Privy Council Appeal No. 2 of 1956

Subramaniam, son of Munusamy - - - - - - - *Appellant*

v.

The Public Prosecutor - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16 MAY, 1956

Present at the Hearing:

LORD RADCLIFFE
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal by special leave from a judgment of the Supreme Court of the Federation of Malaya (Mathew, C.J., Wilson and Abbot, J.J.) dismissing an appeal against a conviction in the High Court of Johore Bahru (Storr, J., sitting with two assessors) whereby the appellant was found guilty of being in possession on the 29th April, 1955, of 20 rounds of ammunition contrary to Regulation 4 (1) (*b*) of the Emergency Regulations, 1951, and sentenced to death.

When the appeal to the Supreme Court came up for hearing counsel assigned to argue the case for the appellant said that there was nothing that he could urge and, probably as a consequence, the judgment of the Supreme Court does not give reasons for the dismissal of the appeal. The statement of counsel in the Supreme Court, though relevant to the question whether valid grounds for this appeal exist, is not conclusive of that question.

Regulation 4 provides:—

"(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, 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 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

(*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

(*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 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—

(*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."

The words " who without lawful excuse, the onus of proving which shall be on such person " in subsection 1 did not appear in the original regulation and were added by an amendment made in 1952. Subsection 2A was added by an amendment, made on 30th December, 1954.

It was common ground that on the 29th April, 1955, at a place in the Regam 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 ammunition ; no weapon of any description was found upon him or in the immediate vicinity.

The defence put forward on behalf of the appellant was that he had been captured by terrorists, 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 with which intention he had come to the place where he was found.

In view of the opinion they have formed upon the questions relating to the defence of duress it is not necessary for their Lordships to discuss the questions unrelated to this defence argued upon this appeal.

The law relating to duress is set out in section 94 of the Penal Code of the Federated Malay States (Chap. 45, The laws of the Federated Malay States, Vol. II, page 935), in a group of sections headed " general exceptions " and is to the following effect : —

" 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.

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.

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."

It is convenient at this stage to deal with an interpretation of subsection 2A and section 94 taken together put forward by counsel for the respondent. He conceded that the "general exceptions" appearing in the Penal Code were applicable to offences created by the Emergency Regulations. He argued however that the term "lawful excuse" in section 4, subsection 1, and in section 4, subsection 2A, included the general exceptions and that, consequently, duress (or any other general exception) would be of no avail as a defence to a charge under section 4 unless the conditions set out in paragraphs (*a*) and (*b*) of subsection 2A were satisfied. Their Lordships cannot agree. Their Lordships are of the opinion that "lawful excuse" in section 4 covers a field of its own and that subsection 2A, although it restricts the scope of the defence of "lawful excuse", does not affect the scope of the defences afforded by the general exceptions appearing in the Penal Code.

For the purposes of their decision their Lordships find it sufficient to set out in brief outline the evidence led in the case.

Four members of the security forces, a police inspector and an interpreter gave evidence for the prosecution.

The members of the security forces deposed *inter alia* that on the 29th April a patrol went out to search a terrorist camp where an engagement had occurred earlier on the same day between another patrol and some terrorists. The patrol found the camp deserted. On searching the surrounding area they found the appellant wounded on the head, back, neck, right arm and right hand, with a belt containing twenty rounds of ammunition upon him. It was in respect of this ammunition that the appellant was charged.

The police inspector produced a statement which, after due caution, he had obtained, with the aid of the interpreter, from the appellant while he was lying in hospital in a wounded condition. In this statement the appellant said, among other things, that while walking along a certain road he was accosted by three Chinese terrorists armed with pistols and made to follow them, one walking in front and two behind him. He said that he was taken to a place where there were about a hundred terrorists, all armed, where he stayed about a month and was given training, and that after this training he was given a rifle and ammunition. He said he left the camp with twelve others to collect food and that after some days they camped at the spot where they were attacked by security forces.

The statement appears as a series of answers to a series of questions but from the evidence of the inspector and interpreter it is uncertain whether every question put has been recorded. The appellant was given an opportunity of adding to the statement, but did not do so. It does not appear that he was asked whether the carrying of the ammunition, and his conduct generally, was voluntary or the result of duress, and there is nothing in the statement to the effect that duress had been exercised except what might be gathered remotely from the fact that the terrorists were armed.

The appellant gave evidence in defence. He called witnesses to give evidence as to his character and to support his story as to how he had been occupied for some months before his capture by the terrorists.

The appellant described his capture thus:—

". . . when I was just walking down a small hill, where there was lallang at the sides, a Chinese came out and asked me to halt; I did not know then that he was a communist; he came from behind me. I asked him why are you stopping me? I want to return home.

> He spoke in Malay and I replied in Malay. He then asked me Do you know who I am? and so saying he drew out a revolver from behind him; to all appearance he was a civilian; he pointed that pistol at me and said 'I am a communist' and it was then I knew that he was one. He asked me to produce my I. Card; when he looked at my I.C. he spoke something in his own language and 2 others came out; the 3 then surrounded me; of the other 2 one had a pistol and the other had a rifle about a yard long; they told me I could not return home; two of them had knives like sickles."

He then described how he was forced to accompany the terrorists, one of whom walked in front and two behind, who told him he was being taken to their leader. At this stage an intervention by the trial judge is recorded thus:—

> "*Court:* I tell Murugason hearsay evidence is not admissible and all the conversation with bandits is not admissible unless they are called."

Murugason was counsel assigned to defend appellant.

In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

In the rest of the evidence given by the appellant statements made to him by the terrorists appear now and again to have been permitted, probably inadvertently, to go in. But, a complete, or substantially complete, version according to the appellant, of what was said to him by the terrorists and by him to them has been shut out. This version, if believed, could and might have afforded cogent evidence of duress brought to bear upon the appellant. Its admission would also have meant that the complete story of the appellant would have been before the trial judge and assessors and enabled them more effectively to have come to a correct conclusion as to the truth or otherwise of the appellant's story.

In the course of his evidence the appellant stated that he was given the ammunition belt to wear but no weapon, the object, according to him, being that others could use the ammunition. The evidence of the appellant, such as it was, suggested generally that he was in fear, that he planned unsuccessfully to escape, and that he had no alternative but to do as the terrorists asked him to do. He said amongst other things, "I could not refuse wearing the belt; if I had refused they would have done anything to me." Those words, in the context in which they occur, may well have been used by the appellant to indicate, as best as he could, that owing to what the terrorists said and did he was in reasonable fear of instant death if he refused to do what the terrorists demanded of him.

At the end of the trial the learned trial judge put to the assessors the question (among other questions which their Lordships do not find it necessary to discuss) whether the appellant was acting under duress when he was in possession of the ammunition. In this connection he read and explained to them section 94 of the Penal Code. He reviewed the evidence and 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." It would appear that in the use of the word "evidence" he included evidence led for the defence

as well as evidence led for the prosecution. This direction was favourable to the appellant.

On the question of duress he observed, "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."

The first assessor answered, "I am doubtful. From the prosecution evidence he was under constant watch of Communist Terrorists 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." The second assessor answered, "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."

When due weight is given to the direction regarding doubts (vide above) these answers must be considered as having been in the minds of the assessors, answers in favour of the appellant, and it would appear that they were so understood by the trial judge. He disagreed with them and convicted the appellant.

On the question of duress the following passage appears in his judgment, "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." He then stated what the question was and what the answers were and went on to say, "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."

Their Lordships cannot agree with the statement made by the learned trial judge to the assessors and repeated in his judgment that there was no evidence of duress in the evidence recorded, if by that statement he meant that as a matter of law there was no evidence of duress to be considered by a jury or, as in this case, by a judge and assessors. The evidence may, after due consideration, have failed on grounds of credibility or other grounds, to establish the existence of duress but it would be incorrect to say that there was no evidence.

It is possible, though it is not clear, that in saying what he did the learned judge did not intend to say that there was no evidence of duress but was saying (as he was entitled to do) that the evidence was unacceptable. The last sentence in the passage from his judgment quoted above would appear to support this view.

It is also possible, though in their Lordships' view, improbable, that the learned trial judge directed himself and the assessors that there was no evidence of duress because at the actual moment of capture the terrorists had left and the learned judge thought that duress, if it had existed, had then ceased to exist. But threats previously made could have been a continuing menace at the moment the appellant was captured, and this possibility was at least a matter for consideration by a jury or by a judge and assessors. The terrorists or some of them may have come back at any moment.

Whatever may be said of the evidence of duress on the record it is only fair to the appellant to assume that the evidence which the appellant was in the course of, but was wrongly prevented from, giving would have borne upon the vital issue of duress, and their Lordships have to consider whether in the circumstances of this case this exclusion of admissible evidence affords sufficient reason for allowing this appeal.

The jurisdiction exercised by the Board in criminal cases is a very narrow one. In examining that jurisdiction Lord Simon, delivering the judgment of the Board in *Muhammad Nawaz* v. *King-Emperor* 68 I.A. 128, said:—"Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice.

An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses." In this case the appellant has not been allowed to give relevant and admissible evidence which is a circumstance very similar in its consequences to not being allowed "to call relevant witnesses". It is not however in every case that admissible evidence is shut out that their Lordships will interfere, and the question whether this is a case which warrants interference requires further consideration. There remains one further matter to be considered before this question can be finally decided.

The learned trial judge in the last paragraph of his judgment said—"Considering the evidence as whole, I am unable to accept the story of the accused as to his entry into the jungle or what he did there." If this view of the credibility of the appellant's story is accepted, the exclusion of evidence referred to in preceding paragraphs was immaterial to the result of the trial. In support of his view the learned trial judge referred to a discrepancy between the appellant's evidence and his statement to the police and also to a discrepancy between his evidence and the evidence of a witness for the defence as to the period during which the appellant had stayed with the witness. Whatever might have been the effect of these two discrepancies on the mind of the learned trial judge he had to, and did, consider the evidence as a whole. The argument that, in the circumstances of this case, the admission of the evidence wrongly excluded would have made a material difference to the consideration of the evidence as a whole and to the conclusions of the learned trial judge upon credibility and duress has considerable force, particularly when the opinions of the assessors are taken into account. And the argument would have force even if the appellant be regarded as having given untrue evidence on the matters with regard to which the discrepancies arose. His evidence upon vital matters may or may not have been held to be untrue. Their Lordships feel unable to hold with any confidence that had the excluded evidence, which goes to the very root of the defence of duress, been admitted, the result of the trial would probably have been the same.

For the reasons which have been given their Lordships have humbly advised Her Majesty that the appeal be allowed.

(39764) Wt. 8069—3 90 7/56 D.L.

In the Privy Council

SUBRAMANIAM, SON OF MUNUSAMY

v.

THE PUBLIC PROSECUTOR

[DELIVERED BY MR. L. M. D. DE SILVA]

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