[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

PANAYIOTIS MOUZOURIS (NO. 2),

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3764).

Jurisdiction—Objection as to jurisdiction may be taken on appeal—Military Court—Material time for determining existence of jurisdiction of, is the time of commission of the offence and not the time of the trial—Section 112(2)(*a*) *of the Military Criminal Code and Procedure Law,* 1964 (*Law* 40 *of* 1964)—*Cf. section* 241 *of the Military Criminal Code in Greece.*

Jurisdiction—Military Court—Person normally within jurisdiction of Military Court—Charged with having committed offence together with an unknown person not coming within the jurisdiction of such Court—Tried on his own and not together with such person—Fact that he was so charged not sufficient to take him out of the jurisdiction of the Military Court—Section 114(1) *of the Military Criminal Code and Procedure Law,* 1964 (*Law* 40 *of* 1964)—*Cf. section* 248 *of the Military Criminal Code in Greece.*

Criminal Procedure—Investigation of offences—Committed by member of the National Guard in active service—Whether it can be carried out by Police officers—Section 4(1) *of the Criminal Procedure Law, Cap.* 155 *and sections* 119(1), 138 *and* 124 *of the Military Criminal Code and Procedure Law,* 1964 (*Law* 40 *of* 1964)—*Presumption of regularity.*

Military Court—Jurisdiction—Sections 112(2)(*a*) *and* 114(1) *of the Military Criminal Code and Procedure Law,* 1964 (*Law* 40 *of* 1964).

Military Criminal Code and Procedure Law, 1964 (*Law* 40 *of* 1964)—*Jurisdiction of Military Court—Sections* 112(2)(*a*) *and* 114(1) *of the Law—Investigation of offences—Sections* 119(1), 138 *and* 124 *of the Law.*

Presumption of regularity—In matters of Criminal Procedure.

The appellant was in active service in the National Guard from July 20, 1974, when he was called up as a reservist for further service, and he was discharged on August 28, 1976.

On the 26th October, 1976 he was convicted by the Military Court of the offences of attempting to destroy property by explosives and of possessing explosive substances.

The offences of which he was convicted were committed during the period between January and March 1975 and his trial commenced on May 27, 1976. It was concluded on October 26, 1976, after his discharge from the National Guard.

Upon appeal against conviction counsel for the appellant raised the following preliminary issues:-

(a) That the Military Court lacked jurisdiction to convict the appellant in that at the time he was no longer serving in the ranks of the National Guard.

Counsel submitted in this connection that the Military Court has jurisdiction in respect of a National Guardsman only if he is in active service both at the time of the commission of an offence and at the time of the conclusion of his trial for such offence.

(b) That since in the information the appellant was charged to have committed two, of the three, offences, of which he was convicted, together with an unknown person, he could not have been tried by the Military Court, in view of the provisions of section 114(1)* of Law 40/64.

(c) That the whole process leading up to the conviction of the appellant was a nullity because the investigation into the offences concerned was carried out by the police and not by the military authorities.

Held, (1) that the material time for determining the existence of jurisdiction of the Military Court under section 112(2)(a)** of

* Section 114(1) reads as follows:
"114.(1) Accomplices in felony or misdemeanour, some of whom are within the jurisdiction of the Military Court, and some of whom within that of the ordinary criminal Courts, are all tried by the ordinary Courts".

** Section 112(2)(a) provides as follows:
"112(2) Within the competence of the Military Court, in respect of offences committed by them, come
(a) military personnel in active service and those who are assimilated to them by law".

Law 40/64 is the time of the commission of the offence, and not the time of the trial; that, in other words, the Military Court possesses jurisdiction if the accused was in active military service at the time of the commission of the offence even if he has been discharged from the ranks of the army, in the meantime, before the date of his trial by the Military Court; and that, accordingly, the Military Court possessed jurisdiction to try the appellant, because the offences with which he was charged were committed during the period when he was in active service in the National Guard and the Military Court could not be deprived of its jurisdiction simply because the trial of the appellant was concluded after he was discharged from the National Guard (see the interpretation by the Supreme Court in Greece of section 241 of the Military Criminal Code in Greece, which is similar to our section 112(2)(a)).

(2) That the appellant was charged and tried on his own, and not together with any person who did not come within the jurisdiction of the Military Court but who came within the jurisdiction of the ordinary criminal Courts; and that the fact that he was charged with having committed two, of the three, offences stated in the information together with an unknown person is not sufficient to take him out of the jurisdiction of the Military Court (see the interpretation given by the Supreme Court in Greece to section 248 in the relevant Code which is practically identical to our section 114(a)).

(3) That the investigations into the offences concerned were carried out by police officers, under standing orders, in accordance with section 4 of the Criminal Procedure Law, Cap. 155, and that this was not one of those cases where the investigations were conducted "ex proprio motu" as envisaged under subsection (2) of section 119 of Law 40/64; that it was not necessary to adduce any evidence to the effect that the formalities preliminary to the preferment of the charges against the appellant, such as those envisaged by, *inter alia*, section 124 of Law 40/64, had been complied with, because, in the absence of any indication to the contrary, the presumption of regularity applied and it had, therefore, to be taken for granted that all formalities leading up to the prosecution of the appellant had been duly completed (see, regarding the presumption of regularity in relation to matters of criminal procedure, *R.* v. *Ioannou and Others*, 22 C.L.R. 84 at p. 87); and that, accordingly, the preliminary objections raised by appellant cannot be sustained.

Order accordingly.

Per curiam: The objection to the jurisdiction was not taken at the trial and it is being raised for the first time before us. In view, however, of the nature of such an objection it could be raised even at this late stage (see *Mouyios and Others* v. *Police* (1974) 2 C.L.R. 23 at p. 30). We would stress, however, that it is most desirable, for very obvious reasons in relation to which we need not expand, that objections to the jurisdiction should be taken as early as possible at the trial, as special pleas under section 69(1)(a) of the Criminal Procedure Law, Cap. 155.

Cases referred to:

Mouyios and Others v. *The Police* (1974) 2 C.L.R. 23 at p. 30;

Nicolettides and Another v. *The Police* (1973) 2 C.L.R. 222 at p. 227;

R. v. *Ioannou and Others*, 22 C.L.R. 84 at p. 87;

Decisions of the Supreme Court of Greece ("Άρειος Πάγος"): *Decisions Nos.* 279/1952, 136/1955, 459/1961.

Decision.

Decision on preliminary issues riased in an appeal against conviction by Panayiotis Mouzouris who was convicted on the 26th October, 1976 by the Military Court sitting at Nicosia (Case No. 158/76) of the offences of attempting to destroy property by explosives, contrary to sections 325, 21 and 20 of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 and of conspiracy to commit a felony, contrary to section 371 of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 and was sentenced by the Military Court to three years' and one year's imprisonment, respectively, on each count, the sentences to run concurrently.

A. Pandelides *with A. Ladas* and *St. Kittis*, for the appellant.

St. Tamassios, for the respondent.

Cur. adv. vult.

The decision of the Court was delivered by:–

TRIANTAFYLLIDES, P.: At this stage of the hearing of this appeal we have to pronounce on certain preliminary issues raised by counsel for the appellant.

The said preliminary issues are, indeed, of such a nature that if counsel for the appellant were to succeed in regard to anyone

of them then it would not be necessary to proceed further with the hearing of this appeal and it would have to be determined in favour of his client.

The first issue is the one concerning the jurisdiction of the Military Court which has tried and convicted the appellant in the present case:

It is common ground that the appellant was in active service in the National Guard from July 20, 1974, when he was called up as a reservist for further service, and he was discharged on August 28, 1976.

The offences of which he was convicted were committed, according to the information, during the period between January and March 1975, and his trial commenced on May 27, 1976. It was concluded on October 26, 1976, after his discharge from the National Guard.

It has been the submission of counsel for the appellant that the Military Court lacked jurisdiction to convict the appellant in that at the time he was no longer serving in the ranks of the National Guard and, according to counsel for the appellant, the Military Court has jurisdiction in respect of a National Guardsman only if he is in active service both at the time of the commission of an offence and at the time of the conclusion of his trial for such offence.

The objection to the jurisdiction was not taken at the trial and it is being raised for the first time before us. In view, however, of the nature of such an objection it could be raised even at this late stage (see *Mouyios and others* v. *The Police*, (1974) 3 C.L.R. 23 at p. 30). We should stress, however, that it is most desirable, for very obvious reasons in relation to which we need not expand, that objections to the jurisdiction should be taken as early as possible at the trial, as special pleas under section 69(1)(a) of the Criminal Procedure Law, Cap. 155.

The relevant legislative provision, regarding the issue of jurisdiction raised by counsel for the appellant, is section 112(2)(a) of the Military Criminal Code and Procedure Law, 1964 (Law 40/64), which reads as follows:–

" (2) Εἰς τὴν ἁρμοδιότητα τοῦ στρατιωτικοῦ δικαστηρίου ὑπάγονται διὰ τὰ ὑπ' αὐτῶν πραττόμενα ἀδικήματα—

(α) οἱ ἐν ἐνεργείᾳ στρατιωτικοὶ καὶ οἱ τούτοις διὰ νόμου ἐξομοιούμενοι·"

("(2) Within the competence of the Military Court in respect of offences committed by them, come

(a) military personnel in active service and those who are assimilated to them by law").

Section 112(2)(a), above, is very similar, in every material respect, to section 241 of the Military Criminal Code (Στρατιωτικὸς Ποινικὸς Κῶδιξ) in Greece (see Γιαννήρη "Ἑρμηνεία τοῦ Στρατιωτικοῦ Ποινικοῦ Κώδικος", 2nd ed., p. 213); as it appears from textbooks (see Γιαννήρη, *supra*, Δασκαλάκη "Ἐπιτομὴ Στρατιωτικοῦ Ποινικοῦ Δικαίου", 1966, p. 57 and Ἀνανιάδου "Στρατιωτικὸν Ποινικὸν Δίκαιον", 1955, p. 238) the material time for determining the existence of jurisdiction of the Military Court, under the provisions of section 241, above, of the Military Code in Greece—and, consequently, in view of its very close similarity to it, under our own section 112(2)(a), too—is the time of the commission of the offence, and not the time of the trial; in other words, the Military Court possesses jurisdiction if the accused was in active military service at the time of the commission of the offence even if he has been discharged from the ranks of the army, in the meantime, before the date of his trial by the Military Court.

The above view is based on the case-law of the Supreme Court in Greece ("Ἄρειος Πάγος") interpreting section 241, above (see Decision 279/1952, Ποινικὰ Χρονικά, vol. B, 1952, pp. 382, 383, Decision 136/1955, Π. Χρ., vol. E, 1955, pp. 352, 353, and Decision 459/1961, Π. Χρ., vol. IB, 1962, pp. 160, 161).

In the light of the foregoing we have no difficulty in holding that the Military Court in the present case possessed jurisdiction to try the appellant, because the offences with which he was charged were committed during the period when he was in active service in the National Guard and it cannot be that the the Military Court was deprived of its jurisdiction simply because the trial of the appellant was concluded after he was discharged from the National Guard.

Also, we, consequently, find no merit at all in the collateral contention of counsel for the appellant that there should have been adduced evidence showing that the appellant was in active service, in the National Guard, at the time of his conviction, because this was not a matter which was material as regards the jurisdiction of the Military Court.

Moreover, as it was well known both to him and to all concerned that at the time when he committed the offences with which he was charged he was in active service as a reservist, he could not have been prejudiced at all by the fact that in the information he is inaccurately described as an "ex-reservist".

The second matter with which we have to deal, and which was not at the end pressed much by counsel for the appellant, is his contention that since in the information he is charged to have committed two, of the three, offences, of which he was convicted, together with an unknown person, he could not have been tried by the Military Court, in view of the provisions of section 114(1) of Law 40/64; the said section reads as follows:-

"114.-(1) Συμμέτοχοι κακουργήματος ἢ πλημμελήματος, ὑπαγόμενοι τινες εἰς τὴν ἁρμοδιότητα τοῦ στρατιωτικοῦ δικαστηρίου, τινὲς δὲ εἰς τὴν τῶν κοινῶν ποινικῶν δικαστηρίων, ὑπάγονται ἅπαντες εἰς τὰ κοινὰ δικαστήρια".

("114(1) Accomplices in felony or misdemeanour, some of whom are within the jurisdiction of the Military Court, and some of whom within that of the ordinary criminal Courts, are all tried by the ordinary Courts").

In the present case the appellant was charged and tried on his own, and not together with any person who did not come within the jurisdiction of the Military Court but who came within the jurisdiction of the ordinary criminal Courts; so, the fact that he was charged with having committed two, of the three, offences stated in the information together with an unknown person is not sufficient to take him out of the jurisdiction of the Military Court.

The corresponding provision in the relevant Code in Greece is section 248, which is practically identical to our section 114(1), above, and according to the interpretation given to it by the Supreme Court in Greece (see Decision 136/1955, *supra*) it can only operate so as to bring persons, who are normally within the jurisdiction of a Military Court, within the jurisdiction of the ordinary criminal Courts together with an accomplice who is within their jurisdiction, if such accomplice is actually being prosecuted together with the persons normally triable by a Military Court (see, also, Γιαννήρη,, *supra*, p. 233).

We, therefore, find no merit in the second preliminary objection of counsel for the appellant.

Lastly, counsel for the appellant has submitted that the whole process leading up to the conviction of the appellant is a nullity because the investigation into the offences concerned was carried out by the police and not by the military authorities.

Counsel for the appellant raised the same objection before the trial Court—after seven prosecution witnesses had been heard—and it was not disputed by counsel for the prosecution that the investigation had, in fact, been carried out by police officers and, then, the matter was referred to the military authorities and to the military prosecutor's office.

The relevant provision of Law 40/64 is section 119(1), which reads as follows:-

"119.-(1) Ὑπὸ τὴν ἐποπτείαν καὶ συμφώνως πρὸς τὰς ὁδηγίας τοῦ Γενικοῦ Εἰσαγγελέως τῆς Δημοκρατίας ἡ ἀνάκρισις ἐνεργεῖται, εἴτε κατόπιν διαταγῆς τοῦ ἔχοντος δικαίωμα πρὸς τοῦτο, εἴτε αὐτεπαγγέλτως ".

("Under the supervision, and in accordance with the instructions, of the Attorney-General of the Republic, the investigations are carried out either under orders of any person entitled to do so or ex proprio motu").

Section 4(1) of the Criminal Procedure Law, Cap. 155, reads as follows:-

"4.(1) Any police officer may investigate into the commission of any offence".

The above provisions must be read together with section 138 of Law 40/64, which reads as follows:-

"138. Περὶ τῶν ἀντικειμένων περὶ ὧν δὲν προβλέπει εἰδικῶς ὁ παρὼν Νόμος ἐφαρμόζονται αἱ διατάξεις τοῦ περὶ Ποινικῆς Δικονομίας Νόμου καὶ παντὸς ἑτέρου εἰδικοῦ ἐπὶ ἑκάστης περιπτώσεως νόμου καὶ κανονισμοῦ ".

("138. In relation to those matters for which no special provision is made in this Law there shall be applied the provisions of the Criminal Procedure Law and of any other Law or Regulation, applicable specifically to any matter").

In *Nicolettides and another* v. *The Police*, (1973) 2 C.L.R. 222, 227, it was pointed out that investigations into offences are carried out, in accordance with standing orders, by police

officers having, under the relevant legislation, the right to conduct such investigations.

In the present instance it is clear that the investigations into the offences concerned were carried out by police officers, under standing orders, in accordance with section 4 of Cap. 155, and that this was not one of those cases where the investigations were conducted "ex proprio motu" as envisaged under subsection (2) of section 119 of Law 40/64.

Nor was it necessary to adduce any evidence to the effect that the formalities preliminary to the preferment of the charges against the appellant, such as those envisaged by, *inter alia*, section 124 of Law 40/64, had been complied with, because, in the absence of any indication to the contrary, the presumption of regularity applied and it had, therefore, to be taken for granted that all formalities leading up to the prosecution of the appellant had been duly completed (see, regarding the presumption of regularity in relation to matters of criminal procedure, *R.* v. *Ioannou and others*, 22 C.L.R. 84, 87).

We, therefore, can find no merit in any of the three objections raised by counsel for the appellant.

The preliminary objections which have been determined above are those raised by grounds of appeal Nos. 1, 2, 3, 4, 7, and 16, and since they have not been sustained the hearing of this appeal will have to proceed in respect of the remaining grounds of appeal.

Order accordingly.