 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.

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.

Court: I cannot agree with these answers. I find accused guilty of the charge and convict him accordingly".

p. 24 l. 1

16. The Trial Judge delivered an oral Judgment in the course of which he said :-

p.29 l.2

"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.

My third question was (reads question). The answer of the first Gentleman Assessor was: (as in Notes) and that of the second Gentleman Assessor was: (As in Notes). I regret I am unable to agree with either of these answers. I can find no evidence that the accused had the intention to surrender until he was surrounded and covered by the security forces.

Considering the evidence as a whole, I am unable to accept the story of the accused as to his entry into the jungle or what he did there. His story does not tally with the story of his friend Perumal (DW4); the accused said he stayed with Perumal for a day at least on the 6th February this year, but Perumal said the accused stayed with him only for 2 or 3 hours. Further the statement he gave to the police differs from the evidence he gave in this Court, and his explanation that the difference arose from loss of memory can hardly be accepted. I am referring especially to his statement that he had a rifle at the time of the attack by the security forces and also the other details he gave to the police. These details could not have been given from loss of memory.

For these reasons, I find the accused guilty of the charge and I convict him". p.29 l.37

17. The Appellant appealed to the Court of Appeal of the Supreme Court of the Federation of Malaya. The grounds of his appeal were :-

"The conviction is against the weight of evidence and the appellant above-named therefore prays that the conviction and sentence on him may be set aside or that the sentence on him may be reduced". p.30 l.30 p.31 l.1

18. At the hearing of the said appeal Counsel for the Appellant said that he was unable to urge anything in the appeal and it was therefore dismissed summarily

19. The Appellant petitioned Her Majesty in Council for special leave to appeal from the judgment dismissing the appeal. The Petition for Special Leave to Appeal was based on the ground that the Appellant had established at the trial that he had a lawful excuse for possession of the ammunition as he intended to surrender. It is submitted that by virtue of the provisions of Paragraph (2 a) of Regulation 4 this Defence was not open to the Appellant. On his own evidence he had not acquired the ammunition in a

lawful manner nor for a lawful purpose. Further on his own evidence the Appellant clearly had acted in a manner prejudicial to public safety and the maintenance of public order while carrying or having in his possession the said ammunition. Further and in the alternative, the Trial Judge clearly did not believe that the Appellant intended to surrender until he was surrounded and covered by the soldiers.

20. In a Supplementary Petition the Appellant raised the following additional points which are set out in Paragraphs 21 to 26 below.

21. The Appellant first submitted that the Trial Judge failed to direct either the Assessors or himself with regard to Regulation 4 (2a). It is submitted by the Respondent that this error caused no miscarriage of justice because for reasons set out above the defence under paragraph (2a) was not open to the Appellant on his own evidence.

22. It was submitted for the first time on behalf of the Appellant that the charge against him was defective as it did not contain the allegation that he was acting without lawful excuse. The Respondent submits first that the charge was not defective by reason of the omission of the said words, alternatively that it is not open to the Appellant to raise this point at this stage, and further that the alleged omission did not cause any miscarriage of justice. Finally, Counsel for the Appellant at the trial expressly stated that he was not taking the point that the charge was defective by reason of the said omission. But for that statement the charge would (if defective) have been amended.

23. It was also submitted that the learned Trial Judge was wrong in ruling that conversations between the Appellant and bandits were inadmissible in evidence and it was suggested that the Appellant was by this ruling precluded from giving evidence that he was compelled to carry ammunition by threats and that therefore his defence of duress was prejudiced. The Respondent does not admit that the Appellant was about to give evidence of any such threats either at the time of the ruling complained of or at any other time during the trial. The Appellant's Counsel never indicated to the learned Trial Judge that the reason why he wanted to lead evidence of the said conversations was to give evidence of such threats. Further the Appellant both before and after the said ruling gave in evidence the substance of the several conversations between himself and other bandits and if there had been any such threats he would have given evidence of them. Further

the Appellant did not say anything in his evidence to suggest that when he was given the ammunition or when he was carrying the same he was compelled to do so by any words spoken to him nor that he was under any apprehension of instant death if he refused to take or carry the ammunition.

24. It was also submitted on behalf of the Appellant that the learned Trial Judge misdirected the Assessors and himself in saying in his summing up and in his judgment that there was no evidence of duress. The Respondent submits that the learned Trial Judge was correct in saying that there was no evidence of duress. The Appellant did not say in evidence that he was compelled to carry the ammunition by reason of anything said to him or that he was at the time under apprehension of instant death. The highest the Appellant put his case was that if he had refused to wear the ammunition belt the bandits would "have done anything" to him. Even if it is conceded that doing anything to him would include killing him, then the Appellant's evidence can be paraphrased as follows:- "If I had refused they would have done anything to me, even going so far as to kill me". That is not enough. To establish duress the Appellant's state of mind should have been that he apprehended that if he refused to wear the belt the consequence could only be his instant death. It is not enough for the Appellant to say (as it is submitted he was saying) that he thought that there was a possibility that he would be killed. Further in his judgment the learned Trial Judge rejected the Appellant's story both of how he came to join the bandits and what he did while he was there because (inter alia) of the discrepancies between his evidence and his statement to the police. The effect of this finding must be that the learned Trial Judge did not accept that the Appellant played such a reluctant part as he alleged. Once the Judge rejected the Appellant's story of how he was compelled to join the bandits the Respondent submits that even if the Appellant was thereafter compelled by threats of instant death to carry the ammunition he would not be protected by section 94 of the Penal Code since he would come under the proviso to that section being a person who had of his own accord or from a reasonable apprehension of harm to himself short of instant death placed himself in a situation by which he became subject to such constraint. Indeed even if the Appellant's evidence of how he joined the communists was accepted in full, it was not strong enough to prevent the proviso coming into operation.

Further as the learned Trial Judge pointed out in his summing up to the Assessors, the Appellant had on his own evidence been alone for some time before his capture. During that time he could not be said to be under any fear of being killed. The Appellant admitted that during that time he could have thrown the belt away. His explanation for not doing so was that he thought if he told the truth he would be pardoned. This explanation even if accepted, does not constitute the defence of duress for that period of time. Finally the Respondent submits that the defence of duress does not apply to the breach of Regulation 4 which creates an absolute offence the only defences being those incorporated into the Regulation itself.

25. The Appellant also suggested that the learned Trial Judge failed to direct the Assessors or himself that the burden on the Appellant of proving duress was less than the burden of proof on the prosecution. In fact, the learned Trial Judge directed the Assessors to give the benefit of any reasonable doubt to the Appellant on any point, which of course included the question of duress. The Assessors by their answers clearly showed that they thought that if they had any doubt on the question of duress they should find in favour of the Appellant. Further the learned Trial Judge treated the Assessors' answers that they were in doubt as a finding in the Appellant's favour. The Respondent submits that this misdirection (if it existed) caused no miscarriage of justice

26. The Appellant's final submission was that the learned Trial Judge erred in not applying the decision of Wong Pooh Yin -v- Public Prosecutor 1955 A.C. 93 The Respondent submits first that the facts of the present case are quite different from the facts of Wong Pooh Yin's Case. Secondly the phrase "Lawful excuse" is now defined by Regulation 4 (2)(a) which came into force after Wong Pooh Yin's case

The Respondent humbly submits that the appeal should be dismissed for the following among other

REASONS

(1) Because the Appellant was guilty of the offence as charged

(2) Because the Appellant had no lawful excuse as defined by Regulation 4 (2)(a) for his possession of the said ammunition.

(3) Because the learned Trial Judge's failure to direct the Assessors on the effect of Regulation 4 (2)(a) caused no miscarriage of justice to the Appellant

(4) Because the form of the charge was not defective, alternatively, if it was defective, the defect caused no miscarriage of justice to the Appellant.

(5) Because the learned Trial Judge's ruling that conversations between the Appellant and the bandits were inadmissible was not intended to and did not in fact prevent the Appellant giving evidence in support of the defence of duress.

(6) Because the learned Trial Judge did not misdirect himself or the Assessors in saying that there was no evidence of duress.

(7) Because the Appellant had failed to assert or establish that he was under the apprehension of instant death at the material time

(8) Because the learned Trial Judge rejected as he was entitled to do the Appellant's evidence on which the said defence of duress was based.

(9) Because the said defence of duress is not a defence to a charge under the said Regulation 4.

(10) Because there was no misdirection as to the burden of proof on the Appellant in establishing the defence of duress, alternatively if there was any such misdirection the same did not cause any miscarriage of justice.

D.A.GRANT.

No. 2 of 1956

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

BETWEEN:-

SUBRAMANIAM, son of MUNUSAMY Appellant

-and-

THE PUBLIC PROSECUTOR Respondent

C A S E

-for-

THE RESPONDENT

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