Judgment 32 of 1978

P.C. Appeal No. 15 of 1978.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

CRIMINAL APPEAL NO. 46 of 1976

B E T W E E N :

TEH CHENG POH @ CHAR MEH — Appellant

- and -

PUBLIC PROSECUTOR — Respondent

CASE FOR THE RESPONDENT

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1. On 8 June, 1976, the Appellant appeared before the High Court at Penang (F.C. Arulanandon, J.) to face two charges under the Internal Security Act, 1960, viz:

(1) being in possession of a firearm, namely, a .38 revolver, in a security area, without lawful excuse, contrary to section 57(1)(a) — In pocket at end

and (2) being in possession of ammunition, namely 5 rounds .38 special revolver bullets, in a security area, without lawful excuse, contrary to section 57(1)(b) — In pocket at end

It was proposed that the trial should be governed by the provisions of the Essential (Security Cases) Regulations 1975, and the Essential (Security Cases) (Amendment) Regulations, 1975, (hereinafter together referred to as "the Regulations") which lay — In pocket at end / In pocket at end

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down special rules as to procedure and evidence in relation to security cases.

The hearing was adjourned in order that the decision of the Federal Court on a number of questions which had been referred to it relating to the validity of the Regulations should be known.

2. On 14 August, 1976, the Federal Court, in Public Prosecutor v. Khong Teng Khen & Anor, decided by a majority that the Regulations were valid. The Appellant's trial was continued before F.C.Arulandandon, J. at Penang on 16th November, 1976, and on 17th November, 1976, the Appellant was found guilty on both charges and sentenced to death.

3. On 26th March, 1977, the Federal Court heard the appeal of the Appellant at the same time as three other appeals which raised the same, or similar, points and unanimously dismissed the appeal.

4. On 19th December 1977 special leave to appeal to the Yang di-Pertuan Agong was granted.

5. In his appeal to the Federal Court the Appellant did not seek to assert that the Regulations were invalid for any of the reasons that had been put forward in Public Prosecutor v. Khong Teng Khen & Anor, but in his petition for special leave to appeal he indicated that he intended to raise these points by way of additional grounds of appeal at the hearing of this appeal in addition to relying on the points he, and the other appellants whose appeals had been heard at the same time, took before the Federal Court.

6. It is the view of the Respondent that the following main issues are raised in this appeal.

(1) A preliminary point, namely, whether the Privy Council has jurisdiction to consider this Appeal. Regulation 26(2) of the Essential (Security Cases) (Amendment) Regulations, 1975, excludes the right of appeal to the Yang di-Pertuan Agong in respect of security cases, of which, by

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virtue of Regulation 2(1) of the Essential (Security Cases) Regulations, 1975, the present case is one.

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The Appellant contends that the Regulations are invalid and that, therefore, his right of appeal to the Yang di-Pertuan Agong has not been affected.

The Appellants reasons for arguing that the said regulations 26(2) is invalid are the same as his reasons for contending that the Regulations as a whole are invalid. The Respondent will contend, for reasons set out under 3rd issue, in paras. 14-24 below that the Regulations are valid and it will, therefore, be the submission of the Respondent that the Privy Council has no jurisdiction to hear the appeal.

In view of the fact, however, that special leave has been granted to the Appellant to appeal, the Respondent deals hereafter with the issues raised by the Appellant in the substantive grounds of Appeal.

(2) Was the Appellant wrongly charged under Section 57, Internal Security Act, 1960 either :-

(a) Because the Attorney General by causing him to be charged under the Internal Security Act (when on the same facts, the Appellant might have been charged under the Arms Act, 1960, or under the Firearms (Increased Penalties) Act 1960) exercised his discretion in such a way as to result in him acting in contravention of Article 8(1) of the Federal Constitution which provides that all persons are equal before the law and entitled to equal protection of the law.

or (b) Because the Internal Security Act, 1960, was passed for combating

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political subversion and there was no evidence before the Court to suggest that there was an element of subversion involved in this case.

or (c) Because the Internal Security Act, 1960, was intended by the Legislature only to relate to offences in limited areas of the Federation which were to be declared security areas for the purposes of Section 47, Part III of the Act (Revised in 1972) and it was not intended that the whole country should be declared a security area.

(3) If the Appellant was properly charged under Section 57, Internal Security Act, 1960, a further issue arises, namely, was the Appellant's trial invalid because he was tried under rules and procedure laid down in the Regulations and the Regulations were invalid and void either:

(a) Because the Regulations were made under the powers given to the Yang di-Pertuan Agong by the Emergency (Essential Powers) Ordinance, 1969, which was itself promulgated by the Yang di-Pertuan Agong, under the powers given to him by Article 150 of the Constitution for use only during an emergency, and the State of Emergency proclaimed in 1969 had lapsed and had ceased to exist by 1975.

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or (b) Because the Yang di-Pertuan Agong wrongly sub-delegated to the Attorney-General the powers to make essential regulations given to him by Section 2, Emergency (Essential Powers) Ordinance, 1969.

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or (c) Because the Regulations were made when both Houses of Parliament had sat after the proclamation of emergency on 15 May, 1969, and were, therefore, made in contravention of Article 150(2) of the Constitution.

or (d) Because the Regulations are inconsistent

with certain provisions of the Constitution and are not saved from invalidity by Article 150(6) thereof because it applies only to Ordinances and not to regulations

or (e) Because the provisions of the Regulations are inconcistent with provisions of the Constitution other than Articles 5, 9 & 10 and as the Regulations were made to regulate trials under the Internal Security Act, 1969, and, as that Act was passed in accordance with the provisions of Article 149 of the Constitution, the Regulations could only be saved from invalidity (by virtue of Article 149) if they contained provisions inconsistent with Articles 5, 9 & 10 of the Constitution but not otherwise

or (f) Because Section 28(6) and 29 of the Constitution Amendment Act, 1960, were invalid and therefore, the Regulations were no longer effective at the time of the offence or at the time of the trial.

The Respondent's contentions in relation to the issues set out in (2) and (3) above are given hereunder.

7. Issue set out in para. 6(2)(a) i.e. did the Attorney General exercise his discretion in a manner inconsistent with Article 8(1) of the Constitution

The Appellant argues that the Deputy Public Prosecutor was wrong to charge him under the Internal Security Act, 1960, Section 57(1)(a) and (1)(b) because:

(i) he thereby deprived the Appellant of the equal treatment guaranteed to him under Article 8(1) of the Constitution

and (ii) Article 145(3) of the Constitution, which confers on the Attorney-General

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"power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence....." should be read subject to Article 8(1)

8. The Respondent will submit, firstly, that Article 8(1) must be read subject to Article 145(3). Section 376(1), Federated Malay States Procedure Code, which provides that the Attorney General in his capacity of Public Prosecutor shall have the control and direction of all criminal proceedings, has been in existence since before the Constitution came into existence. The fact that the makers of the Constitution chose not to rely upon Section 376(1) indicates that the wide powers vested in the Attorney General by Article 145(3) were not intended to be limited by the Application of Article 8(1).

9. Further, the exercise by the Attorney General of the powers vested in him in criminal proceedings, and more particularly on the question whether or not in any given case to initiate a prosecution, and if so, under what act and for what offences, is a matter completely within his discretion. It is moreover, a discretion the exercise of which (provided it is exercised in good faith) is not subject to judicial review, the sole redress for any allegedly improper decision being the political one of complaint or criticism in Parliament.

That the courts have no jurisdiction to interfere with the Attorney General's decision to institute proceedings or even to enquire into his reasons for so deciding is a long established principle of constitutional law, both in the United Kingdom and in Malaysia. It follows both from the unique position in the Constitution occupied by the Attorney General and from the principle that it is his right, if not his duty, when considering whether to prosecute to take into account the public interest, broadly defined to include such questions as public order and morale, respect for the law and problems of law enforcement.

This principle of the Attorney General's

unfettered and absolute discretion has been accepted in the context of criminal prosecutions at least since the decision in Ex p. Newton (1855) 4E & B 869. It was treated as being of general application in a decision of the House of Lords in London Country Council v. A-G (1902) A.C. 165. More recently in Gourrier v Union of Post Office Workers (1977) 3 AU ER 70 it was treated as beyond dispute.

That the Attorney General enjoys a similarly unfettered discretion and immunity from judicial revision of his decisions whether and if so how to lay charges in Malaysia was most recently decided by the Malaysian Federal Court in Long Bin Sarat v Public Prosecutor (1974) 2 MLJ 152.

10. The Respondent will further submit that in any event, there is no evidence to suggest that the decision to prosecute the Appellant under the Internal Security Act, 1960, rather than the Arms Act, 1960, or the Firearms (Increased Penalties) Act, 1960, constituted a breach of Article 8(1) of the Constitution.

Such a conclusion, even if theoretically possible, could only be legitimately drawn from a situation in which two or more defendants had been charged under different Acts for identical acts committed under identical circumstances. Such circumstances would not be limited to the immediate facts required to establish the offence but would include such matters as previous conduct, presumed intentions, and other matters in respect of which the Attorney General by virtue of his unique office might have access to confidential information not available to the Courts.

In the absence of any such evidence as is referred to above, the mere fact of the existence of two alternative acts under which the Appellant could have been, but was not, charged cannot constitute an infringement of Article 8(1). So to hold would be tantamount to holding that Parliament itself is restricted

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by Article 8(1) in the sovereign exercise of its right to enact such laws as it thinks fit.

11. Finally, on this point, the Respondent will submit that it is impossible to hold that the Attorney General's exercise of his discretion was improper without accepting that Parliament did not intend the fact of having a firearm or ammunition in one's possession in a security area without lawful excuse to be a sufficient condition for liability to prosecution under the Act. No such intention is expressed in the wording of the Act nor is there anything else in the Act from which such an intention can be inferred.

12. Issue set out in paragraph 6(2)(b) i.e. the Appellant should not have been charged under the Internal Security Act, 1960, because there was no evidence of subversion

The Appellant argues that he should not have been charged under the Internal Security Act, 1960, because the prosecution case disclosed no evidence of subversion.

The Respondent will submit that the proof of subversion is not a necessary condition either of bringing a charge under the Internal Security Act, 1960, or of finding such a charge proved. The Appellant sought to rely on the long title and preamble of the Act, but it is a principle of statutory construction that a preamble or long title may only be referred to as an aid to discovering the intention of Parliament where its intention is not manifest in the wording of the Act itself. In the present case Section 57(1) is couched in unambiguous terms which make it clear that all that has to be proved is the fact of possession (of arms or ammunition) and the lack of lawful excuse. The burden of establishing that the Appellant had lawful excuse is placed on him by the act itself. It is, therefore, only in relation to the position when there is evidence of possession that it becomes necessary for the Attorney General to exercise his discretion.

The Respondent repeats his submissions

already made on the unfettered nature of the Attorney General's discretion and further submits that if the Attorney General did have information that this was a case involving subversion such as would justify in the public interest the selection of the more serious charge, there might be a variety of valid and proper reasons why such information could, or should, not be adduced in open Court. It is precisely in cases such as this that the public benefit arising from the Attorney General's unfettered discretion is demonstrated.

13. Issue set out in paragraph 6(2)(c) i.e. the Appellant should not have been charged under the Internal Security Act, 1960, because it was not intended that the whole country should be a security area

The Appellant further argues that the Internal Security Act, 1960, is inapplicable in his case on the ground that the legislature only intended limited areas of the Federation to be declared security areas for the purposes of Section 47, Part III, Internal Security Act, 1960 (Revised 1972).

The Respondent submits that since Sections 47 and 57 of the Internal Security Act, 1960, were in Part II of that Act at the time when the Yang di-Pertuan Agong proclaimed all areas in the Federation to be security areas for the purposes of Part II, the Sections in the Act as revised in 1972 still apply to all areas of the country.

14. Issue set out in paragraph 6(3)(a) i.e. The State of Emergency to which the Regulations related had lapsed by effluxion of time and had ceased to exist by the time the Regulations were made in 1975, or alternatively by the time of the offence.

The Appellant contended that the Regulations having been made under the authority of the Emergency (Essential Powers) Ordinance, 1969, which was, in turn, promulgated under the Proclamation of Emergency (P.A.(A) 145 of 1969), were invalid as the said Proclamation had lapsed

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and ceased to have effect by effluxion of time and by force of changed circumstances.

The Respondent submits that there is no rule of law to justify the Appellant's contention that the mere effluxion of time or the changing of the circumstances prevailing when an Act was passed is capable of bringing the operation of the act to an end.

The dictum of Lord Reid in the House of Lords in the Petition of the Earl of Antrim & Eleven other Irish Peers (1966) 3 W.L.R. 1141 at 1149 that "a statutory provision becomes obsolete if the state of things on which its existence depended has ceased to exist, so that its object is no longer obtainable" was relied upon by the Appellant. The Respondent submits it does not support the Appellant's contention. Lord Reid made it clear that this principle only applies where the "state of things" essential for the operation of the statutory provision, has ceased to exist by virtue of having been repealed expressly or by implication by a subsequent enactment.

In this case the "state of things" was the 1969 Emergency and, if and in so far as that emergency ceased to exist at the time the Appellant committed his offence, it did not so cease as a result of any enactment.

15. Further the Respondent will contend that since the validity of a statute is independent from the circumstances which obtained at the time of its enactment, it follows that its validity is incapable of being affected by a change of those circumstances. To hold otherwise would in addition confer on the Courts a right and an obligation to pronounce on essentially political matters.

16. The Respondent will further contend that by virtue of Article 150(3) of the Constitution the Proclamation could only cease to have effect if revoked or annulled by resolutions passed by both Houses of Parliament, neither of which events have occurred.

17. Issue set out in paragraph 6(3)(b) i.e.

sub-delegation by the Yang di-Pertuan Agong of power to make essential regulations given him by Section 2, Emergency (Essential Powers) Ordinance, 1969

The Respondent contends that the Regulations do not constitute unlawful sub delegation to the Attorney General of the Yang di-Pertuan Agong's powers under the Emergency (Essential Powers) Ordinance, 1969, to alter the mode of trial of persons offending against the regulations made under the Ordinance. He further contends that the Regulations were intra vires the Ordinance as falling within the language of Regulations 2(1) and 2(2), Essential (Security Cases) (Amendment) Regulations, 1975.

18. Issue set out in paragraph 6(3)(c) i.e. the Regulations are invalid as being in contravention of Article 150 of the Constitution because they were made when both Houses of Parliament had sat after the Proclamation of Emergency on 15 May, 1969.

The Appellant argues that the Regulations are invalid because they were made after both Houses of Parliament had sat after 15 May, 1969, and thus were made in contravention of Article 150(2) of the Constitution. This Article permits the Yang di-Pertuan Agong to promulgate ordinances only until both Houses of Parliament are sitting.

The Respondent will contend that the restrictions imposed by Article 150(2) applies only to the promulgating of ordinances and not to the making of regulations under them. Further, so far as the restriction on ordinances is concerned, it applies only to the time during which they may be promulgated and not to the length of time for which they continue to be effective.

Since, therefore, the 1969 Ordinance was promulgated before both Houses of Parliament had sat, and since by the time that the Regulations were made under its authority, the Ordinance had not been revoked

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or annulled in the manner prescribed by Article 150(3) of the Constitution, the Respondent submits that at the time the Regulations were made the Ordinance was still valid, from which it follows that the Regulations are valid.

19. Issue set out in paragraph 6(3)(d) i.e. the Regulations are inconsistent with provisions of the Constitution and are not saved from invalidity by Article 150(6) because it applies only to ordinances and not to regulations

The Respondent will contend that Article 150(6) applies to Regulations made under Emergency Ordinances no less than to the ordinances themselves. Further since one of the primary purposes of promulgating an emergency ordinance is to enable the Executive to deal with critical situations freely as they arise, to hold that Article 150(6) does not extend to regulations made from time to time under ordinances so as to be able to meet new situations as they arise and develop would be to stultify the effect of the Article.

The Respondent will further contend that since the Regulations were made under Ordinance No.1, which was promulgated under Article 150, and is therefore protected by Article 150(6), and since sub-section 4 of Section 2 of Ordinance No.1 expressly provides that the regulations made under the Ordinance shall be valid notwithstanding inconsistency within the Constitution, the immunity conferred on the Regulations by the said subsection derives indirectly from Article 150(b) and as such cannot be impeached.

20. Issue set out in paragraph 6(3)(e) i.e. the Regulations are inconsistent with provisions of the Constitution other than Articles 5, 9 and 10 and as the Regulations were made to regulate trials under the Internal Security Act, 1960, and as that Act was passed in accordance with the provisions of Article 149 the Regulations could only be saved from invalidity (by virtue of Article 149) if the inconsistencies with the Constitution were confined to inconsistencies with Articles 5, 9 and 10.

The Respondent will contend that as the

Regulations were made under an Ordinance promulgated under Article 150, Article 150(6) makes them valid even if they contain provisions inconsistent with part of the Constitution other than Articles 5, 9 and 10.

Further the Respondent will contend that the immunity conferred on Acts by Article 149 is not exhaustive and does not exclude the possibility of immunity from the consequences of inconsistency with other parts of the Constitution being conferred by other Articles.

21. Issue set out in paragraph 6(3)(f) i.e. that Sections 28(6) and 29 Constitutions Amendment Act,1960, were invalid and that, therefore, the Regulations were no longer effective at the time of the offence or at the time of the trial.

The Appellant argues that Sections 28(b) and 29, Constitution (Amendment) Act, 1960, were invalid (1) because they contravene Article 4(1) of the Constitution,

and (2) because they are destructive of the basic structure of the Constitution

If these propositions were correct Articles 149 and 150 of the Constitution as it was before amendment by the said Sections would apply and the Internal Security Act 1960 (which was passed under the provisions of Article 149) should have ceased to exist after a period of one year from the Proclamation of Emergency on 15 May, 1969, and all ordinances and regulations passed under Article 150 would likewise have ceased to be in force.

22. As to the Appellants first proposition on this point the Respondent will contend that Sections 28(b) and 29, Constitution (Amendment) Act 1960, do not contravene Article 4(1). Furthermore if the Appellant's proposition was accepted it would follow that the Constitution is incapable of amendment and that Article 159 (which provides for how the Constitution is to be amended) has no effect. It is of the essence of any

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Act of Parliament which purports to amend the Constitution that it is "inconsistent" with the Constitution as it exists in the sense that the inconsistency of its provisions with the existing Constitution is precisely what makes it necessary for them to be brought into effect by way of an amending act. If it had been the intention of Parliament that the Constitution should be incapable of change, there would have been no purpose served by passing Article 159. If it had been the intention of Parliament to limit the nature of future constitutional amendments it would have imposed such limitations expressly by defining in advance the ambit of permissible amendments. In fact the only limitation provided by the Constitution affects not the type of amendment which may be made, but the manner in which amendments may be made (i.e. the two thirds majority rule in Article 159).

23. The Respondent, therefore, will submit that

(i) Article 4(1) must be read subject to Article 159

and (ii) The words "this Constitution" in Article 4(1) should be interpreted to mean "the Constitution in its present form or as amended in accordance with the Constitution"

and(iii) the word "Law" in Article 4(1) does not include an Act of Parliament amending the Constitution in accordance with the provisions of Article 159.

24. As to the Appellant's second proposition on this point (set out in para.21 above) the Respondent submits

(i) That there is no rule of constitutional law to the effect that constitutional amendments passed in accordance with the provisions laid down in the Constitution are invalid if, and on the sole ground that, they destroy the basic foundation and structure of the Constitution.

(ii) That the only ground on which a

constitutional amendment can be invalid is if it specifically contravenes an article or articles of the Constitution.

(iii) That in the absence of such express or implied contravention there is no legal basis upon which a court could decide whether a particular purported constitutional amendment does or does not destroy the basic foundation and structure of the Constitution.

(iv) That to hold that the Courts have the power to make such a decision would be to invest them with powers which it was not intended by the makers of the Constitution that they should exercise.

25. The Respondent, therefore humbly submits that this appeal should be dismissed for the following among other

R E A S O N S

(1) BECAUSE the decision to charge the Appellant under the Internal Security Act, 1960, was not unlawful

(2) BECAUSE the Internal Security Act, 1960, and the Regulations are valid and were valid at the time of the offence and at the time of the Appellant's trial.

(3) BECAUSE the Judgments of the Federal Court in this case and the majority Judgments of the Federal Court in the case of Public Prosecutor v. Khong Teng Khen & Anor were correct

(4) BECAUSE the Privy Council has no jurisdiction to hear this appeal.

PATRICK MEDD

NICHOLAS STADLEN

IN THE JUDICIAL COMMITTEE OF THE
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O N A P P E A L

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Appellant

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CASE FOR THE RESPONDENT

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