1983 September 12

[TRIANTAFYLLIDES, P., LORIS, PIKIS, JJ.]

ANDREAS NEOFYTOU KREKOU,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4425).

Military Offences—Sentence—Divulgence of military secrets—Ten years' imprisonment—Appellant a person of low mentality and psychologically disturbed—Though appellant's sense of responsibility a factor relevant to sentence extent to which the sentence may be individualised varies with the nature of the crime, the purpose of the Law, and the need for deterrence—Seriousness of offence in view of the present situation in the country—Need for deterrence—Sentence substained.

The appellant, a national guardsman serving as a sentry at a military post along the line separating the Forces of the Republic from the occupation forces opposite, went over to the Turkish side where he disclosed whatever be came to know during his service in the National Guard at different army centres, about the weaponry and fortifications of the National Guard. On his return he was charged of the offence of divulgence of military secrets and was sentenced to ten years' imprisonment. He was, admittedly, a person of low mentality, psychologically disturbed and with a low capacity to respond to pressure.

Upon appeal against sentence it was contended on his behalf that the sentence was excessive because the trial Court failed to attach proper weight to his mental and psychological condition and thereby individualise sentence to the extent necessary to fit the tragic person of the appellant.

Held, that though the accused's sense of responsibility is, both in principle and on authority, a factor relevant to sentence,

the extent to which sentence may be individualised varies with the nature of the crime, the purpose of the law in introducing the prohibition and, the need for deterrence; that the divulgence of military secrets is an act of betrayal of the mission of a national guardsman, and conduct calculated to weaken the efficacy of the National Guard as a defence force; that it cannot be lightly countenanced; that in ascertaining the need for deterrence, this Court cannot overlook that a small country is struggling against tremendous odds to sustain its entity and whatever is sacred for its inhabitants, their homes and land; and that the National Guard is in the forefront of the effort for survival; that without, in any way, minimising the effect of diminished responsibility as a mitigating factor and, without overlooking the otherwise sad circumstances of the appellant, this Court, is unable to interfere with the sentence imposed by the Military Court; accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Costa v. *Republic* (1966) 2 C.L.R. 87;

Chrysafis v. *Police* (1967) 2 C.L.R. 310;

Pantelis v. *Republic* (1969) 2 C.L.R. 92;

Christodoulou v. *Republic* (1974) 2 C.L.R. 4;

Georghiou v. *Republic* (1974) 2 C.L.R. 72;

Charalambous v. *Republic* (1975) 2 C.L.R. 161;

Mousiou v. *Republic* (1976) 2 C.L.R. 10;

Achilleos v. *Republic* (1966) 2 C.L.R. 109.

Appeal against sentence.

Appeal against sentence by Andreas Neophytou Krekou who was convicted on the 24th June, 1983 by the Military Court sitting at Nicosia (Case No. 175/83) on one count of the offence of desertion contrary to sections 29(1)(2) and 31(1)(2) of the Military Criminal Code and Procedure Law, 1964 (Laws 1964–1979), on one count of divulgence of military secrets contrary to section 70(1)(6) of the Military Criminal Code and Procedure Law, 1964, on one count of abandonment of post contrary to section 54(b) of the Military Criminal Code and Procedure Law, 1964 and on one count of dis-

obedience of a military order contrary to section 51(1)(b) of the Military Criminal Code and Procedure Law, 1964 and was sentenced to 3 years' imprisonment on the first count, 10 years' imprisonment on the second count and to 1 year's imprisonment on each of the remaining two counts, the sentences to run concurrently.

A. Eftychiou with *A. Hadjipanayiotou*, for the appellant.

P. Ioulianou, for the respondent.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS, J.: The Military Court sentenced the appellant, a young man of 21, to an effective sentence of ten years' imprisonment, on counts of desertion, divulgence of military secrets, abandonment of post and disobedience to orders, contrary to the pertinent provisions of the Military Code. The details of the sentence were,

— 3 years' imprisonment for desertion,

— 10 years' imprisonment for divulgement of military secrets,

— 1 year's imprisonment for abandonment of sentry post and, lastly,

— 1 year's imprisonment for disobedience of a military order.

The sentences were made to run concurrently.

Briefly, the facts giving rise to the above convictions were:

The appellant, a national guardsman, serving as a sentry at a military post along the line separating the forces of the Republic from the occupation forces opposite, debated for some time with himself, his colleagues and superiors in the army, the possibility of deserting to the side opposite, in order to avoid further military service. Neither the counsel of his fellow-soldiers, nor that of his superiors dissuaded him from perpetrating his plan. That he was not immediately removed from the position of a sentry upon expressing an inclination to desert, may have been an act of folly on the part of his superiors. Eventually, the appellant went over to the Turkish side, while knowing what was awaiting him. He was fully aware that the Turkish military authorities would extract from him everything he knew about the army and defence arrangements. He discussed the implications of his surrender to Turkish military personnel with a Turkish soldier manning a guard-post

accross the dividing line. What happened afterwards, is explained in a statement the appellant gave to the authorities on his return, nine months later. He disclosed, it seems, whatever he came to know during his service in the National Guard at different army centres, about the weaponry and fortifications of the National Guard.

Admittedly, the appellant is a person of low mentality, psychologically disturbed, with a low capacity to respond to pressure. Medical reports and the Social Investigation Report placed before the trial Court, confirm the above. An unhappy childhood and the hardship that befell him and his family during the Turkish invasion, compounded his problems and added to the instability of his personality. The appellant, as well as his mother and sisters, were held captive by the occupation forces during the Turkish invasion. The appellant lived moments of agony for the fate of himself and his sisters, adding to his traumas.

Counsel for the appellant who, it must be said, took up every point that could be taken on behalf of the appellant, argued that the sentence of ten years' imprisonment is excessive to the extent of justifying our intervention. The trial Court failed, in his submission, to attach proper weight to his mental and psychological condition and, thereby, individualise sentence to the extent necessary to fit the tragic person of the appellant. Another factor to which inadequate consideration was given, in the contention of counsel, was his admission of the offences, signifying repentance and collaboration to facilitate the enforcement of the law—*Kleovoulou* v. *The Police* (1981) 2 C.L.R. 237, 240, is a recent decision, indicating the implications of voluntary confession as a factor in mitigation.

It was submitted, in the face of his mental and psychological condition, the sentence imposed was inordinately high. The personality of the accused and ability to reflect upon his acts, made him prey to his urges. His sense of responsibility was, on account of the above, considerably diminished. A series of decisions of the Supreme Court acknowledges mental and psychological disturbance, or affliction, as factors justifying leniency. Citing from a work on Sentencing, he depicted the effects, upon sentence, of low mentality and psychological and emotional upset, as follows:

"It is clear, on authority, that a person suffering from a

mental handicap at the time of the commission of the offence, be it permanent or temporary, is entitled to leniency. The Supreme Court interfered on a number of occasions with judgments that did not heed sufficiently the implications of mental disability as a mitigating consideration. The level of the accused's intelligence as well as his psychological condition shed light on his mentality and inclinations and, if the accused is found wanting on account of low mentality or disturbed psychology, he should be treated leniently for that".

The decisions of the Supreme Court in the cases listed below, lend support to the above statement of the law and indicate the importance of the mentality of the accused as a determinant of sentence—*Andreas Foka Costa* v. *The Republic* (1966) 2 C.L.R. 87; *Christos Chrysostomou Chrysafis* v. *The Police* (1967) 2 C.L.R. 310; *Adamos Pantelis* v. *The Republic* (1969) 2 C.L.R. 92; *Christodoulou* v. *The Republic* (1974) 2 C.L.R. 4; *Georghiou* v. *The Republic* (1974) 2 C.L.R. 72; *Charalambous* v. *The Republic* (1975) 2 C.L.R. 161; *Pantelis Charalambous Mousiou* v. *The Republic* (1976) 2 C.L.R. 10.

Counsel for the Republic supported the sentence imposed and submitted that it is right in principle and warranted by the grave facts of the case. The actions of the accused contradicted his mission as a soldier and undermined the security of the country. He submitted there is no room whatever for interference with the sentence imposed.

We have given anxious consideration to the propriety of the sentence imposed. The stark features of the case are; on the one hand, the gravity of his conduct, as defined by law, 14 years' imprisonment for the divulgence of military secrets, and reflected by the facts of the case and, his low mentality and limited sense of responsibility, on the other. We subscribe to the proposition that the accused's sense of responsibility is, both in principle and on authority, a factor relevant to sentence. Generally, criminal liability is measured, inter alia, by reference to the accused's sense of responsibility. There is a direct connection between diminished responsibility and criminal culpability in the process of individualising sentence so as to fit the person of the accused as well as the offence. But the extent to which

sentence may be individualised, varies with the nature of the crime, the purpose of the law in introducing the prohibition and, the need for deterrence. There is no doubt that the crime of divulging military secrets is grave both on account of the sentence provided by law, and the implications on the security of the country. As Triantafyllides, P., observed in the course of argument, the appellant may consider himself lucky not to have had to face a severer charge still.

The divulgence of military secrets is an act of betrayal of the mission of a national guardsman, and conduct calculated to weaken the efficacy of the National Guard as a defence force. It cannot be lightly countenanced. The need for deterrence was, as it appears from the judgment of the Military Court, prominent in their minds. They felt they exhausted all limits of leniency by imposing a sentence four years lower than the maximum provided by law. In ascertaining the need for deterrence, this Court cannot overlook that a small country is struggling against tremendous odds to sustain its entity and whatever is sacred for its inhabitants, their homes and land. The National Guard is in the forefront of the effort for survival.

Without, in any way, minimising the effect of diminished responsibility as a mitigating factor and, without overlooking the otherwise sad circumstances of the appellant, we feel unable to interfere with the sentence imposed by the Military Court. In similar circumstances the Supreme Court was equally disinclined to interfere with the sentence of ten years' imprisonment imposed for the commission of a similar nature upon a person likewise suffering from diminished responsibility on account of his mental and psychological condition—*Georghios Yiakoumi Achilleos* v. *The Republic* (1966) 2 C.L.R. 109. If anything, the need for deterrence has increased since 1966, in view of the grave circumstances that afflicted the country since 1974.

The appellant is presently undergoing treatment in prison, as we understand. In due course the responsible authorities may, depending on his improvement and bearing in mind the remoteness of the possibility of the appellant committing similar offences (he was discharged from the National Guard), may consider the possibility of clemency. That, of course, is a matter entirely for those entrusted with authority on such matters.

The appeal is dismissed.

Appeal dismissed.