ANDREAS PANAYIOTOU AOUROU,

Appellant,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeal No. 2768)

Criminal Law—Appeal against sentence—Offences of pretending incapacity and causing incapacity to himself, contrary to sections 40 (1) (*b*) *and* 38 (1) (*b*) *of the Military Criminal Code and Procedure Law* 40 *of* 1964*—Whether offences committed during a state of mobilization—Trial Court's sentences imposed on the footing that both offences fell within sub-paragraphs* (*b*) *of the aforesaid both sections, set aside—New sentence imposed as provided under sub-paragraph* (γ) *thereof.*

Sections 38 (1) (*b*) (γ) and 40 (1) (*b*) (γ) of the Military Criminal Code and Procedure Law (Law 40 of 1964) read as follows :—

« 38.—(1) Στρατιωτικός, ὅστις ἐκ προθέσεως καθιστᾷ ἑαυτόν, μόνος ἢ δι' ἄλλου, καθόλου ἢ ἐν μέρει, διαρκῶς ἢ προσκαίρως, ἀνίκανον πρὸς ἐκπλήρωσιν τῶν στρατιωτικῶν του ὑποχρεώσεων, εἶναι ἔνοχος κακουργήματος καὶ τιμωρεῖται—

(β) μὲ φυλάκισιν μὴ ὑπερβαίνουσαν τὰ δεκατέσσαρα ἔτη ἐὰν ἡ πρᾶξις ἐτελέσθη, ἐν καιρῷ πολέμου, ἐνόπλου στάσεως, καταστάσεως ἐκτάκτου ἀνάγκης ἢ ἐπιστρατεύσεως·

(γ) μὲ φυλάκισιν μὴ ὑπερβαίνουσαν τὰ δύο ἔτη εἰς πᾶσαν ἄλλην περίπτωσιν·

40.—(1) Στρατιωτικός, ὅστις ἐπὶ τῷ σκοπῷ ὅπως ἀποφύγῃ τὴν ἐκπλήρωσιν τῆς στρατιωτικῆς του ὑποχρεώσεως, προσποιεῖται νόσον ἢ σωματικὰ ἐλαττώματα ἢ μεταχειρίζεται ἄλλα ἀπατηλὰ μέσα, εἶναι ἔνοχος κακουργήματος καὶ τιμωρεῖται—

(β) μὲ φυλάκισιν μὴ ὑπερβαίνουσαν τὰ τρία ἔτη, ἐὰν ἡ πρᾶξις ἐτελέσθη ἐν καιρῷ πολέμου, ἐνόπλου στάσεως, καταστάσεως ἐκτάκτου ἀνάγκης ἢ ἐπιστρατεύσεως·

(γ) μὲ φυλάκισίν μὴ ὑπερβαίνουσαν τοὺς ἓξ μῆνας εἰς πᾶσαν ἄλλην περίπτωσιν »·

The appellant, a member of the National Guard, was convicted on his own plea, by the Military Court of the offences of pretending incapacity contrary to article 40 (1) (*b*) and of causing incapacity to himself by shooting his left foot with his rifle, contrary to article 38 (1) (*b*) of the Military Criminal Code

and Procedure Law, (Law 40 of 1964) and was sentenced to one year's imprisonment on the first count and three years' imprisonment on the 2nd count.

The trial Court in measuring sentence acted upon a statement of counsel for the prosecution who in reply to the Court's enquiry stated that the offences were committed while in a state of mobilization and therefore the sentences would have to be measured under sub-paragraph (*b*) of the respective sections, which are much more severe than those provided in sub-paragraph (γ) thereof.

On appeal, counsel who has been briefed for the appeal, sumbitted that the statement made by the prosecution in the trial Court to the effect that the offences were committed during the time of mobilization, was legally unjustified and he attacked the sentences imposed, mainly upon the contention that his client's case fell in sub-paragraphs (γ) regarding both offences, which provide for six months imprisonment (instead of three years) for the offence in the first count, and two years' imprisonment (instead of fourteen years) for the offence in the second count; counsel appearing for the Republic conceded that this was so.

Held, (1) as at present advised, we are inclined to think that counsel before us are right on the point, and we appreciate the assistance received from them both which, unfortunately, the trial Court did not have.

(2) In the circumstances, following up the position as stated in the judgment of the trial Court, and particularly, respecting their decision and the reason which led them to the decision extending leniency to the appellant, we set aside the sentences imposed on the footing that the offences fell within sub-paragraph (*b*) of the respective sections, and we substitute for them sentences under the provisions of sub-paragraph (γ) in both cases. These are: Imprisonment of three months for the offence in the first count; and imprisonment for one year for the offence in the second count. Both sentences to run concurrently.

Appeal allowed. Order and sentence accordingly.

Appeal against sentence.

Appeal against the sentence imposed on the appellant who was convicted on the 7th April, 1965, by the Military Court, sitting at Nicosia, (Case No. 12/65) on two counts of the offences of (1) pretending incapacity contrary to article 40 (1) (*b*) of the Military Criminal Code and Procedure Law, 1964 and (2) for causing incapacity to himself by shooting his left foot with his rifle, contrary to section

38 (1) (*b*) of the same statute and was sentenced to one year's imprisonment on the first count and to three years' imprisonment on the second count, the sentences to run concurrently.

E. Efstathiou, for appellant.

K. C. Talarides, counsel of the Republic, for the respondent.

The judgment of the Court was delivered by :

VASSILIADES, J.: This is an appeal against the sentences imposed on the appellant by the Military Court upon his pleading guilty to the two counts in the information. The first for pretending incapacity, contrary to Article 40 (1) (*b*) of the Military Criminal Code and Procedure, 1964 ; and the second for causing incapacity to himself by shooting his left foot with his rifle, contrary to Article 38 (1) (*b*).

Before the trial Court the appellant was defended by an advocate, who, after his client's plea and after hearing the statement on the relevant facts by the prosecuting counsel, presented to the trial Court appellant's case in mitigation of sentence.

As it may be seen in the record before us, counsel for the appellant tried to show to the Military Court that the appellant has been suffering with his nerves as well as other painful ailments, which, added to the unfortunate circumstances of his childhood, affected in a way his mental balance.

The learned President of the Military Court gave every opportunity to counsel for the appellant to put before the Court any medical evidence or other material which might assist his client. But, as the record abundantly shows, counsel did not think it necessary to go beyond his statement on the point.

Upon returning to the Court after retiring for consultation, the President of the Military Court enquired from counsel conducting the prosecution, whether appellant's case came within the provisions of Article 38 (1) (*b*) and particularly whether the offence was committed during a state of mobilization. Otherwise, the first count would fall under sub-paragraph (γ) and not (*b*) of Article 40 (1) ; and the second count would likewise fall under Article 38 (1) (γ) instead of 38 (1) (*b*). This was a very pertinent and material question to ask as the sentences provided in sub-paragraph (β) respectively, are very much more severe than those provided in sub-paragraphs (γ) of the respective sections.

Counsel conducting the prosecution stated in reply to Court's enquiry, that the offences were committed while in a state of mobilization and, therefore, the sentences would have to be measured under sub-paragraphs (*b*) of the respective sections.

Acting upon that statement, and bearing in mind that the punishment provided for the first offence was imprisonment not exceeding three years, and for the offence in the second count imprisonment not exceeding fourteen years, the trial Court stated the reasons in their judgment for which they decided to extend leniency to the appellant, and proceeded to impose one year's imprisonment for the offence in the first count and three years' imprisonment for the offence in the second count.

Mr. Efstathiou, who has been briefed for the appeal, attacked the sentences imposed, mainly upon the contention that his client's case fell in sub-paragraphs (γ) regarding both offences, which provide for six months imprisonment (instead of three years) for the offence in the first count, and two years' imprisonment (instead of fourteen years) for the offence in the second count. He submitted that the statement made by the officer conducting the prosecution in the trial Court to the effect that the offences were committed during the time of mobilization, were legally unjustified.

Mr. Talarides appearing for the Republic in this case, conceded that this was so. As at present advised, we are inclined to think that counsel before us are right on the point, and we appreciate the assistance received from them both which, unfortunately, the trial Court did not have.

In the circumstances, following up the position as stated in the judgment of the trial Court, and particularly, respecting their decision and the reasons which led them to the decision of extending leniency to the appellant, we set aside the sentences imposed on the footing that the offences fell within sub-paragraphs (*b*) of the respective sections, and we substitute for them sentences under the provisions of sub-paragraphs (γ) in both cases : These are :- Imprisonment of three months for the offence in the first count ; and imprisonment for one year for the offence in the second count. Both sentences to run concurrently from today.

Appeal allowed. Order and sentences accordingly.