1984 April 9

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

EVGENIOS L. THEOFILOU,

Appellant.

v.

THE REPUBLIC.

Respondent.

(*Criminal Appeal No.* 4498).

Military Criminal Code and Procedure Law, 1964 (*Law* 40/64)—*Applying violence against a subordinate—Section* 81 *of the Law—Consent to the infliction of violence is not a defence—Mens rea takes the form of an intention to use force against a subordinate.*

Criminal Law—Intent—Motive—Criminal act does not lose its character because it is committed in jest—Assault—When committed.

Sentence—Assessment—Absence of social inquiry report—Effect.

Military offences—Sentence—Applying violence against a subordinate—Brutal conduct, offensive to human dignity and violating human rights—Sentence of six months' imprisonment increased to one year's imprisonment.

Human Rights—Crimes committed in disregard of the human rights of soldiers—The maximum of the sentence or a sentence near the maximum the approrpiate punishment—Courts duty bound to uphold human rights.

The appellant, a cadet officer of the National Guard pressed a lighted cigarette on each hand of a subordinate, a newly conscripted national guardsman causing him burns. The incident occurred during a military assignment, whilst appellant professed to test the endurance and capacity for hardship of his fellow national guardsman. He was convicted by the Military Court on a count of applying violence against a subordinate (vieopragia) contrary to s.81 of the Military Criminal Code and Procedure Law (40/64) and a count of assault occasioning actual bodily

harm contrary to s. 243 of the Criminal Code and s.5 of the Military Criminal Code and Procedure and sentenced to six months' imprisonment.

He appealed against conviction and sentence on the following grounds:

(a) That the finding of the trial Court that the complainant had not consented to the assault was wrong;

(b) That the conviction was unsound in law, on the findings of the Military Court because of lack of mens rea on the part of the appellant, in that the element of Criminal intent necessary to sustain every crime was missing as the acts were committed as a joke or in jest.

(c) That the sentence was excessive having regard to the clean record of the appellant, his youth and disciplinary punishment suffered.

(d) That in assessing sentence the trial Court acted without the aid of a social inquiry report a noticeable failure once they contemplated a sentence of imprisonment.

Held, (1) that the finding of the trial Court that complainant had not consented to the assault was not in any way erroneous or a finding not reasonably open to the trial Court; that in relation to the crime of applying violence against a subordinate, which is defined by s.81 of Law 40/64, his consent to the infliction of violence upon him by a superior can under no circumstances constitute a defence; that mens rea takes the form of an intention to use force against a subordinate; that as the conduct of appellant was voluntary and purposive the appeal against conviction must fail.

Held, further, that a criminal act does not lose its character because it is committed in jest; that the crime of assault is committed where one intentionally batters another or causes by his conduct reasonable apprehension that battery will be committed; and that if the conduct is intentional the motivation of the perpetrator is immaterial.

(2) That it is obvious that the Military Court did take into consideration everything that could be taken in favour of the appellant; and that, therefore, the absence of a social inquiry report does not appear to have misled them about the personal circumstances of the appellant.

(3) That the conduct of the appellant can properly be described as brutal; that under no pretence can there be countenanced or suffered in the army or in any society, conduct offensive to human dignity, violating human rights; that the sentence must be increased to one year's imprisonment to run from today.

Appeal against conviction dismissed. Sentence increased.

Per curiam:

(1) We must warn that for crimes of this nature committed in disregard of the human rights of soldiers, the maximum of the sentence provided by law, three years' imprisonment or a sentence near the maximum, is the appropriate punishment.

(2) We must warn that the Courts of the land are duty bound to uphold human rights and condemn in an exemplary manner every act calculated to diminish human dignity.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Evgenios L. Theofilou who was convicted on the 18th January, 1984 by the Military Court sitting at Nicosia (Case No. 456/83) on one count of the offence of applying violence against a subordinate contrary to section 81 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40/64) and on one count of the offence of assault occasioning actual bodily harm contrary to section 243 of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 and was sentenced to six months' imprisonment on each count to run concurrently.

P. Sphykas with *D. Ioulianou* (*Mrs.*), for the appellant.

St. Tamasios, for the respondent.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: Evgenios Theofilou, a cadet officer of the National Guard pressed a lighted cigarette on each hand of a subordinate, a newly conscripted national guardsman causing him burns. The incident occurred during a military assignment, while Theofilou professed to test the endurance and capacity for

hardship of his fellow national guardsman. He was charged before the Military Court on a count of applying violence against a subordinate (viepragia) contrary to s.81 of the Military Criminal Code and Procedure Law (40/64) and a count of assault occasioning actual bodily harm contrary to s.243 of the Criminal Code and s.5 of the Military Criminal Code and Procedure. The two counts were founded on the same facts.

Theofilou did not dispute the incident, but denied criminal liability on account of the circumstances associated with the infliction of violence and lack of evil or vicious motivation on his part. The military Court had been asked to infer that the complainant consented to undergo the ill treatment giving rise to the alleged offences.

After reviewing the evidence, the Military Court dismissed the suggestion that complainant consented to application of violence against him. They found the accused guilty as charged and sentenced him to 6 months' imprisonment. In passing sentence they took into consideration at the request of accused another offence arising from the indulgence of the accused in an act of purposeless and unauthorized shooting.

The appeal was taken both against conviction and sentence. In relation to the appeal against conviction, the finding of the Court that complainant had not consented to the assault was challenged. Moreover, the conviction of the appellant was questioned as unsound in law on the findings of the Military Court because of lack of mens rea on his part. The element of criminal intent necessary to sustain every crime was missing for in the contention of counsel the acts were committed as a joke or in jest. We can dismiss the submission that a criminal act loses its character because it is committed in jest. Intentional invasion of the bodily integrity of another is no less criminal because it is committed in jest. The crime of assault is committed where one intentionally batters another or causes by his conduct reasonable apprehension that battery will be committed. If the conduct is intentional the motivation of the perpetrator of violence is immaterial. Motive is generally irrelevant for the definition of a crime. The mens rea required for the commission of the crime of assault consists of an intention to batter or intentional conduct reasonably causing apprehension to another that battery is imminent. This much

in parenthesis to dispel a misconception about the element of criminal intent necessary to sustain the crime of assault.

Nothing that was said before us persuades us that the finding of the trial Court that complainant had not consented to the assault was in any way erroneous or a finding not reasonably open to the trial Court. Therefore, we need not debate the implications of consent in relation to the application of violence. We express doubt whether consent of any kind and under any circumstances can legitimise the occasioning of bodily harm. However, we need not pursue the matter further for in the circumstances of this case it is of academic interest in view of the unassailable finding of the trial Court that the victim did not consent.

In relation to the crime defined by s.81 of the Military Criminal Code and Procedure, consent by a subordinate to the infliction of violence upon him by a superior can under no circumstances constitute a defence. By its very definition s.81 is designed to eliminate from the ranks of the National Guard the humiliating treatment of subordinates by their superiors. The crime is not modelled on the definition of assault. It prohibits in express terms the use of force by a superior against a subordinate. Mens rea takes the form of an intention to use force against a subordinate. There is no doubt the conduct of appellant in this case was voluntary and purposive. Only in the exceptional circumstances specifically referred to in s.81 can there be justification for resort to force as in the case of desertion before the enemy, armed mutiny or use of force for the purpose of stopping acts of looting or destruction. This disposes of the appeal against conviction.

Sentence

Counsel supported that sentence is excessive having regard to the clean record of the appellant, his youth and disciplinary punishment suffered. Because of the commission of the offences under consideration, the military authorities expelled the appellant from the frogmen commando units and shifted him to the infantry, a matter of great loss to him. Also, counsel complained that the Military Court acted without the aid of a social inquiry report, a noticeable failure once they contem-

plated a sentence of imprisonment. Going through the judgment, it is obvious the Military Court did take into consideration everything that could be taken in favour of the appellant; therefore the absence of a social inquiry report does not appear to have misled them about the personal circumstances of the appellant.

We debated at length the soundness of the sentence imposed, particularly the length of the term of imprisonment and the relationship it bears to the facts of the case. The response of each one of us was that the sentence imposed is inordinately low, out of range with the grave facts of the case. We were revolted by the conduct of the appellant. Under the guise of instilling endurance in the complainant and strengthening discipline in the ranks of the army he embarked upon conduct that hardly befits a human being. Discipline in the army is not reinforced by purposeless violence apt to humiliate and demoralize subordinates. It is safeguarded by healthy and robust leadership, by giving an example of devotion to duty inspiring subordinates in the objects and mission of the National Guard. The conduct of the appellant can properly be described as brutal. Under no pretence can there be countenanced or suffered, in the army or in any society, conduct offensive to human dignity, violating human rights. The mission of the National Guard can only be accomplished in a climate of freedom and respect for human rights. Punishment is only justified as a measure of discipline: it can only be exercised in the name of the law and subject to its provisions.

After much discussion, we decided to increase the sentence imposed by no more than doubling it. However, it must not be supposed that one year's imprisonment is the measure for conduct of the kind under consideration. We must warn that for crimes of this nature committed in disregard of the human rights of soldiers, the maximum of the sentence provided by law, three years' imprisonment or a sentence near the maximum, is the appropriate punishment.

Addressing ourselves to the appellant as well as to everybody else in the National Guard, we must warn that the Courts of the land are duty bound to uphold human rights and condemn

in an exemplary manner every act calculated to diminish human dignity.

We hereby increase the sentence to one year's imprisonment to run from today; the appeal against conviction is dismissed. The sentence is increased accordingly.

Appeal against conviction dismissed. Sentence increased.