Privy Council Appeal No. 15 of 1978

Teh Cheng Poh alias Char Meh – – – – – *Appellant*

v.

The Public Prosecutor, Malaysia – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER 1978

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD SALMON
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL

[*Delivered by* LORD DIPLOCK]

On 13 January 1976, in Georgetown, Penang, the appellant Teh Cheng Poh was found in possession of a revolver and ammunition. This happened in the course of a search by a police patrol which had been instituted as a result of an emergency phone call complaining of an armed robbery. The appellant was subsequently charged with two offences under s.57(1) of the Internal Security Act, 1960. One was of having in his possession in a security area without lawful excuse a firearm without lawful authority therefor; the other charged a similar offence in respect of the ammunition. The mandatory penalty for these offences is death.

Penang, in common with all other areas in Malaysia, had been declared to be a security area for the purposes of Part II of the Internal Security Act, by a Proclamation of H.M. the Yang di-Pertuan Agong made on 15 May 1969 (" the Security Area Proclamation "). If this Proclamation were still effective on 13 January 1976 the offences with which the appellant was charged would constitute " security offences " within the meaning of the Essential (Security Cases) (Amendment) Regulations, 1975 (" the Security Cases Regulations "), which purported to be made by the Yang di-Pertuan Agong under s.2 of the Emergency (Essential Powers) Ordinance, 1969 (" the No. 1 Ordinance "). The No. 1 Ordinance was made on 15 May 1969 by the Yang di-Pertuan Agong in reliance upon the powers conferred upon him by Article 150(2) of the Federal Constitution. These powers had become exercisable by virtue of a Proclamation of Emergency (" the Emergency Proclamation ") issued by him on the same date under Article 150(1) of the Federal Constitution.

The Security Cases Regulations provide for a special procedure to be adopted in trials for security offences. It differs substantially from the procedure prescribed for the trial of capital offences under the Criminal Procedure Code. For the purposes of the instant appeal it is only necessary to mention that there is no preliminary inquiry before a magistrate and that the mode of trial is not by a jury in West Malaysia or by a judge with the aid of assessors in East Malaysia, but by a judge sitting alone.

In November 1976 the appellant was tried under this special procedure in the High Court in Malaya at Penang by a judge sitting alone. He was found guilty and sentenced to death. He appealed to the Federal Court upon a number of grounds of law. Their Lordships do not find it helpful to enumerate these, as a previous decision of the Federal Court delivered shortly before the hearing of the instant appeal, *Public Prosecutor v. Khong Teng Khen and Anor.* [1976] 2 M.L.J. 166, had made it impossible to argue successfully before the Federal Court a number of grounds of law which had been raised and decided in favour of the prosecution in the earlier appeal. The instant appeal is thus, in effect, an appeal against conclusions of law to be found in the judgment of the Federal Court in *Khong Teng Khen's case* as well as in the instant case.

Their Lordships will find it convenient to marshal under three heads the questions of law which fall to be decided. The first is the validity of the Security Cases Regulations under the Constitution of Malaysia; the second is whether the Security Area Proclamation was still in force on 13 January 1976; the third is the legality under the Constitution of the decision of the Attorney General to prosecute the appellant for an offence under s.57(1) of the Internal Security Act, 1960.

It is important to distinguish between the first head and the other two. If the appellant succeeds under the first head in establishing that the Regulations are void, the consequence will be that his trial by a judge sitting alone was a nullity; but unless he also succeeds under the second or the third head success under the first head would not necessarily preclude his being prosecuted for the same capital offence under the Internal Security Act, 1960, but this time by a jury and in accordance with the procedure prescribed by the Criminal Procedure Code.

The Security Cases Regulations

In considering the validity of the Regulations it is necessary to bear in mind two dates: 15 May 1969, the date of issue of the Emergency Proclamation, at a time when Parliament was not sitting, and 20 February 1971, when Parliament next sat. During that period, the Yang di-Pertuan Agong is empowered by Article 150(2) of the Constitution to " promulgate ordinances having the force of law, if satisfied that immediate action is required ".

Although this, like other powers under the Constitution, is conferred nominally upon the Yang di-Pertuan Agong by virtue of his office as the Supreme Head of the Federation and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by Article 40(1) to act in accordance with the advice of the Cabinet. So when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affairs exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the

Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question.

The power to promulgate Ordinances having the force of law is expressed to be exercisable only until both Houses of Parliament are sitting. It lapses as soon as Parliament sits. Thereafter while the Proclamation of Emergency remains in force any further laws required by reason of the emergency are to be made by Parliament in the exercise of the legislative authority of the Federation vested in it by Article 44 of the Constitution, but freed by Article 150(5) and (6) of many constitutional restrictions upon the legislative powers of Parliament which apply except when a Proclamation of Emergency is in force. These enhanced legislative powers of Parliament take the place of the power of the Yang di-Pertuan Agong under Article 150(2) to promulgate Ordinances having the force of law. Once Parliament has sat after the Proclamation, the power to legislate by Ordinance under Article 150(2) does not revive even during periods when Parliament is not sitting, unless and until a new Proclamation of Emergency is issued by the Yang di-Pertuan Agong.

The Security Cases Regulations were made on 1 November 1975, more than four years later than the first sitting of Parliament after the Emergency Proclamation of 15 May 1969. They are entitled "Regulations" and are expressed to be made by the Yang di-Pertuan Agong "in exercise of the powers conferred by [the No. 1 Ordinance]". As already mentioned they purport to alter the law of Malaysia as enacted in the Criminal Procedure Code. Plainly if the same provisions had been made in an instrument which purported to be an "Ordinance" promulgated under Article 150(2) of the Constitution that Ordinance would have been invalid since it was made long after the Ordinance-making power of the Yang di-Pertuan Agong had lapsed.

One must therefore look to see what is relied upon as the source of the power of the Yang di-Pertuan Agong to do in 1975 by "Regulation" what he no longer had power to do by "Ordinance". The source relied upon is s.2 of the No. 1 Ordinance, which was made while the Ruler's Ordinance-making power under Article 150(2) was still subsisting. The No. 1 Ordinance, after reciting that a Proclamation of Emergency had been issued and that Parliament had been dissolved and the elections to the new Parliament had not been completed, was expressed to be made by the Yang di-Pertuan Agong "pursuant to Clause (2) of Article 150 of the Constitution". It did contain in sections 5, 6 and 7 some positive provisions having immediate effect as law; but these have no bearing on the instant appeal. The provisions that are important for present purposes are those contained in s.2. They do not purport to make any law having immediate effect; they purport to give to the Yang di-Pertuan Agong wide powers to make laws in the future under the description of "Essential Regulations", without imposing any express time limit upon the exercise of such powers.

Section 2 needs to be set out in full, so that its full breadth may be appreciated:

> "2(1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, 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 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 provisions for the apprehension, trial and punishment of persons offending against the regulations, and for the detention, exclusion and deportation of persons whose detention, exclusion or deportation appears to the Minister for Home Affairs to be expedient in the interests of the public safety or the defence of Malaysia notwithstanding that such persons are citizens;

(*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 Ordinance);

(*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 procedure (including the hearing of proceedings *in camera*) in civil or criminal cases and of the law regulating evidence, proof and civil and criminal liability;

(*e*) make provisions for the control of aliens;

(*f*) make provisions for directing and regulating the performance of services by any persons;

(*g*) authorise—

(i) the taking of possession, control, forfeiture or disposition on behalf of the Government of Malaysia, of any property or undertaking;

(ii) the acquisition, on behalf of the Government of Malaysia, of any property other than land;

(*h*) authorise the entering and search of any premises;

(*i*) prescribe fees or other payments;

(*j*) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;

(*k*) notwithstanding anything contained in the Constitution, provide for any specified grounds upon which any person may be deprived of his citizenship;

(*l*) make provisions for the control of the harbours, ports and territorial waters of any State in Malaysia and of the movements of vessels;

(*m*) make provisions for the transportation by land, or water, and the control of the transport and movement of persons, animals and things;

(*n*) make provisions for trading, storage, exportation, importation, production, and manufacture;

(*o*) make provisions for the supply and distribution of food, water, fuel, light, and other necessities;

(*p*) 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 Ordinance to be made, and may contain such incidental and 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,

including the Constitution or the Constitution of any State, other than this Ordinance or in any instrument having effect by virtue of any written law other than this Ordinance."

The subject matter of " Essential Regulations " having the force of law which by this Ordinance the Yang di-Pertuan Agong purports to empower himself to make is no less broad than the subject matter of the " Ordinances " having the force of law that he is empowered to make under Article 150(2) of the Constitution. The maker of the law, the Yang di-Pertuan Agong, is the same for both Ordinances and for Essential Regulations, the subject matter of the law-making power is the same for both; the only difference is in the label that is attached to them. But in applying constitutional law the court must look behind the label to the substance.

There are only two sources from which the Yang di-Pertuan Agong as such can acquire power to make written law, whatever label be attached to it: one is by a provision of the Constitution itself; the other is by the grant to him of subordinate legislative power by an Act passed by the Parliament of Malaysia in whom by Article 44 of the Constitution the legislative authority of the Federation is vested. So far as his power to make written laws is derived from Article 150(2) of the Constitution itself, in which they are described as " ordinances ", it comes to an end as soon as Parliament first sits after the Proclamation of an Emergency; he cannot prolong it, of his own volition, by purporting to empower himself to go on making written laws, whatever description he may apply to them. That would be tantamount to the Cabinet's lifting itself up by its own boot straps. If it be thought expedient that after Parliament has first sat the Yang di-Pertuan Agong should continue to exercise a power to make written laws equivalent to that to which he was entitled during the previous period to exercise under Article 150(2) of the Constitution, the only source from which he could derive such powers would be an Act of Parliament delegating them to him.

This is what had been done in the previous emergency which had been proclaimed on 3 September 1964. Parliament on 18 September 1964 passed the Emergency (Essential Powers) Act, 1964. In compliance with Article 150(6) of the Constitution it contained the declaration that the Act appeared to Parliament to be required by reason of that emergency; and the terms of s.2 were identical with those of s.2 of the No. 1 Ordinance save for the substitution of references to " this Act " instead of to " this Ordinance " and the omission from s.2(2) of the Act of some of the paragraphs (which list specific subject matters for Essential Regulations) that are included in s.2(2) of the Ordinance.

Because, unlike the No. 1 Ordinance, the Emergency (Essential Powers) Act, 1964, was an Act of Parliament it was effective under the Constitution to delegate to the Yang di-Pertuan Agong wide powers exercisable throughout the duration of the emergency proclaimed on 3 September 1964 to continue to make regulations having the force of law notwithstanding that Parliament had previously sat, as was held by this Board in *Osman and Anor v. Public Prosecutor* [1968] 2 M.L.J. 137. To the extent, however, that the No. 1 Ordinance purports to authorise the Yang di-Pertuan Agong to continue to make instruments having the force of law notwithstanding that Parliament has sat, it suffers from the fatal constitutional flaw that such exercise of legislative power by the Ruler after Parliament has sat, is not authorised by the Constitution itself nor has it been delegated to him by Parliament in whom the legislative authority of the Federation is vested.

It has not been contended on behalf of the Attorney General that the Emergency (Essential Powers) Act, 1964, was still in force in 1975 so as to constitute an alternative source from which the Yang di-Pertuan Agong

could derive authority to make Essential Regulations. Their Lordships agree that after the Emergency Proclamation on 15 May 1969, no reliance can any longer be put upon this Act. From its long title and recitals it is manifest that powers conferred on the Yang di-Pertuan Agong under s.2 were intended to be exercisable only for the duration of the previous emergency proclaimed on 3 September 1964. It does not appear that the proclamation of that emergency was ever expressly revoked nor was it annulled by resolutions passed by both Houses of Parliament under Article 150(3) of the Constitution. The power to revoke, however, like the power to issue a proclamation of emergency, vests in the Yang di-Pertuan Agong, and the Constitution does not require it to be exercised by any formal instrument. In their Lordships' view, a proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.

That such was the intention of the Yang di-Pertuan Agong when he issued the Emergency Proclamation of 15 May 1969, is manifest from the terms of No. 1 Ordinance itself. The power he purports to be exercising is the power to take immediate action conferred upon him directly by the Constitution itself under Article 150(2); s.6 refers to Essential Regulations made under the Emergency (Essential Powers) Act, 1964, and provides that they " shall be in force and shall have effect as if they have been made under this Ordinance; and . . . may be amended, modified or repealed as if they have been made under this Ordinance ". This is a clear recognition that the power to make Essential Regulations under the Emergency (Essential Powers) Act, 1964, which was exercisable only so long as the emergency proclaimed on 3 September 1964 continued, had come to an end; and consistently with this all Essential Regulations made by the Yang di-Pertuan Agong after the Emergency Proclamation of 15 May 1969, recited as the only source of authority for making them s.2 of the No. 1 Ordinance.

For the above reasons their Lordships are of opinion that once Parliament had sat on 20 February 1971, the Yang di-Pertuan Agong no longer had any power to make Essential Regulations having the force of law. The Essential (Security Cases) (Amendment) Regulations, 1975, purport to alter in respect of security cases the mode of trial laid down by the Criminal Procedure Code. They are *ultra vires* the Constitution and for that reason void.

Their Lordships would point out that a similar reasoning would not invalidate written laws described as " Essential Regulations " that were made by the Yang di-Pertuan Agong before 20 February 1971. The power to make such written laws is conferred upon him by Article 150(2) of the Constitution where they are described as " ordinances "; the fact that in consequence of a misunderstanding of the constitutional position he has attached a different label to them does not render them invalid.

Since they have held the Essential (Security Cases) (Amendment) Regulations, 1975, to be invalid upon the ground that they were made after the Yang di-Pertuan Agong's power to make them had expired, it is unnecessary to decide whether or not they were invalid on the alternative and more far-reaching ground advanced by the appellant: namely, that by the time the Regulation was made the emergency proclaimed on 15 May 1969 was over and the Emergency Proclamation of that date had ceased to be in force. As their Lordships' jurisdiction to advise His Majesty the Yang di-Pertuan Agong on the effect of any provision of the Constitution has been withdrawn from 1 January 1978 except in appeals that were already pending on that date, they do not think it appropriate to express opinions on questions of law falling within this category unless they are essential for the decision of an appeal that was pending on that date.

The Security Area Proclamation

The direct source of the Yang di-Pertuan Agong's power to make the Security Area Proclamation was s.47 of the Internal Security Act, 1960. The Act, which was passed pursuant to Article 149 of the Constitution, contains many provisions authorising Ministers to take specific action inconsistent with Article 5 (Liberty of the Person), Article 9 (Freedom of Movement) and Article 10 (Freedom of Speech, Assembly and Association) in all parts of Malaysia, whether included in a "security area" or not. The effect of proclaiming an area in Malaysia as a security area is (1) to confer upon the Minister additional powers to restrict the freedom of movement of persons within that area; (2) to create additional offences and to impose higher penalties for existing offences if committed in that area; and (3) to confer on the Yang di-Pertuan Agong very wide powers to make regulations in respect of that area which are inconsistent with Article 5, 9 or 10, and are additional to the powers exercisable in areas which are not security areas which are conferred upon Ministers directly by the Act itself.

Article 149 of the Constitution reads as follows:

"*Legislation against subversion*

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation—

(*a*) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(*b*) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(*c*) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(*d*) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(*e*) which is prejudicial to the security of the Federation, or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article."

The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something has happened in the past viz. that action of the kind described "has been taken or threatened". It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause (2) of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence. Where such an Act of Parliament confers powers on the Executive to act in a manner inconsistent with

Article 5, 9 or 10, the action must be taken *bona fide* for the purpose of stopping or preventing subversive action of the kind referred to in the recitals to the Act, for in order to be valid under Article 150(1) the provision of the Act which confers the power must be designed to stop or prevent that subversive action and not to achieve some different end.

S.47 of the Internal Security Act, 1960, reads as follows:—

"(1) If in the opinion of the Yang di-Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area for the purposes of this Part.

(2) Every proclamation made under sub-section (1) shall apply only to such area as is therein specified and shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament:

Provided that such revocation or annulment shall be without prejudice to anything previously done by virtue of the proclamation.

. . . ."

The power to proclaim an area as a security area with the consequences that this will entail is a discretionary one. It is for the Yang di-Pertuan Agong (again, in effect, the Cabinet) to form an opinion whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in the section, and to consider whether in his opinion it is necessary for the purpose of suppressing organised violence of the kind described. But, as with all discretions conferred upon the Executive by Act of Parliament, this does not exclude the jurisdiction of the court to inquire whether the purported exercise of the discretion was nevertheless *ultra vires* either because it was done in bad faith (which is not in question in the instant appeal) or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him the Yang di-Pertuan Agong has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled or, in exercising it, he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration.

The conditions precedent to the exercise of the Ruler's discretion to proclaim an area as a security area under s.47 are that at the time of making the Proclamation he should be satisfied of the present existence of a number of matters. They are (1) that public security in that area is seriously disturbed or threatened; (2) that the disturbance or threat to public security is caused by action taken or threatened by a substantial number of persons; (3) that the effect of such action is either to cause organised violence against persons or property or to cause a substantial number of citizens to fear organised violence; and (4) that for the purpose of suppressing the organised violence then existing or threatened it is necessary to proclaim the area as a security area.

It cannot be seriously contended that any of these conditions precedent was not satisfied on 15 May 1969 when the Security Area Proclamation was made. What is contended on behalf of the appellant is that it is a matter of common knowledge, of which the courts are entitled to take judicial notice, that long before 13 January 1976 there had ceased to be any organised violence of the kind described existing or threatened in Penang and consequently there was none to be suppressed by treating

Penang as a security area. The appellant's submission is that in these circumstances the Security Area Proclamation must be treated in law as having lapsed.

Subsection (2) of s.47 expressly provides that a security area Proclamation "shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament". The revocation of a security area Proclamation is, like its issue, a matter that is left by the section to the discretion of the Yang di-Pertuan Agong acting in accordance with the advice of the Cabinet. In their Lordships' view, however, the discretion whether and when to revoke a security area Proclamation is not entirely unfettered. The Proclamation is lawful because it is considered by the Yang di-Pertuan Agong to be necessary to make an area a security area for the purpose, not of suppressing violence by individuals generally but of suppressing existing or threatened organised violence of the kind described in the section. Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the Proclamation in force for some different purpose.

This, however, does not mean, as the appellant would have it, that the Security Area Proclamation can be treated by the court as having lapsed *ipso facto* as soon as there are no longer any grounds for considering it still to be necessary for the particular purpose described in s.47 for which it was originally made. Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the Proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, mandamus could, in their Lordships' view, be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation.

No such steps to obtain revocation of the Security Area Proclamation had been taken by 13 January 1976. Their Lordships are far from suggesting that there was any material in existence before that date which would have justified an application for mandamus on the grounds that have been mentioned above. They do not regard themselves as qualified to express any views on the matter either way. But since it had not been revoked the Proclamation was still in force; Penang was in a security area; and s.57 of the Internal Security Act, 1960, which made possession of firearms or ammunition capital offences, was applicable to the possession of firearms in Penang.

Their Lordships are thus unable to uphold the appellant's contentions under the second head.

The Decision of the Attorney General to Prosecute under s.57 of the Internal Security Act, 1960

At the time when the appellant was found in possession of a firearm and ammunition, on 13 January 1976, there were two Acts of Parliament in force in Malaysia which made the unlawful possession of firearms or ammunition a criminal offence. One was s.57 of the Internal Security Act, 1960, which made the unlawful possession of firearms or ammunition in a security area a capital offence for which the death penalty was

mandatory; the other was the Arms Act, 1960, passed in the same session as the Internal Security Act, 1960, but which did not come into operation until 1 March 1962. The penalty for unlawful possession under the Arms Act, 1960, was laid down by s.9 as a maximum term of imprisonment of seven years or a fine of $10,000 or both; but in respect of firearms there was substituted by s.8 of the Firearms (Increased Penalties) Act, 1971, a maximum penalty of fourteen years and a mandatory whipping with not less than six strokes. Although there are slight variations in the words used in the two Acts to describe what amounts to unlawful possession it is conceded on behalf of the Attorney General that the ingredients of the offences under the two Acts are the same except that under the Internal Security Act, 1960, the offence must be committed in a security area.

Their Lordships have been informed that since 15 May 1969 when the whole of Malaysia was proclaimed a security area, the Attorney General has regarded himself as entitled to exercise his discretion under Article 145(3) of the Constitution to decide whether a person shall be prosecuted for an offence under one Act or the other. In the instant case he exercised his discretion by prosecuting the appellant for an offence under s.57(1) of the Internal Security Act, 1960, carrying with it the mandatory death penalty.

It was contended on behalf of the appellant that the exercise of this discretion by the Attorney General deprived the appellant of his right under Article 8(1) of the Constitution to equality before the law. The Clause reads:

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

Their Lordships agree with the Federal Court in rejecting this contention. Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by Article 145(3) of the Constitution, viz:

> "The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial".

There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them, may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiassed consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

If indeed the Attorney General was possessed of a discretion to choose between prosecuting the appellant for an offence against s.57(1) of the Internal Security Act, 1964, or for an offence under the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not

proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the Internal Security Act, 1960.

The Internal Security Act, 1960, was Act No. 18 of 1960. It came into force in West Malaysia on 1 August 1960. This was before the Arms Act, 1960, which was Act No. 21 of that year but did not come into force until 1 March 1962. Although the Internal Security Act was revised in 1972 none of its provisions that affect the instant appeal were altered. Part II of the Act which contains the sections relevant to the instant appeal bears the heading: "Special Provisions relating to Security Areas". It lays down special laws applicable only in areas that have been proclaimed security areas and not elsewhere in Malaysia. In creating by s.57 the offence of unlawful possession of firearms or ammunition in a security area and enacting that the punishment for that offence must be death, Parliament manifested its intention that a person who was proved before a court of justice to have been in possession of firearms or ammunition in a security area should be condemned to death. This Act was followed almost immediately and in the same session of Parliament by the Arms Act, 1960. This was a general Act and it created a general offence of unlawful possession of firearms or ammunition in Malaysia for which it fixed, by s.9, only the maximum penalties of imprisonment and fine, leaving to the discretion of the judge of trial the actual punishment, within those limits, to be imposed in the particular cases. If these sections applied to the special case of unlawful possession of firearms or ammunition in a security area as well as to such possession elsewhere in Malaysia there would be a conflict between them and s.57 of the Internal Security Act, 1960. It is however a well-established rule of statutory construction expressed in the Latin maxim *generalia specialibus non derogant* that the legislature is presumed to have not intended that provisions of general application in a subsequent statute were to apply in circumstances for which special and different provision had been made in previous statutes: *Bishop of Gloucester v. Cunnington* [1943] K.B. 101. That presumption, in their Lordships' view, applies to the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, which is also general in its terms. Although the sections creating the offence of unlawful possession under these two Acts contain no express exception of unlawful possession in a security area, it cannot be supposed that Parliament having manifested in the Internal Security Act, 1960, its intention that in the special circumstances where unlawful possession occurred in a security area the penalty must be death and not any punishment less severe, nevertheless by an Act in general terms and passed in the same session, departed from that intention.

In their Lordships' view, the provisions of the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, which deal with the offence of unlawful possession of firearms or ammunition *simpliciter* are not applicable where the possession occurs in a security area. In their Lordships' view the appellant was correctly charged in the instant case; and his ground of appeal under the third head fails.

For these reasons it follows that the charge against the appellant was good in law but that his trial upon that charge was a nullity.

Their Lordships will report to His Majesty the Yang di-Pertuan Agong that the conviction and sentence of the appellant on 17 November 1976 should be set aside and the case remitted to the Federal Court for further consideration as to whether or not to order a new trial.

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In the Privy Council

TEH CHENG POH alias CHAR MEH

v.

THE PUBLIC PROSECUTOR, MALAYSIA

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LORD DIPLOCK

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