1978 November 24

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Appellant,

v.

PAVLOS PAPAELIA PAVLOU,

Respondent.

(*Criminal Appeal No.* 3882).

Criminal Law—Sentence—Causing death by a rash act—Section 210 *of the Criminal Code, Cap.* 154*—Death caused through playful handling of weapon by soldier—Principles governing proper sentence in cases of this nature—Mitigating factors—Deterrent aspect of sentence—Appropriate sentence in this case one of imprisonment—Sentence of* £50 *fine increased to one of two months' imprisonment on appeal by the Attorney-General.*

The respondent pleaded guilty to the offence of causing death by a rash act, contrary to section 210 of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 and was sentenced to pay a fine of £50.

Both the respondent and the deceased were serving in the National Guard. During an incident, in the course of which they were exchanging remarks in a playful manner, the respondent pressed the trigger of a military automatic weapon with the result that the deceased was shot dead.

According to the version of the respondent, which does not appear to have been disputed, he was labouring under the misconception that he was using the automatic weapon issued officially to him, which he knew to be empty, whereas in fact, he was holding, by mistake, another such weapon which happened to be loaded.

The Military Court decided to show the greatest possible

leniency towards the respondent having taken into account, amongst other mitigating factors, the contention of the respondent that he was about to proceed abroad for higher studies after his discharge from the National Guard. A closer perusal of the relevant documents, however, did not appear to support this contention and actually, though he was an external student of a College abroad, the respondent has remained in Cyprus and became the employee of a bank in Nicosia.

Upon appeal by the Attorney-General of the Republic on the ground that the said sentence of fine was wrong in principle and manifestly inadequate and that it should be replaced by an appropriate sentence of imprisonment:

Held, (*after stating the principles governing the proper sentence in a case of this nature—vide p.* 460 *post*) (1) that this is a case in which the appropriate sentence is one of imprisonment; and that the Military Court would itself have passed such a sentence had it not been led to believe, on insufficient grounds as it has transpired subsequently, that, if sent to prison, the respondent would be prevented from proceeding abroad for studies, after his discharge from the National Guard.

(2) That having taken fully into account that the respondent has already been in prison for just under a month during the investigation of the offence, and having, also, not lost sight of the detriment to his career which may be entailed by a sentence of imprisonment; as well as of all the mitigating factors which were taken rightly into account by the Military Court, this Court has decided that the leniest sentence that can be passed on the respondent is one of two months' imprisonment as from today, this being an offence which carries a maximum sentence of imprisonment of two years.

Appeal allowed.

Per Curiam: In a case such as the present one we have attributed particular importance to the deterrent aspect of the sentence, because we believe that if it is understood by all concerned that conduct such as the one which has resulted in the loss of the life of the deceased is punishable, as a rule, by imprisonment, then regrettable occurrences of this kind will be avoided in future.

Cases referred to:

Attorney-General of the Republic v. *Iacovides* (1973) 2 C.L.R. 344;

R. v. *O'Neill*, 51 Cr. App. R. 241 at p. 243.

Appeal against sentence.

Appeal by the Attorney-General of the Republic against the inadequacy of the sentence imposed on the respondent who was convicted on the 19th June, 1978, by the Military Court of Nicosia (Case No.217/78) of the offence of having caused death by a rash act contrary to section 210 of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 (Law 40/64) and was sentenced to pay a fine of £50.–.

A.M. Angelides, Counsel of the Republic, for the appellant.

St. Charalambous, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: In this case the Attorney-General of the Republic has appealed against the sentence of a fine of £50 passed upon the respondent by a Military Court when he was convicted, on his own plea of guilty, of having, on October 14, 1977, caused death by a rash act, contrary to section 210 of the Criminal Code, Cap. 154, and section 5 of the Military Criminal Code and Procedure Law, 1964 (Law 40/64).

At the time the respondent was a sergeant in the National Guard and the deceased was, also, serving in it as a private.

Both of them were members of a special platoon of soldiers who were doing guard duty at the tomb of the late President of Cyprus Archbishop Makarios III, at "Throni tis Panayias", near the Monastery of Kykko.

It is the contention of the appellant Attorney-General that the aforementioned sentence of a fine is wrong in principle and manifestly inadequate and that it should be replaced by an appropriate sentence of imprisonment.

The salient facts of this case are as follows:-

During an incident, in the course of which the respondent and the deceased were exchanging remarks in a playful manner, the respondent pressed the trigger of a military automatic weapon with the result that the deceased was shot dead.

According to the version of the respondent, which does not appear to have been disputed, he was labouring under the misconception that he was using the automatic weapon issued officially to him, which he knew to be empty, whereas, in fact, he was holding, by mistake, another such weapon which happened to be loaded.

The fact remains, however, that on the weapon which the respondent used there was at the time a magazine, though there had been given strict instructions by his superiors that the magazines should not be fixed on the weapons but were to be kept separately from them.

It is, indeed, common ground that the respondent and the deceased were friends and that, naturally, the respondent was deeply shocked and is full of contrition because of what has happened.

The Military Court decided, as it appears from its judgment, to show the greatest possible leniency towards the respondent, having taken into account the following mitigating factors:

That he was a young man with a clean record who did no even have against him any disciplinary conviction during his two years' service in the National Guard, that he had been kept in custody for twenty-one days during the investigation of the case, that he was the son of a poor displaced family, and that he intended to go abroad for higher studies.

As a matter of fact, however, the documents which were produced before the Military Court, and which have been produced before us, too, and on the basis of which the Military Court was satisfied that the respondent was about to proceed abroad for studies soon after he would be discharged from the ranks of the National Guard, do not, on a closer perusal, appear to support this contention, which was put forward on

behalf of the respondent; and, actually, though he is an external student of a College abroad, the respondent has remained in Cyprus and became the employee of a bank n Nicosia.

We take the view that in a case of this nature, when, through the playful handling by trained soldiers of the Nationa' Guard of weapons assigned to them to be used only in the course of duty, death is caused in a manner contrary to section 210 of Cap. 154, the proper sentence—just as in cases of causing death contrary to the same provision through negligent driving—should be, as a rule, a term of imprisonment befitting the particular circumstances of the individual case and that only in a special case a fine can be regarded as a sentence correct in principle and adequate to punish an offence of this nature (see, *inter alia*, *The Attorney-General of the Republic* v. *Iacovides*, (1973) 2 C.L.R. 344, and the case-law referred to in the judgment in that case).

As correctly pointed out by Thomas on Principles of Sentencing (1970), p. 82, in this sort of cases the sentence is based primarily on the conduct of the offender which caused the death, and the fact that death has resulted, although not irrelevant, is not in itself, normally, an overwhelming factor; and as has, also, been stated in *R.* v. *O'Neill*, 51 Cr. App. R. 241, by Lord Parker C.J. (at p. 243) "Manslaughter is, of course, a serious offence, but the degrees of seriousness vary infinitely from a matter of life down to probation."

We are approaching this particular case on the footing that what has happened is not something between an accident and mere carelessness, but on the indisputable basis that the respondent has pleaded guilty that he has behaved with that degree of criminal negligence which is envisaged under section 210, above.

At the same time we shall pay due regard to all the particular circumstances relating both to the commission of the offence and to the respondent as an offender:

It is indeed, unfortunate that, though the offence was committed in October 1977, the case was not presented before the Military Court until June 1978, and, by now, the respondent has been discharged from the ranks of the National Guard and

has arranged his private life in such a way that a sentence of imprisonment may, quite possibly, have adverse repercussions as regards his present employment. On the other hand, we cannot lose sight of the fact that, through the rash act of the respondent, the deceased, an innocent young man, nineteen years old, who was doing his duty to his country by serving in the National Guard, lost his life and that this is due to conduct on the part of the respondent which was contrary to—as already mentioned—express military orders, in addition to being criminal negligence in the sense of section 210, above.

We have reached the conclusion that this is a case in which the appropriate sentence is one of imprisonment and we think that the Military Court would itself have passed such a sentence had it not been led to believe, on insufficient grounds as it has transpired subsequently, that, if sent to prison, the respondent would be prevented from proceeding abroad for studies, after his discharge from the National Guard.

Having taken fully into account that the respondent has already been in prison for just under a month during the investigation of the offence, and having, also, not lost sight of the detriment to his career which may be entailed by a sentence of imprisonment, as well as of all the mitigating factors which were taken rightly into account by the Military Court, we have decided that the leniest sentence that can be passed on the respondent is one of two months' imprisonment as from today, this being an offence which carries a maximum sentence of imprisonment of two years.

In a case such as the present one we have attributed particular importance to the deterrent aspect of the sentence, because we believe that if it is understood by all concerned that conduct such as the one which has resulted in the loss of the life of the deceased is punishable, as a rule, by imprisonment, then regrettable occurrences of this kind will ne avoided in future.

In the result this appeal is allowed and the respondent is sent to prison for a period of two months as from today, in substitution of the sentence of £50 fine.

Appeal allowed.