Judgment 14, 1968

JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL No.20 of 1967

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. OSMAN BIN HAJI MOHAMED ALI and
2. HARUN BIN SAID alias TAHIR
Appellants

- and -

THE PUBLIC PROSECUTOR Respondent

CASE FOR THE APPELLANTS

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10 1. This is an appeal by special leave from a judgment of the Federal Court of Malaysia (Wee Chong Jin, C.J., Tan Ah Tah and Ambrose, JJ.) given on the 5th October, 1966, dismissing the appeals of the Appellants against their conviction in the High Court of Singapore (Chua, J.) on the 20th October, 1965 of the murder of three persons (namely, Susie Choo Kay Hoi, Juliet Goh Hwee Kuang and Yasin bin Kesit) and affirming the sentences of death passed on the Appellants by the learned Judge. pp.611-612 pp.601-611 pp.579-580

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2. The statutory provisions relevant to this appeal are set out in the appendix to this Case.

3. The circumstances in which the said three deceased came to their deaths were as follows:-

On the 10th March, 1965 at 3.07 p.m. there was an explosion in a building in Orchard Street, Singapore known as MacDonald House. That explosion was caused by the ignition of some 20-25 lbs. of explosives which had been placed on the landing of the mezzanine floor of the said building a few minutes earlier. No one saw who it was who placed the explosives there. The explosion killed Susie Choo and Juliet Goh. It caused fatal injuries to Yasin, who died therefrom two days later.

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4. On the 13th March, 1965 at about 8 a.m. the

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Appellants were rescued from the sea by two men in a bumboat. The Appellants were then clinging to a wooden plank. This was in Malaysian waters. The Appellants were handed over to a passing marine police boat and taken to Singapore. There the Appellants were charged with having entered a controlled area contrary to the Internal Security Act, and subsequently with the murder of the said three deceased.

5. Both Appellants made statements to the Police later on the 13th March, 1965. The first
pp.616-617 Appellant said in his statement that he had reached Singapore on Wednesday, the 10th March, with the second Appellant. They had gone to look for a target, and after finding the target had gone to eat and had some rest. They had then gone to the building, and placed two bundles of explosives on stairs before reaching the first floor. The second Appellant had lit the fuse, and then they had left and taken a 'bus. The
pp.620-621 second Appellant said in his statement that he had come to Singapore on the 10th March with the first Appellant on instructions from Komando Operasi Tertingi Indonesia. His instructions as a soldier had been to carry the parcel and light it at the electric power station in Singapore or any other building. The Appellants had gone to Pasir Panjang (where the power station is), and later to the building where they had placed the parcel on a landing of a staircase. After lighting the fuse they had taken a 'bus. They had spent the night in a junk. Later on the 13th March, the first Appellant made a statement
pp.621-625 before a Magistrate. In this statement he said he had been instructed by Lieutenant Paulus Subekti to cause trouble in Singapore. He then repeated the substance of the statement which he had made earlier to the Police, and went on to say that they had slept that night and also the next night in a taxi. On the third day, at about 11 p.m. they had decided to leave Singapore, and had boarded a motor boat. The boat had hit a rock and been smashed to pieces, and they had saved themselves with a plank. At about 7 a.m. they had been arrested within Malaysian waters by the Police.

6. The Appellants were tried by Chua, J. sitting

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alone, without a preliminary inquiry, under the Emergency (Criminal Trials) Regulations, 1964, on thirteen days between the 4th and 20th October, 1965. At the trial the claim of the Appellants to be treated as prisoners of war was heard as a preliminary issue. The learned Judge expressed the view, which was accepted by the Respondent, that at the material time there was a state of armed conflict between the Republic of Indonesia and the Federation of Malaysia (of which Singapore was then a part). The Appellants both gave evidence that they were members of the Indonesian armed forces. Evidence was called by the Prosecution of the circumstances in which the Appellants were rescued from the sea, and events which took place while they were in custody awaiting trial. At the conclusion of the evidence, the learned Judge heard submissions by counsel for the Appellants, and then said that the evidence was overwhelming that the Appellants, when picked up out of the water on the 13th March, were not in military uniform. He found that when picked up the Appellants had claimed to be fishermen, but later the first Appellant had told the Police that he was a fisherman while the second Appellant had claimed to be a farmer. The learned Judge said that he had no doubt that the Appellants were not members of the regular armed forces of the Republic of Indonesia. Even if they had been members of those forces, they would not, in his opinion, have been entitled to the status of prisoners of war. The learned Judge took the view that members of the enemy armed forces who came to Singapore "with the assumption of the semblance of peaceful pursuits divesting themselves of the character or appearance of soldiers" were not entitled, if captured, to the privileges of prisoners of war. The trial therefore proceeded.

pp.3-138
p. 9
pp.139-148
p. 148
p. 149

7. The Appellant s respectfully submit that on the evidence before him Chua, J. ought to have held that they were members of the armed forces of Indonesia. In any event, on the hearing of the Petition for leave to appeal on the 7th June, 1967 fresh material bearing on this point was put in evidence on behalf of the Appellants. The evidence came from the Indonesian authorities and was not available at the trial because of the state of confrontation then prevailing. That evidence was not challenged on

pp.626-656

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behalf of the Respondent, and in the respectful submission of the Appellants it conclusively establishes that they were indeed members of the regular armed forces of the Republic of Indonesia at the material time.

8. The Prosecution tendered in evidence the statements of the Appellant s summarized in paragraph 5 above. Objection to the admission
pp.466-474 of these statements was made on behalf of the Appellants on the ground that the statements had been made as a result of threats and ill-treatment, and that the Appellants had been told by the Police what they were to say.
pp.310-465 After hearing evidence, Chua, J. admitted all
pp. 474 the statements.

9. Of the other evidence given for the Prosecution, it is necessary to summarize only that referring to two points, viz:-

(a) a witness named Tan Goh Eng said he was an omnibus conductor. On the 10th March,
pp.269-272 1965, at two or three minutes past 3 p.m. his omnibus had been held up at traffic lights near MacDonald House. While it had been held up at the lights, two male
pp.272-273 Malays had boarded it. On the 18th March, 1965, he had attended an identification parade, and had picked out the Appellants as these two Malays. When boarding the 'bus they had been wearing ordinary clothes.

(b) there was no complete evidence to show who the occupants of MacDonald House were or what business was conducted in it.

pp.182-246 The effect of the evidence was as follows:-

The Hong Kong and Shang-hai Bank Corporation occupied the ground and mezzanine floors of Macdonald House. A separate entrance led to what was described at the trial as the tenanted part of the building. This comprised the first to the eighth floors. The explosives had been placed in that part of the building on the landing of the

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mezzanine floor.

A business called Lee Wee Thin Import Export Company Limited, one called Lim Wee Phang Company Limited and one called Associated Instrument Manufacturers Ltd. had offices on the first floor of the building; the Australian High Commission was situated on the second floor; the Metal Box Company Limited had offices on the third floor; there were tenanted offices on the fourth floor; there was a dental clinic on the fifth floor; there were two flats on the eighth floor; and the Malaya-Borneo Building Society had offices in some part of the building. But there was no evidence that the above-named had the exclusive occupation of their respective floors nor was there any evidence with regard to the nature of the business or activity carried on by them except what was to be inferred from their names. Moreover, there was no evidence with regard to the tenants of the fourth floor of the building nor with regard to the occupants (if any) of the sixth and seventh floors. In particular there was no evidence that the building was occupied or used solely for non-military purposes.

10. The evidence given by the Appellants at the trial was, in short, to the following effect:-

On the 10th March, 1965, the day of the explosion, the Appellants were in Indonesia and not Singapore. They were both members of the regular armed forces of the Republic of Indonesia stationed in the Rhio Islands. pp.497-525 pp.525-569

The Appellants were instructed by their Commanding Officer to go in a motor sampan to Pulau Dua in Singapore. There they were to meet a Chinese named Tam and to exchange the sampan with him for a boat loaded with goods. This boat they were to take back to the Rhio Islands.

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In pursuance of these orders the Appellants set out at about 2 a.m. on the 13th March, 1965; but they never achieved their mission. Shortly after leaving the sampan struck an object in the water and sank. The Appellants were able to keep afloat by clinging to a loose plank. It was thus that they came to be rescued by the two men in the bumboat some two hours later.

pp.579-580 pp.584-594

11. At the conclusion of the evidence and the submissions by counsel Chua, J. convicted both Appellants and sentenced them to death. He delivered the reasons for his decision on the 10th November, 1965. The learned Judge described the explosion in MacDonald House on the 10th March, 1965, and the rescue of the Appellants from the sea in the morning of the 13th March. He then summarized the evidence given for the Prosecution and by the Appellants about the making of the Appellants' statements. Having done so, he said he had found that the statements had been made voluntarily, and not by force, inducement, threat or promise. He then summarized the evidence of the omnibus conductor, and said he accepted his identification of the Appellants. Chua, J. then summarized the evidence given by the Appellants. He said he did not believe it, but was convinced on the evidence of the conductor that the Appellants had boarded an omnibus near MacDonald House at about 3 p.m.. on the 10th March, 1965. He said he had regarded the Appellants' confessions with great care, and after considering the whole of the evidence had been convinced that the confessions were true. He had therefore found the Appellants guilty of the charges.

pp.598-600

12. The Appellants appealed to the Federal Court of Malaysia. The appeal was heard by Wee Chong Jin, C.J., Tan Ah Tah and Ambrose, JJ. Judgment was reserved. The judgment

pp.601-611

of the Court was delivered on the 5th October, 1966. The appeals were dismissed and the convictions and sentences affirmed.

13. In their judgment, the learned Judges of the Federal Court first summarized the material

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evidence. They then referred to the question whether the Appellants were members of the Armed Forces of Indonesia and prisoners of war within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (hereinafter called "the Convention"). The question whether the Convention was applicable in Singapore had not been raised at the trial, and the Court therefore dealt with the appeal on the assumption that the Convention was applicable. The learned Judges said they were satisfied that there had been ample evidence to support Chua, J's finding that the Appellants were not members of the regular armed forces of the Republic of Indonesia. However, they went on to say that the Appellants, assuming they were the persons who had placed and set off the explosives at MacDonald House, had entered and left that building in civilian clothing, nor could there be any doubt that the explosion "was not only an act of sabotage but one totally unconnected with the necessity of war". The learned Judges thought it clear that under International Law "a member of the armed forces of a party to a conflict who, out of uniform and in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a prisoner of war".

pp.601-607

pp.607-608

14. The learned Judges next discussed the admissibility of the Appellants' statements. They upheld Chua, J's. ruling that they were admissible in evidence. It had been contended they said, that, since the statements amounted to confessions and the Appellants had retracted them at the trial, no weight should have been attached to them. It had also been argued, in reliance upon certain Indian authorities, that a retracted confession could not be made the sole basis of a conviction without corroboration. They said they did not agree with this latter view. They adopted the following passage in the judgment of the Court of Appeal of the Malayian Union in Yap Sow Keong v. The Public Prosecutor (1947) M..L.J. 90:

pp.609-610

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> "In our view the law as to the admissibility of retracted confessions in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the Court is satisfied of its truth. We do not agree with those Indian decisions which lay down that before a person can be convicted on his retracted confession there must be corroborative evidence to support it."

The learned Judges said that, applying that principle to the facts, they shared the conclusion of Chua, J., who had been "convinced that the confessions made by the two accused were true." They held that Chua, J., although the confessions had been retracted, had been justified in accepting the confessions as true and in convicting the Appellants.

15. The Appellants respectfully submit that Chua, J. sitting alone had no jurisdiction to try them. The authority claimed for this procedure was the Emergency (Criminal Trials) Regulations, 1964. Section 200 of the Criminal Procedure Code provides that in all cases "where the punishment of death is authorised by law the accused shall be tried by jury". By Article 8 (1) of the Constitution of Malaysia, "All persons are equal before the law and entitled to the equal protection of the law." The Appellants therefore respectfully submit that the said Regulations, in so far as they purport to authorize the Public Prosecutor, or any of the numerous Deputy Public Prosecutors, to deprive any person charged with a capital offence of the protection of a preliminary inquiry and trial by jury, are unconstitutional and invalid. The Appellants further submit that s.2 of the Emergency (Essential Powers) Act, 1964, upon its proper interpretation, does not empower the Yang di-Pertuan Agong to make regulations conflicting with the Constitution; alternatively, if s.2 does purport to confer such power upon the Yang di-Pertuan Agong, s.2 is iteself unconstitutional and invalid.

16. The Appellants respectfully submit,

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furthermore, that at the date of the trial they were Prisoners of War within the meaning of paragraph A (1) of Article 4 of the Convention. They respectfully submit that this is so whether the acts with which they were charged (and were subsequently held to have committed) were acts of war or not. In the alternative, the Appellants respectfully submit that at the date of the trial their status had not been determined by a competent tribunal within the meaning of Article 5 of the Convention, and they were therefore deemed to be Prisoners of War at that time by virtue of that provision.

17. It was therefore incumbent upon the Singapore authorities, in the respectful submission of the Appellants, to give the notification required by Article 104 of the Convention and section 4 of the (Malaysian) Geneva Conventions Act, 1962. No evidence was adduced by the Prosecution at the trial that that notification had been given. The trial nevertheless proceeded, and the Appellants respectfully submit that in these circumstances it was a mistrial.

18. The case was argued in the Courts below on the assumption that at the material time (a) there was a state of armed conflict between Indonesia and Singapore and (b) the Convention was applicable in Singapore. In the respectful submission of the Appellants both assumptions were correct in fact and in law. pp.9, 608 pp.7, 607

19. Since it is now established that the Appellants were in truth members of the regular armed forces of the Republic of Indonesia, they respectfully submit that the acts which they were found to have committed were acts of war and hence incapable of constituting the offence of murder.

20. Chua, J. regarded 'the assumption of the semblance of peaceful pursuits' by the Appellants as alone sufficient to deprive them upon capture of the privileges of prisoners of war. The learned Judges of the Federal Court also placed emphasis upon the wearing by the Appellants of civilian clothing. The Appellants respectfully p. 149 p. 608

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submit that in International Law, whatever the position may once have been, the wearing by a soldier of civilian clothes is not now alone sufficient to deprive his acts of the character of acts of war. The learned Judges of the Federal Court also relied on the
p. 608 placing of the explosives 'in a non-military building'. The Appellants respectfully submit that the evidence was not sufficient to shew that MacDonald House was a non-military building. Furthermore, the attempted distinction between military and non-military buildings is no longer valid in International Law.

21. The Appellants respectfully submit that there was no evidence upon which they could legally be convicted. Their confessions made to the Police were subsequently retracted. In India the law governing the admissibility of confessions is identical with that of Singapore, and the conditions of the country are not dissimilar. It has been held in India that a court ought not to act upon a retracted confession unless upon the whole of the evidence the court is in a position to come unhesitatingly to the conclusion that the confessior is true, and the court can rarely be in that position unless the retracted confession is corroborated. The Appellants respectfully submit that this is the law in Singapore as well. In so far as Yap Sow Keong v. Public Prosecutor (1947)M. L.J.90, upon which the Federal Court relied, laid down a different rule, it was, in the respectful submission of the Appellants, wrongly decided.

22. Neither according to the Indian rule nor even according to the decision in Yap Sow Keong v. Public Prosecutor was there, in the Appellants' respectful submission, evidence to warrant their conviction. The retracted confessions were uncorroborated, for there was no independent evidence tending to confirm the statements in the confessions that the Appellants placed explosives in the building. The Appellants respectfully submit that the evidence of the conductor of the omnibus did not constitute corroboration in this sense.

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There being no corroboration, there was nothing else in the evidence upon which the court could come unhesitatingly to the conclusion that the confessions were true. The Appellants respectfully submit that the Federal Court, in relying upon the circumstances of the Appellants' rescue from the sea and the false evidence (as Chua, J. found it to be) given by the Appellants at the trial, failed adequately to appreciate the position of Indonesian soldiers at large in Singapore during the period of confrontation (as, upon the evidence of the conductor, the Appellants had been). Furthermore, neither Chua, J. nor the learned Judges of the Federal Court referred to the inconsistency between the confessions attributed respectively to the Appellants. In particular, in the second Appellant's statement to the Police, the Appellants are said to have spent the night following the explosion in a junk anchored at Tg.Rhu. In the first Appellant's statement to the magistrate, they are said to have spent both that night and the next night in a taxi.

pp.619, 620

p. 623

23. The Appellants respectfully submit that as a result of the procedure adopted at the trial their defence was not properly considered. In deciding the preliminary issue, the learned Judge found (in effect) that upon that issue both Appellants had given lying evidence. At the trial proper the learned Judge alone was the tribunal of fact. It was impossible for him, having decided the preliminary issue as he had, to approach with an open mind the consideration of the evidence subsequently given by the Appellants. The injustice, in the Appellants' respectful submission, is the more serious because it is now known that the learned Judge's conclusion against them on the preliminary issue was wrong.

24. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed and their convictions ought to be quashed for the following (among other)

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REASONS

1. BECAUSE Chua, J. sitting alone had no jurisdiction to try the Appellants:

2. BECAUSE there was no evidence that the notification required by art. 104 of the Convention (and by s.4 of the Geneva Conventions Act, 1962) had been given:

3. BECAUSE the acts which the Appellants have been found to have committed were acts of war and so did not constitute murder:

4. BECAUSE there was no evidence upon which the Appellants could legally be convicted:

5. BECAUSE the defence of the Appellants was not properly considered.

J.G. LE QUESNE

JOHN HAYMAN

APPENDIX

1. Criminal Procedure Code.

Section 200. In all cases where the punishment of death is authorised by law the accused shall be tried by jury.

2. Interpretation and General Clauses Ordinance, 1948.

Section 2 (1). In this Ordinance, and in every written law as hereinafter defined ..... the following words and expressions shall ..... have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise specifically provided -

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(97) 'Written law' means all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution.

3. Emergency (Essential Powers) Act 1964.

WHEREAS by reason of the existence of a grave emergency threatening the security of the Federation, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under Article 150 of the Constitution:

AND WHEREAS Parliament by reason of the emergency considers it necessary for securing public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community, that powers be conferred on the Yang di-Pertuan Agong to make such regulations as appear to him to be necessary;

AND WHEREAS it is hereby declared that this Act appears to Parliament to be required by reason of the emergency:

NOW, THEREFORE, pursuant to Clause (6) of Article 150 of the Federal Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same as follows :

2. (1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Act referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, Essential Regulations may, so far

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as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that sub-section -

(a) make provisiion for the apprehension, trial and punishment of persons offending against the regulations, and for detention of persons whose detention appears to the Minister for Home Affairs to be expedient in the interests of the public safety or the defence of the Federation;

(b) create offences and prescribe penalties (including the death penalty) which may be imposed for any offence against any written law (including regulations made under this Act);

(c) provide for the trial by such Courts as may be specified in such regulations, of persons guilty of any offence against the regulations;

(d) make special provisions in respect of precedure (including the hearing of proceedings in camera) in civil or criminal cases and of the law regulating evidence, proof and civil and criminal liability;

(i) provide for amending any written law, for suspending the operating of any written law and for applying any written law with or without modification; and

(j) provide for any other matter in respect of which it is in the opinion of the Yang di-Pertuan Agong desirable in the public interest that regulations should be made.

(3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and

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supplementary provisions as appear to the Yang di-Pertuan Agong to be necessary or expedient for the purposes of the regulations.

(4) An Essential Regulation, and any order, rule or by-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act or in any instrument have effect by virtue of any written law other than this Act.

4. Constitution of Malaysia.

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that -

(a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or -

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature

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of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

8. (1) All persons are equal before the law and entitled to the equal protection of the law.

150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened he may issue a Proclamation of Emergency.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

5. Emergency (Criminal Trials) Regulations, 1964.

In exercise of the powes conferred by section 2 of the Emergency (Essential Powers) Act, 1964 (hereinafter referred to as "the Act"),

the Yang di-Pertuan Agong hereby makes the following Regulations:

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

"Public Prosecutor" includes a Director of Public Prosecutions and a Deputy Public Prosecutor.

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 other regulations made under the Act, the ordinary practice and procedure of the Courts, as applicable in the State where the case is tried or the appeal heard, as the case may be, shall apply to emergency procedure cases tried under these Regulations.

4. Where a person is charged with any offence against any written law (whether committed before or after the commencement of these Regulations) and the Public Prosecutor certifies in writing that the case is a proper one for trial under these Regulations, such case shall not be tried by a jury or by a Judge with the aid of assessors but shall be tried by a Judge without the aid of assessors and disposed of in accordance with the provisions of these Regulations.

5. (1) No preliminary inquiry shall be held in respect of an emergency procedure case, but the Magistrate before whom the accused person is brought shall, upon production of the certificate referred to in regulation 4 and whether or not a preliminary inquiry has already been commenced, forthwith commit the accused for trial by a Judge at such place (whether within the same State or not) and upon such charge as may be preferred by the Public Prosecutor.

6. Geneva Conventions Act, 1962.

2. In this Act, unless the context otherwise

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requires -

"protected prisoner of war" means a person protected by the convention set out in the Third Schedule;

"the protecting power", in relation to a protected prisoner of war or a protected internee, means the power or organization which is carrying out, in the interests of the power of which he is a national, or of whose forces he is, or was at any material time, a member, the duties assigned to protecting powers under the convention set out in the Third or, as the case may be, Fourth Schedule,

4. (1) The Court before which

(a) a protected prisoner of war is brought up for trial for any offence; or

(b) a protected internee is brought up for trial for an offence for which that court has power to sentence him to death or to imprisonment for a term of two years or more,

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power, and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

(2) The particulars referred to in sub-section (1) are -

(a) the full name and description of the accused, including the date of his birth and his profession or trade, if any, and if the accused is a protected prisoner of war, his rank and army, regimental, personal or serial number;

(b) his place of detention, internment or residence;

(c) the offence with which he is charged; and

(d) the court before which the trial is to take place and the time and place appointed for the trial.

THIRD SCHEDULE

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

Geneva, 12th August, 1944.

Article 4.

A. Prisoners of war, in the sence of the present Convention, are persons belonging to one of the following categories who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

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Article 5.

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 10.

The High Contracting Parties may at any time agree to entrust to an organisation which offers all guarantees of impartiality and efficancy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organisation provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organisation, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arrange accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Article 104.

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the

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Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;

(2) place of internment or confinement;

(3) specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at lease three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

No. 20 of 1967

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. OSMAN BIN HAJI MOHAMED ALI and
2. HARUN BIN SAID alias TAHIR
Appellants

- and -

THE PUBLIC PROSECUTOR
Respondent

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