IOANNIS KYRMIZIS,

Appellant,

v

THE REPUBLIC,

Respondent

(*Criminal Appeal No* 2763)

Criminal Law—Insulting a superior, contrary to section 52 *of the Military Criminal Code and Procedure Law* 40 *of* 1964—*Offence a serious one not comparable to the offence of insult under the ordinary Criminal Code—Nevertheless fundamental principles governing administration of criminal justice cannot be ignored even in cases of military offences*

Criminal Law—Provocation – Trial Court failed to attach the necessary importance to the act of provocation which induced appellant to commit the offence charged (ubi supra)*—Provocation though cannot constitute a justification, still it could have been taken into consideration as a fact in mitigation*

Practice—Supreme Court—Empowered to act as an Appellate Court by virtue of section 102 *of the Military Criminal Code and Procedure Law* 40 *of* 1964*—Sentence reduced by virtue of section* 145 (2) *of the Criminal Procedure Law, Cap* 155 *which is applicable and enforceable by virtue of section* 138 *of Law* 40 *of* 1964 (supra)

The appellant, a serviceman and a member of the National Guard was convicted on his own plea by the Military Court, sitting at Nicosia, of the offence of insulting a superior, contrary to section 52 of the Military Criminal Code and Procedure Law 40 of 1964 and was sentenced to one year's imprisonment

He appealed against sentence on the ground that it was excessive

Held, (1) there is no doubt that the military offence of insulting a serviceman superior in rank to the person doing the offence, in view of the nature of the military service and the strict discipline required for the smooth functioning of the army, is a serious offence which cannot be compared to the offence of insult under the provisions of the ordinary Criminal Code

(2) The offence has been properly described by the trial Court as an offence of a rather serious nature for the punishment of which the Military Law provides a sentence much more serious than the one provided for the offence of public insult contained in the Criminal Code Consequently there can be no compa-

rison between the sentence which should be inflicted in the case of the military offence and the sentence which would have been proper in the case of the corresponding offence provided by the Criminal Code. Therefore, the Military Court properly decided that it had to impose a severe punishment.

(3) But in imposing sentence a competent judicial authority cannot ignore certain fundamental principles of justice, which govern the administration of criminal justice, even in the case of military offences. In the case before us, it does not seem that the trial Court attached the necessary importance to the act of provocation which induced the appellant to commit the offence charged. The provocation, even as stated by the Counsel of the appellant cannot constitute a justification. But, in our opinion, it could have been taken into consideration as a fact in mitigation for the unlawful and most improper behaviour of the accused.

(4) The trial Military Court properly arrived at the conclusion that the accused was entitled to be treated leniently, but erred, we think, in the proper exercise of the required leniency in the commutation of sentence.

(5) In the present appeal this Court is unanimously of the opinion that the sentence imposed by the trial Court should be reduced to three months from the date of conviction. We, therefore, decide and order that the sentence for the offence charged shall be reduced to one of three months imprisonment as from the 15th March, 1965.

Appeal allowed. Sentence reduced accordingly.

Appeal against sentence.

Appeal against the sentence imposed on the appellant who was convicted on the 15.3.65 at the Military Court, sitting at Nicosia, (Case No. 3/65) on one count of the offence of insulting a superior contrary to section 52 of the Military Criminal Code and Procedure Law (Law 40 of 1964) and was sentenced to one year's imprisonment.

The appellant in person.

S. Georghiades, counsel of the Republic, for the respondent.

The judgment of the Court was delivered by :

VASSILIADES, J. : The appellant Ioannis Kyrmizis of Kormakitis is a serviceman and a member of the National Guard, in which he was enlisted on the 27th June, 1964. He belongs to the 2nd Company of the 261st Infantry Regiment. He is 22 years of age and he was employed in the Department of Public Works, at the time when his class was called up for Military Service.

On the 15th March, 1965, he appeared before the Military Court, sitting in Nicosia, and he was charged with insulting a superior, contrary to section 52 of the Military Criminal Code and Procedure, Law 40 of 1964. The charge brought against him, as it appears in the record before us, was that " on the 20th September, 1964 in the camp of his Unit, he insulted his superior in rank Sergeant Nicolaou Andreas by using vulgar words ". The appellant pleaded guilty to this charge and the Military Prosecutor explained to the Court the circumstances under which the offence was committed. On his turn the Military Counsel of the appellant explained to the Court the circumstances in mitigation on the strength of which he asked the leniency of the Court. " Sergeant Nicolaou Andreas, the counsel of the appellant stated, when he entered the room of the accused, was threatening continuously, he started insulting the accused, and whilst possessed by anger, he took a firearm to intimidate accused ", (Page 4B of the record). And the counsel added that the accused had been a good soldier who had never any charge brought against him by his officer-in-charge, and that he never before appeared before a Court. This had been confirmed today to us by the learned counsel for the prosecution. The senior Officer who presided over the Military Court, in delivering the judgment of the Court, described the charge as of a rather serious nature and stated that the offence charged is punishable under the Military Criminal Code with an imprisonment of three years. In fact section 52 (1) of the Military Criminal Code provides that " a serviceman, who by words or deeds or by threats or by any other means insults the honour and the reputation of his superior is guilty of an offence and he is punishable with imprisonment not exceeding three years ".

There is no doubt that the military offence of insulting a serviceman superior in rank to the person doing the offence, in view of the nature of the military service and the strict discipline required for the smooth functioning of the army, is a serious offence which cannot be compared to the offence of insult under the provisions of the ordinary Criminal Code. In our opinion, the offence has been properly described by the trial Court as an offence of a rather serious nature for the punishment of which the Military Law provides a sentence much more serious than the one provided for the offence of public insult contained in the Criminal Code. Consequently there can be no comparison between the sentence which should be inflicted in the case of the military offence and the sentence which

would have been proper in the case of the corresponding offence provided by the Criminal Code. Therefore, the Military Court properly decided that it had to impose a severe punishment.

But in imposing sentence a competent judicial authority cannot ignore certain fundamental principles of justice, which govern the administration of criminal justice, even in the case of military offences. In the case before us, it does not seem that the trial Court attached the necessary importance to the act of provocation which induced the appellant to commit the offence charged. The provocation, even as stated by the Counsel of the appellant cannot constitute a justification. But, in our opinion, it could have been taken into consideration as a fact in mitigation for the unlawful and most improper behaviour of the accused.

The trial Court stated in its judgment " that it weighed all the facts ", but it made no mention of the provocation as a fact of mitigation in spite of the fact that it mentioned the good behaviour of the accused in the army which it described as very good, as it is proved by the fact that he was quickly promoted to the rank of lance-corporal.

The trial Military Court properly arrived at the conclusion that the accused was entitled to be treated leniently, but erred, we think, in the proper exercise of the required leniency in the commutation of sentence.

Section 102 of the Military Criminal Code and Procedure Law 40 of 1964, by virtue of which this Court is empowered to act as an Appellate Court in cases like the present, is followed by section 138 by virtue of which have become enforceable and applicable certain provisions of the Criminal Procedure Law, Cap. 155. One of such provisions is that during the hearing of an appeal against sentence imposed by the trial Court, the Appellate Court can increase, reduce or vary the sentence (section 145 (2), Cap. 155). In the present appeal this Court is unanimously of the opinion that the sentence imposed by the trial Court should be reduced to three months from the date of conviction. We, therefore, decide and order that the sentence for the offence charged shall be reduced to one of three months imprisonment, as from the 15th March, 1965.

Appeal allowed. Sentence reduced accordingly.