NICOS CHARALAMBOUS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeal No. 2827)

Criminal Law—Military Service—Conviction and sentence—Offences against the Motor Vehicles and Road Traffic Law, Cap. 332, *the Military Criminal Code and Procedure Law,* 1964 *(Law No.* 40 *of* 1964 *as amended) the Criminal Code Cap.* 154, *the Firearms Law, Cap.* 57 *as amended by Law No.* 11 *of* 1959, *and the Explosive Substances Law, Cap.* 54*—Appeal against conviction and sentence.*

Firearms—Military Service—The Firearms Law, Cap 57 (supra)*—Carrying a military rifle contrary to section* 3 (1)(2) *of the said Law—Appellant, who at all material times was serving in the National Guard, is not covered, on the facts of this case, by section* 29 *of the aforesaid Law Cap.* 57 *construed and applied in accordance with Article* 188.3 (*a*) *and* 4 *of the Constitution.*

Constitutional Law—Constitution of the Republic, Article 188.3 (*a*) *and* 4 *and section* 29 *of Cap.* 57 (supra)*—Construction of the words "Her Majesty's Forces" in section* 29 *in the light of Article* 188*—Those words should be construed to read now "Forces of the Republic"—And they have to be applied accordingly.*

Criminal Law—Conviction and sentence—The rule laid down in Pefkos v. The Republic 1961 *C.L.R.* 340*—To the effect that trial Courts should not impose sentences for offences of less gravity where these offences are component parts of the graver offence of which the accused was convicted and sentenced—Because, otherwise, the Court might be taken to have punished the accused twice for the same act—This rule is not applicable to the present case where the complaint is that since the appellant had pleaded guilty to the offence of carrying a military rifle in such a manner as to cause terror contrary to section* 80 *of the Criminal Code, Cap.* 154 *and was sentenced to* 18 *months' imprisonment—He should not have been charged, convicted and sentenced to five years' imprisonment for carrying the*

same military weapon contrary to section 3 (1) (2) (a) of the Firearms Law Cap. 57 as amended by Law No. 11 of 1959—In the present case though the facts of the offence of unlawful carrying of the rifle do constitute, to a certain extent, a component part of the offence of carrying arms to terrorize, the former offence is, unlike in the Pefkos' *case* (supra), *the graver of the two—On the other hand the offence of less gravity has an essential ingredient which is not part of the graver offence.*

Criminal Procedure—Joinder of counts—Joinder of traffic offences and offences relating to possession or carrying firearms and explosive substances—This course, though undesirable, would not justify in the circumstances of this case interference by the Court of Appeal—Accused not prejudiced thereby in his defence—No miscarriage of justice.

Miscarriage of justice—Joinder of counts—Though undesirable in this case, this course would not justify interference by the Court of Appeal as there has been no miscarriage of justice—See under Criminal Procedure above.

The facts sufficiently appear in the judgment of the Court. Section 29 of Cap. 57 (*supra*) is set out in the judgment of the Court.

Article 188 of the Constitution provides with reference to the laws in force on the date of the coming into operation of the Constitution, *inter alia*, the following

"3. In any such law . unless the context otherwise requires—

(a) any reference to the Colony of Cyprus or to the Crown shall, in relation to any period beginning on or after the coming into operation of this Constitution, be construed as a reference to the Republic.

4. Any Court in the Republic applying the provisions of any such law shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution "

Cases referred to :—

Pefkos v. *The Republic* 1961 C.L.R. 340, *distinguished.*

Appeal against conviction and sentence.

Appeal against conviction and sentence imposed on the appellant who was convicted on the 7th July, 1966, at the Military Court, sitting at Nicosia, (Case No. 209/66) on 5 counts of the offences of—

1. Driving a military motor-car without due care and attention contrary to sections 6 and 13 of the Motor Vehicles and Road Traffic Law Cap. 332 and section 5 of the Military Criminal Code and Procedure Law 1964 (Law 40/64 as amended by Law 77/65). 2. Desertion of sentry post contrary to section 54 (*b*) of the Military Criminal Code and Procedure Law 1964 (*supra*). 3. Carrying a military rifle in such a manner as to cause terror contrary to section 80 of the Criminal Code Cap. 154. 5. Possessing Explosive Substances contrary to section 4 (4) (*d*) of the Explosive Substances Law Cap. 54, and was sentenced to one month's imprisonment on count 1, six months' imprisonment on count 2, five years' imprisonment on count 3, eighteen months' imprisonment on count 4, two years' imprisonment on count 5, the sentences to run concurrently.

L. Clerides, for the appellant.

E. Odysseos, on behalf of the Attorney-General of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, J.: The judgment of the Court will be delivered by Mr. Justice Loizou.

LOIZOU, AG. J.: The appellant, who at all material times was serving in the National Guard, was charged before the Military Court on six counts and was on the 7th July, 1966, convicted, on his own plea, on five of the six counts, the prosecution having offered no evidence on one of the counts (count 2).

The offences with which the appellant was charged as they appear on the charge-sheet are briefly as follows :

Count 1 : Driving a military motor-car without due care and attention.

Count 2 : Driving a motor-car without being in possession of a driving licence.

Count 3 : Desertion of sentry post.

Count 4 : Carrying a military rifle contrary to section 3 (1) (2) (*a*) of the Firearms Law Cap. 57 as amended by Law 11/59.

Count 5 : Carrying a military rifle in such a manner as to cause terror.

Count 6 : Possession of explosive substances.

The appellant was sentenced by the Court to terms of imprisonment ranging from five years to one month as follows :—

Count 1 : 1 month's imprisonment.

Count 3 : 6 months' imprisonment.

Count 4 : 5 years' imprisonment.

Count 5 : 18 months' imprisonment.

Count 6 : 2 years' imprisonment.

On the 14th July, 1966, the appellant, without the assistance of counsel, filed an appeal against his conviction. The ground given in his notice of appeal was that he was innocent. Subsequently, after he secured the assistance of counsel new grounds of appeal were filed ; they are as follows :—

1. Appeal against conviction.

(*a*) That upon the admitted facts relating to count 4 the appellant could not have been convicted in law for the offence charged in this count, *i.e.* carrying a military rifle contrary to the provisions of section 3 (1) (2) (*a*) of Cap. 57 because—

(i) Appellant had a right as a serviceman to carry a military weapon ;

(ii) section 3 (1) (2) (*a*) does not envisage cases of possession of military rifles by servicemen.

(*b*) That since the appellant had pleaded guilty to the offence of carrying a military rifle in such a manner as to cause terror contrary to section 80 of the Criminal Code Cap. 154 and was sentenced to 18 months' imprisonment he should not have been charged, convicted and sentenced to five years imprisonment on count 4 for carrying the same military weapon.

(*c*) That the inclusion in one and the same charge-sheet of driving offences with offences relating to possession and/or carrying of firearms was most unreasonable and erroneous.

2. Appeal against sentence. That in any event the sentence of the trial Court was manifestly excessive.

There being no objection from the other side the appellant was granted leave to appeal against sentence also. It is convenient to say at this stage that counsel for the appellant limited the appeal against sentence to count 4 only.

The facts as they appear from the record of the proceedings are briefly as follows :—

On the 3rd March, 1966, the appellant was on sentry duty at a sentry box within the Public Works compound in Limassol town between 11.00 p.m. and 1.00 a.m. of the following day the 4th March, 1966. For the purposes of his duty he had the use of a military rifle which was being used by the person on sentry duty at that particular sentry box. Some time before 1.00 a.m. of the 4th March he deserted his post and taking the loaded rifle with him proceeded on a bicycle to Zakaki village not very far outside Limassol town. There he went to the house of one Demetris Ktori and woke him up as well as the other members of his family by knocking at the door of their house. Ktori enquired who was knocking at the door and the appellant replied that it was the police. The residents of the house realized that it was the appellant because he started shouting that he would shoot Ktori because he had upset his plans. All this time the appellant was holding the loaded military rifle pointed at the door of the house. Some time later the wife of Ktori opened the door, admitted the appellant and tried to reason with him, but he repeated to her that he wanted to shoot her husband. It would appear that his grudge was that they refused to give their consent to his marriage to their daughter. Eventually the wife had to promise to the appellant that if he produced a certificate that he was free to marry they would have no objection to his marriage to their daughter. It might be added that the appellant was at the time a married man. In the end he was persuaded to go but before he did so he warned them that if they reported the matter to the police he would kill them all.

The offence set out in count 1 was committed at about 7.00 p.m. of the 3rd March and is quite unconnected with the offences in the other counts on which he was convicted.

The conviction of the appellant on count 4 is challenged mainly on the contention that being a serviceman he

could not be convicted of the offence charged in this count in view of the provisions of section 29 of the Firearms Law Cap. 57. This section reads as follows :—

> "29. Nothing in this Law shall apply to or affect any person serving in Her Majesty's Forces or in the Police Force or any special constable in respect of any firearm entrusted to or used or to be used by such person in his capacity as a member of such forces or as a special constable."

In view of the provisions of Article 188, paragraph 4 of the Constitution, this section has to be applied with such modification as is necessary to bring it into accord with the provisions of the Constitution.

In the light of the provisions of paragraph 3 (*a*) of the said Article we are of the view that the words " Her Majesty's Forces " (occurring in line 2 of the section) should be construed to read " Forces of the Republic " and that section 29 should be applied subject to this modification.

Applying this section so modified to the facts of the present case we are of the view that at the time of the commission of this offence the firearm in question was not being used by the appellant in his capacity as a member of the forces of the Republic.

The question remains whether, at the relevant time, the firearm was entrusted to him in his aforementioned capacity.

It is clear from the record of the proceedings that this firearm was the firearm used by the soldier on duty at that particular sentry box for the period of his sentry duty. It was not, therefore, entrusted to him in the sense that it had been issued to him for use during the period of his military service or for any indefinite period of time. It was entrusted to him for the limited purpose of his sentry duty at the sentry box.

It is also abundantly clear that in taking the rifle to Zakaki village he was not carrying it to be used by him in his capacity as a member of the forces of the Republic.

In the circumstances we are of the opinion that the present case is not covered by section 29 of the Firearms Law Cap. 57 and that, therefore, the appellant was properly convicted on count 4.

With regard to the second ground of appeal we consider it sufficient to say that in our view the present case is distinguishable from the case of *Pefkos* v. *The Republic* reported in 1961 C.L.R. at p. 340.

In the latter case the accused were convicted on several counts including a count for attempted armed robbery and five counts for possessing and using a pistol, possessing and using a revolver and possessing rounds of ammunition.

It was held on appeal that the sentences imposed by the trial Court for the offences of less gravity should be set aside on the ground that the facts constituting these offences were component parts of the graver offence (attempted armed robbery) and the Court might be taken to have punished the accused twice for the same act, a thing which is expressly prohibited by the Constitution and the Criminal Code.

In the present case though the facts of the offence charged in count 4 (the unlawful carrying of the rifle) do constitute, to a certain extent, a component part of the offence charged in count 5 (carrying arms to terrorize) the former offence is, unlike in the *Pefkos case*, the graver of the two carrying a maximum of ten years imprisonment as compared to two years imprisonment in the latter.

On the other hand the offence of less gravity (count 5) has an essential ingredient, which is not part of the offence charged in count 4.

In view of the above it cannot be said that the trial Court having imposed a punishment of five years imprisonment on count 4 has punished the appellant a second time for the same act when it proceeded to impose concurrent punishment of 18 months' imprisonment on count 5 ; we regard such punishment as being punishment for the act of terrorizing with an offensive weapon, irrespective of the lawfulness or otherwise of the carrying of such weapon. Therefore, the principle as to punishment enunciated in the *Pefkos* case cannot be said to have been violated in the present case.

The last ground of appeal against conviction is the inclusion in the same charge-sheet of traffic offences and offences relating to the possession or carrying of firearms.

Although we regard such a course undesirable we do not think that this is a ground which would justify interference by this Court, in view of the fact that the accused

was in no way prejudiced in his defence as a result of such joinder of counts and, therefore, no miscarriage of justice occurred.

For all these reasons the appeal against conviction must fail.

We now come to the appeal against sentence on count 4.

We do think that the term of five years imprisonment is indeed on the heavy side ; had we been assessing sentence ourselves in the first instance we might have been inclined to be less severe ; but in all the circumstances, including the gravity of the offence, its prevalence and the bad record of the appellant, we cannot hold that the sentence is manifestly excessive so as to warrant interference by this Court.

In the result the appeal against sentence is also dismissed, but we direct that the terms of imprisonment will run as from the date of conviction.

Appeal dismissed. Terms of imprisonment to run from date of conviction.