1982 June 8

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

YIANNAKIS PANAYIOTOU COSTA,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4293).

Constitutional Law—Constitutionality of legislation—Cannot be examined in abstracto but in relation to the facts of the particular case before the Court.

Constitutional Law—Human rights—Right to respect for private and family life—Article 15 *of the Constitution and Article* 8 *of the European Convention for the Protection of Human Rights and Fundamental Freedoms—Section* 171 *of the Criminal Code, Cap.* 154 *criminalising homosexual relations—Not contrary to the above articles—Constitutional and legal issues in this case outside the ambit of the construction given to Article* 8 *of the Convention, by the majority of the European Court of Human Rights, in the* Dudgeon *case even assuming that this Court were to accept the majority view which is not accepted—Because conception of morals changes from time to time and from place to place—And because State Authorities of each country are in a better position than an international Judge to give an opinion as to the prevailing standards of morals in their country—Dissenting opinion of Judge Zekia in the* Dudgeon *case adopted.*

European Convention for the Protection of Human Rights and Fundamental Freedoms—Interpretation of provisions of—Domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely the European Court and the European Commission of Human Rights.

Criminal Law—Sentence—Permitting a male person to have carnal

knowledge of him against the order of nature—Section 171(b) of the Criminal Code Cap. 154—Sentence of six months' imprisonment neither manifestly excessive nor wrong in principle.

The appellant was convicted of the offence of permitting another male person to have carnal knowledge of him against the order of nature, contrary to section 171(b)* of the Criminal Code Cap. 154. The offence in question was committed in private in a tent but within the sight of another person who was legitimately using the same tent. The appellant was at the time 19 years of age and both himself and his partner in the illicit affair were soldiers.

Upon appeal against conviction it was contended that section 171(b) of the Criminal Code was contrary to Article 15** of the Constitution and/or contrary to Article 8*** of the European Convention**** of Human Rights and Fundamental Freedoms.

Counsel submitted that the circumstances of the aforesaid section as constituting an offence are so general and absolute as to constitute an interference with a person's private life to

---

* *Section 171(b) provides as follows:*

"171(b) Any person who—

permits a male person to have carnal knowledge of him against the order of nature,

is guilty of a felony and is liable to imprisonment for five years".

** Article 15 of the Constitution provides as follows:

"1. Every person has the right to respect for his private and family life.

2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person".

*** Article 8 of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

**** This Convention is applicable in the Republic by virtue of the provisions of Article 169 of the Constitution after the enactment by the House of Representatives of the European Convention for the Protection of Human Rights (Ratification) Law, 1962, (Law No. 39 of 1962) and by virtue of paragraph 3 of the said Article has superior force to any Municipal Law.

an extent and a degree not necessary in the interests of public morals, and that the section has to be looked at in the present days' circumstances as the acts prohibited thereby can occur in a manner which, it was submitted, may not endanger public morals, such as acts between two consenting adults over twenty-one years of age in private. Counsel relied on the *Dudgeon* case, a judgment of the European Court of Human Rights, whereby the European Court held* by majority (Judge Zekia dissenting) that the existence in the criminal law in force in Norther Ireland of various offences capable of relating to male homosexual conduct constituted an unjustified interference with the right to respect for one's private life in breach of Article 8 of the Convention.

Held, (1) that the examination of the constitutionality of a law or the construction and application of an international convention cannot be made in abstracto but in relation to the facts of the particular case before the Court; that in the present case the act in respect of which the appellant was found guilty was not committed in private but within the sight of another person who was legitimately using the same tent; that, moreover, the appellant was at the time 19 years of age and both himself and his partner in this illicit affair were soldiers, which position constitutes also one of the exceptions under the Sexual Offences Act, 1967 of England; that, therefore, the constitutional and legal issues raised by this appeal should fail on the ground that they are outside the ambit of the construction given in the *Dudgeon* case by the European Court of Human Rights to Article 8 of the Convention even assuming that this Court were to accept the majority view, which it does not for the reasons appearing in para. 2 below.

(2) That in ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European conception of morals; that, furthermore, it has been held that State Authorities of each Country are in a better position than an international Judge, to give an opinion as to the prevailing standards of

* Extracts from the judgment are quoted at pp. 127, 132, 133 post.

morals in their Country; that, in view of these principles this Court has decided not to follow the majority view in the *Dudgeon* case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this Country; that, therefore, in the light of the aforesaid principles and viewing the Cypriot realities this Court is not prepared to come to the conclusion that section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country; accordingly the appeal against conviction should fail.

Held, further, that by adopting the dissenting opinion of Judge Zekia this Court should not be taken as departing from its declared attitude that for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights (see *Fourri and Others* v. *The Republic* (1980) 2 C.L.R. p. 152).

Held, on the appeal against sentence:

(3) That the sentence of six months' imprisonment, which has been imposed on the appellant is neither manifestly excessive nor wrong in principle, taking into consideration the circumstances relevant both to the offender and the offence, which were indeed duly weighed by the Military Court, alongside with a social investigation report; accordingly the appeal against sentence should also fail.

Appeal dismissed.

Cases referred to:

Dudgeon Case, judgment of the European Court of Human Rights.

HjiNicolaou v. *Police* (1976) 2 C.L.R. 63;

Papadopoullos v. *Republic* (1980) 2 C.L.R. 10;

Fourri and Others v. *Republic* (1980) 2 C.L.R. 152 at pp. 168–169.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Yiannakis Panayiotou Costa who was convicted on the 29th January, 1982

by the Military Court sitting at Nicosia (Case No. 355/81) on one count of the offence of having committed an unnatural offence contrary to section 171(b) of the Criminal Code Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) and was sentenced to six months' imprisonment.

E. Markidou (Mrs.) with *Chr. Triantafyllides*, for the appellant.

A. Frangos, Senior Counsel of the Republic, with *P. Ioulianos*, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. This is an appeal against the conviction of the appellant and the sentence imposed on him by the Military Court for having committed an unnatural offence contrary to section 171(b) of the Criminal Code, 154, and section 5 of the Military Criminal Code and Procedure Law, 1964, (Law No. 40 of 1964) as amended.

The particulars of the offence were that the appellant in the night of the 25th to the 26th June, 1981, whilst serving as a private with Infantry Battalion 201, in the area of the village of Agrokypia, permitted private Theocharous Panayioti to have carnal knowledge of him against the order of nature.

The salient facts of the case are these: On the date in question a military exercise took place in the area by this Infantry Battalion. The appellant, the said Theocharous Panayiotis, who was called as a prosecution witness, and prosecution witness Diomedous Heraclis, took part and when they camped at night all three stayed in a tent of two beds in which normally only Theocharous and Diomedous would have slept. All three went to bed in their uniform with the appellant in their middle. In the course of the night Theocharous was seen by Diomedous having carnal knowledge of the appellant against the order of nature in circumstances establishing the latter's permission. We need not, however, enter into the sordid details of the offence which were described by both Theocharous and Diomedous, as the grounds of Law upon which this appeal is based with regard to the conviction do not challenge the findings of fact of the trial Court. They are as follows:-

"1. Section 171(b) of Cap. 154 is contrary to Article 15 of the Constitution, and/or.

2. Section 171(b) of Cap. 154 is contrary to Article 8 of the Convention of Human Rights and Fundamental Freedoms, (*Dudgeon* case)".

The *Dudgeon* case is a judgment of the European Court of Human Rights given at the request of the Commission of Human Rights under the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. This Convention is applicable in the Republic by virtue of the provisions of Article 169 of the Constitution after the enactment by the House of Representatives of the European Convention for the Protection of Human Rights (Ratification) Law, 1962, (Law No. 39 of 1962) and which Convention by virtue of paragraph 3 of the said Article has superior force to any Municipal Law (see inter alia *HjiNicolaou* v. *Police* (1976) 2 C.L.R. 63 at pp. 68, 69; *Papadopoullos* v. *The Republic* (1980) 2 C.L.R. p. 10, at p. 50 and *Fourri and Others* v. *The Republic* (1980) 2 C.L.R. 152, at pp. 168–169).

Section 171 of the Code reads as follows:

"171. Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) permits a male person to have carnal knowledge of him against the order of nature,

is guilty of a felony and is liable to imprisonment for five years".

Article 15 of the Constitution reads:

"1. Every person has to right to respect for his private and family life.

2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person".

Article 8 of the Convention reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The comparison of these two texts shows their substantial similarity which calls for the same interpretation.

It has been argued on behalf of the appellant that the circumstances of the aforesaid section as constituting an offence are so general and absolute as to constitute an interference with a person's private life to an extent and a degree not necessary in the interests of public morals, and that the section has to be looked at in the present days' circumstances as the acts prohibited thereby can occur in a manner which, it was submitted, may not endanger public morals, such as acts between two consenting adults over twenty-one years of age in private.

The examination of the constitutionality of a law or the construction and application of an international convention cannot be made in abstracto but in relation to the facts of the particular case before the Court. In the present case the act in respect of which the appellant was found guilty was not committed in private but within the sight of another person who was legitimately using the same tent; moreover, the appellant was at the time 19 years of age and both himself and his partner in this illicit affair were soldiers, which position constitutes also one of the exceptions under the 1967 Act of England. Therefore, the constitutional and legal issues raised by this appeal should fail on the ground that they are outside the ambit of the construction given in the *Dudgeon* case by the European Court of Human Rights to Article 8 of the Convention, as this is what the majority of the Court of Human Rights held, even, assuming that we were to accept the majority view, which we do not, for the reasons we shall be shortly giving.

Reference, therefore, should be made to para. 62, of the aforesaid judgment where it is stated:

> "In the opinion of the Commission, the interference complained of by the applicant can, in so far as he is prevented from having sexual relations with young males under 21 years of age, be justified as necessary for the protection of the rights of others (see especially paragraphs 105 and 116 of the report). This conclusion was accepted and adopted by the Government, but disputed by the applicant who submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations, that is, 17 years under current Northern Ireland law (see paragraph 15 above).
>
> The Court has already acknowledge the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (see paragraph 49 above). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (see paragraph 52 above)".

Indeed the issue of the age limit came into consideration by the Court inasmuch as in its judgment reference is made to the age of majority which was, when the Sexual Offences Act 1956, was enacted and when amended by the Act of 1967, 21 though reduced to 18 by the Family Law Reform Act of 1979 for certain purposes, including capacity to marry without parental consent and to enter into contractual relations and the minimum age for jury services likewise reduced to 18 by the Representation of the People Act of 1969 and the Criminal Justice Act of 1972, respectively. Reference is also made to the fact that in 1977 the House of Lords rejected a Bill aimed at reducing the age for consent for private homosexual acts to 18 and that later in 1981 a Policy Advisory Committee on sexual offences recommended that the minimum age for homosexual relations between males should be reduced to 18.

In respect of all the above, the Court of Human Rights reached the conclusion that it did with regard to the age limit.

We do not intend, however, to content ourselves with the aforesaid result as the issues raised by this appeal are very important and we feel that we should really express our views on the matter in the light of the Cypriot moral and social realities as we understand them to be.

For that purpose we would like to quote in full the dissenting opinion delivered by Judge Zekia in the *Dudgeon* case, with which we find ourselves in full agreement:

> "I am dealing only with the crucial point which led the Court to find a breach of Article 8.1 of the Convention by the respondent Government.
>
> The Acts of 1861 and 1885 still in force in Northern Ireland prohibit gross indecency between males and buggery. These enactments in their unamended form are found to interfere with the right to respect for the private life of the applicant, admittedly a homosexual.
>
> The decisive central issue in this case is, therefore, whether the provisions of the aforesaid laws criminalising homosexual relations *were necessary* in a democratic society for the pretection of morals and for the protection of the rights and freedoms of others, such a necessity being a prerequisite for the validity of the enactment under Article 8.2 of the Convention.
>
> After taking all relevant facts and submissions made in this case into consideration, I have arrived at a conclusion opposite to the one of the majority. I proceed to give my reasons as briefly as possible for finding no violation on the part of the respondent Government in this case.
>
> 1. Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs.
>
> 2. All civilised countries until recent years penalised sodomy and buggery and akin unnatural practices.
>
> In Cyprus criminal provisions similar to those embodied

in the Acts of 1861 and 1885 in the North of Ireland are in force. Section 171 of the Cyprus Criminal Code, Cap. 154, which was enacted in 1929, reads:

'Any person who (a) has carnal knowledge of any person against the order of nature, or

(b) permits a male person to have carnal knowledge of him against the order of nature

is guilty of a felony and is liable to imprisonment for five years'.

Under section 173 anyone who attempts to commit such an offence is liable to 3 years' imprisonment.

While on the one hand I may be thought biased for being a Cypriot Judge, on the other hand I may be considered to be in a better position in forecasting the public outcry and the turmoil which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland. Both countries are religious minded and adhere to moral standards which are centuries' old.

3. While considering the respect due to the private life of a homosexual under Article 8.1, we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of such people who are completely against unnatural immoral practices. Surely the majority in a democratic society are also entitled under Articles 8, 9 and 10 of the Convention and Article 2 of Protocol No. 1 to respect for their religious and moral beliefs and entitled to teach and bring up their children consistently with their own religious and philosophical convictions.

A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.

A change of the law so as to legalise homosexual activities

in private by adults is very likely to cause many disturbances in the country in question. The respondent Government were justified in finding it necessary to keep the relevant Acts on the statute book for the protection of morals as well as for the preservation of public peace.

4. If a homosexual claims to be a sufferer because of physiological, psychological or other reasons and the law ignores such circumstances, his case might then be one of exculpation or mitigation if his tendencies are curable or incurable. Neither of these arguments has been put forward or contested. Had the applicant done so, then his domestic remedies ought to have been exhausted. In fact he has not been prosecuted for any offence.

From the proceedings in this case it is evident that what the applicant is claiming by virtue of Article 8, paras. 1 and 2 of the European Convention is to be free to indulge privately into homosexual relations.

Much has been said about the scarcity of cases coming to Court under the prohibitive provisions of the Acts we are discussing. It was contended that this fact indicates the indifference of the people in Northern Ireland to the non-prosecution of homosexual offences committed. The same fact, however, might indicate the rarity of homosexual offences having been perpetrated and also the unnecessariness and the inexpediency of changing the law.

5. In ascertaining the nature and scope of morals and the degree of the necessity commensurate to the protection of such morals in relation to a national law, adverted to in Articles 8, 9 and 10 of the European Convention on Human Rights, the jurisprudence of this Court has already provided us with guidelines:

"A" The conception of morals changes from time to time and from place to place. There is no uniform European conception of morals. State authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country (Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

It cannot be disputed that the moral climate obtaining in Northern Ireland is against the alteration of the law under consideration, the effect of which alteration, if made, would be in some way or other to license immorality.

"B" State authorities likewise are in a better position to assess the extent to which the national legislation should necessarily go in restricting, for the protection of morals and of the rights of others, rights secured under the relevant Articles of the Convention.

The legislative assembly competent to alter the laws under review refrained to do so, believing it to be necessary to maintain them for the protection of morals prevailing in the region and for keeping the peace. The Contracting States are entitled to a margin of appreciation, although undoubtedly not an unlimited one.

Taking account of all relevant facts and points of law and the underlying principles for an overall assessment of the situation under consideration, I fail to find that the keeping in force in Northern Ireland of Acts—which date from the last century—prohibiting gross indecency and buggery between male adults has become unnecessary for the protection of morals and of the rights of others in that country. I have come to the conclusion therefore that the respondent Government did not violate the Convention".

By adopting the dissenting opinion of Justice Zekia we should not be taken as departing from the declared attitude of this Court that for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights (see *Fourri and Others* v. *The Republic* (1980) 2 C.L.R. p. 152).

In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the aforesaid organs has already held that the conception of morals changes from time to time and from place to place and that there is no uniform European conception of morals. Furthermore it has been held, as already mentioned, that State authorities of each country are in a better position than an

international Judge, to give an opinion as to the prevailing standards of morals in their country, a concept referred also to in the opinion of Judge Zekia. It is in view of the aforesaid principles that we have not followed the majority view in the *Dudgeon case* as we are convinced that we are entitled to apply the Convention and interpret the corresponding provisions in our Constitution in the light of our assessment of the present social and moral standards of our country.

In the *Dudgeon case* reference was made to the principles relevant to the assessment of the "necessity" "in a democratic society" of a measure taken in furtherance of an aim that is legitimate under the Convention and they are summed up as follows:

> "51. Firstly, 'necessary' in this context does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' for the interference in question (see the above-mentioned Handyside judgment, p. 22, para. 48).
>
> 52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23 para. 49).
>
> As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions of a right (p. 36, para 59). The Government inferred from the Handyside judgment that the margin of appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in the Handyside judgment, that 'the view taken ..... of the requirements of morals varies from time to time and from place to place, especially in our era,' and that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements' (p. 22, para 48).
>
> However, not only the nature of the aim of the restriction

but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particular serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8

53. Finally, in Article 8 as in several other Articles of the Convention, the notion of 'necessity' is linked to that of a 'democratic society'. According to the Court's case-law, a restriction on a Convention right cannot be regarded as 'necessary in a democratic society'—two hallmarks of which are tolerance and broadmindedness—unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, & 49, and the above-mentioned Young, James and Webster judgment, p. 25, & 63)".

In the light of the aforesaid principles and viewing the Cypriot realities we are not prepared to come to the conclusion that section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country.

The appeal therefore against conviction should fail

Turning now to the question of sentence, we find that the one imposed on him, namely, that of six months imprisonment is neither manifestly excessive nor wrong in principle, taking into consideration the circumstances relevant both to the offender and the offence, which were indeed duly weighed by the Military Court, alongside with a social investigation report The appeal therefore against sentence should also fail

For all the above reasons the appeal is dismissed.

Appeal dismissed.