1983 June 13

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

KYRIACOS LOIZIDES,

Appellant,

v.

THE REPUBLIC,

Respondents.

(*Criminal Appeal No.* 4392).

Criminal Law—Sentence—Young offenders—Social Investigation reports—Importance and usefulness of—Absence of a social investigation report in this case left no gap in the information before the trial Court about the person of the appellant.

Criminal Law—Sentence—Consensus of counsel on the proprietary of a sentence not binding on the Court. 5

Military service—Failure to enlist in the National Guard—Conscientious objection to military service because appellant's religious conviction as a witness of Jechova caused him to decline to bear arms—Having regard to present tragic circumstances of Cyprus proper manning and military effectiveness of the National Guard vital for the preservation of the State—Therefore refusal to do military service in the present circumstances of Cyprus not only an act of defiance of law but conduct calculated to weaken its defence—And conscientious objection to Military Service conflicts with the requirements of the law in an area where its strict enforcement is inextricably connected with the struggle for survival of the country—Sentence of 12 *months' imprisonment not excessive, upheld.* 10 15

Criminal Procedure—Trial of criminal cases—Whether accused can testify as a witness after the close of the case for the defence for the purpose of explaining a statement from the dock—Section 54 *of the Criminal Procedure Law, Cap.* 155. 20

The appellant, a man of unblemished past aged 26, was convicted on a count charging him with failure to enlist in the National Guard and was sentenced to twelve months' imprisonment.

5 Upon appeal against sentence it was contended:

(a) That the trial Court failed to pay heed to mitigating circumstances associated with the person of the accused because it failed to obtain a social investigation report on the personal circumstances of the appellant not-10 withstanding an application to that end.

(b) That the sentence was manifestly excessive because of failure on the part of the trial Court to give due weight to the motives of the appellant for the commission of the offence.

15 It was submitted in this connection that the appellant refused to enlist in the National Guard for reasons of conscience because his religious convictions as a witness of Jechova caused him to decline to bear arms; and though his counsel did not question that imprisonment was in principle a correct sentence 20 for the offence committed, in the light of the decision of the Supreme Court in *Solomou and Others** *v. The Republic* (1982) 2 C.L.R.23, he argued that its length should be reduced in line with the sentence approved in *Solomou*, supra, because there was no intrinsic reason for imposing a longer sentence.

25 Counsel for the Republic, while subscribing to the correctness of the choice of sentence, one of imprisonment, felt constrained by the decision in *Solomou* to agree that its length was excessive.

Held, (1) (*after dealing with the importance and usefulness of social* 30 *investigation reports—vide p. 144–145 post*) that there was nothing to contradict the picture painted of the appellant by his counsel who brought to the notice of the Court every factor associated with the person of the appellant relevant to sentence; that the absence of a social investigation report left no gaps in the 35 information before the Court about the person of the appel-

* In the *Solomou* case a sentence of two years' imprisonment was reduced to nine months' imprisonment on appeal.

lant, nor did it lead to a misappreciation of his personal circumstances: accordingly contention (a) should fail.

(2) That the views of counsel on the propriety of sentence are not binding upon the Court and therefore the consensus of counsel does not absolve the Court of its constitutional responsibility to set the measure of the law and see to its enforcement.

(3) That though reasons of conscience are in a separate category from other motives associated with the commission of a crime they are equally irreconcilable, as any other motivation for disobeying the law, with the supremacy of the law—the norm for an orderly and civilised society; that having regard to the present tragic circumstances of Cyprus the proper manning and military effectiveness of the National Guard are vital for the preservation of the State, indeed its survival; that, therefore, refusal to do military service in the present circumstances of Cyprus, is not only an act of defiance of the law but, conduct calculated to weaken its defence as well; that conscientious objection to military service conflicts with the requirements of the law in an area where its strict enforcement is inextricably connected with the struggle for survival of the country; that consequently, this Court cannot uphold the submission of counsel for the appellant, shared by counsel for the prosecution that the length of imprisonment in this case, 12 months, is excessive.

Appeal dismissed.

Per curiam:

That the provisions of s.54 of the Criminal Procedure Law, Cap.155 can, under no circumstances, be invoked to enable the accused to testify as a witness after the close of the case for the defence for the purpose of explaining a statement from the dock.

Cases referred to:

Lazarou v. Police (1969) 2 C.L.R.184;

Stylianou & Others v. Republic, 1961 C.L.R.265;

Michael v. Police (1968) 2 C.L.R.133;

Skoullou alias 'Kotsiras' v. Police (1969) 2 C.L.R.27:

Georghiou v. Police (1970) 2 C.L.R.41:

Solomou and Others v. Republic (1982) 2 C.L.R.23.

Appeal against sentence.

Appeal against sentence by Kyriacos Loizides who was convicted on the 28th March, 1983 by a Military Court sitting at Nicosia (Case No. 43/83) on one count of the offence of failing to enlist in the National Guard, contrary to section 22 (a) of the National Guard Law, 1964 (Law No. 20/64) and was sentenced to twelve months' imprisonment.

L. Clerides with *C. Saveriades*, for the appellant.

St. Tamasios, for the respondents.

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

PIKIS J.: The accused was convicted on a count charging him with failure to enlist in the National Guard in response to an order for the call-up of conscripts, contrary to s.22(a) of the National Guard Law. He was sentenced to twelve months' imprisonment. The appeal was originally directed against both, conviction and sentence. The appeal against conviction was abandoned in the course of the hearing of the appeal.

The principal ground of appeal, so far as we were able to gather, consisted of alleged failure, on the part of the Military Court, to exercise judicially its discretion under s.54 of the Criminal Procedure Law - Cap. 155 and allow the accused to testify, after the close of the case for the defence, in order to explain his statement from the dock and elaborate upon the reasons of conscience that led him to deliberately disobey the order to enlist in the army. Leave was granted to withdraw the appeal against conviction which was consequently withdrawn. As pointed out, it was a sound decision, the provisions of s.54 - Cap.155 can, under no circumstances, be invoked to enable the accused to testify as a witness after the close of the case for the defence for the purpose of explaining a statement from the dock. The withdrawal of the appeal makes it unnecessary to review the provisions of s.54 and contemplate their application in diverse circumstances.

Two were the grounds pressed in support of the appeal against sentence. The first was that the Court failed to pay heed to

mitigating circumstances associated with the person of the accused. The misdirection arose from the failure of the Court to obtain a social inquiry report on the personal circumstances of the accused, notwithstanding an application to that end. Without in any way disputing the usefulness of a social inquiry 5 report, we fail to see in what way such report would have added to the picture before the Court. There was nothing to contradict the picture painted of the accused by his counsel who brought to the notice of the Court every factor associated with the person of the accused, relevant to sentence. 10

Indisputably, the accused was a man of unblemished past, young by sentencing standards, 26 years of age, happily married. There is nothing whatever to suggest that the trial Court misconceived his personal circumstances.

A social inquiry report is an important tool in aid of sen- 15 tencing. It is not an end in itself, in the sense that its absence vitiates the sentencing process. Where its production is judged necessary, the Supreme Court may rectify the omission and require its production before the Supreme Court - *Lambros Lazarou v. The Police* (1969) 2 C.L.R. 184. The value of a 20 social inquiry report lay in the information it furnishes about the personal circumstances of the accused, eliminating the risk of the Court ignoring or overlooking facts material to sentence. In the case of young persons a social inquiry report is of especial value. It serves a dual purpose. It is apt to reveal the socio- 25 economic circumstances of the offender firstly and, may throw light on the likely response of the accused to various forms of treatment, secondly. It is routine practice for the Court to seek a social inquiry report in the case of offenders under the age of 21, whenever a sentence of imprisonment is contemplated 30 - *Andreas Michael Stylianou and Others v. The Republic,* 1961 C.L.R. 265. Also, it is desirable to seek such reports, when imprisonment is contemplated, in the case of youths over 21 (see, inter alia, *Andreas Louca Michael v. The Police* (1968) 2 C.L.R. 133; *Georghios Ioannou Skoullou alias "Kotsiras v.* 35 *The Police* (1969) 2 C.L.R. 27). Whether in a particular case it should be sought, it is very much a matter for the trial Court. Its decision is likely to be affected by the information available to the Court. Social inquiry reports may be helpful in other cases as well, irrespective of the age of the offenders, as in the 40

case of family disputes where the offence is peculiarly connected with the environmental circumstances of the accused and an insight into family circumstances is deemed necessary in order to evaluate sentence in an informed perspective (see, inter alia, 5 *Michael Georghiou v. The Police* (1970) 2 C.L.R. 41).

In this case the absence of a social inquiry report left no gaps in the information before the Court about the person of the accused, nor did it lead to a misappreciation of his personal circumstances.

10 The second submission in support of the appeal against sentence is a more weighty one. The sentence is, in the contention of the accused, manifestly excessive because of failure on the part of the trial Court to give due weight to the motives of the accused for the commission of the offence. As he de- 15 clared to the investigating officer and to the Court, he refused to enlist in the National Guard for reasons of conscience. It was submitted before the trial Court and before us that, his religious convictions as witness of Jechova caused him to decline to bear arms. Counsel for the accused accompanied his 20 plea in mitigation with the statement that the stay of the accused in prison will give him another chance to reflect and reconsider his position. He did not question that imprisonment was in principle a correct sentence for the offence committed, in the light of the decision of the Supreme Court in *Solomou and* 25 *Others v. The Republic* (1982) 2 C.L.R. 23, but argued that its length should be reduced in line with the sentence approved in *Solomou,* supra. There was no intrinsic reason for imposing a longer sentence, he submitted.

Counsel for the Republic, while subscribing to the correctness 30 of the choice of sentence, one of imprisonment, felt constrained by the decision in *Solomou* to agree that its length is excessive.

The views of counsel on the propriety of a sentence, useful as they are, are not binding upon the Court. Under our penal system, sentence is the exclusive province of a Court as the 35 custodians of the law and the guardians of legality. Hence the consensus of counsel does not absolve us of our constitutional responsibility to set the measure of the law and see to its enforcement.

We debated at length the implications of the plea of the accused in mitigation, not least because of its wider implications upon sentencing. We are not oblivious to the motives of the accused in failing to enlist, or the agonising situation in which a man may find himself when the dictates of his conscience conflict with those of the law. Certainly, reasons of conscience are in a separate category from other motives associated with the commission of a crime. On the other hand, reasons of conscience are equally irreconcilable, as any other motivation for disobeying the law, with the supremacy of the law - the norm for an orderly and civilised society.

The weight to be attached to conscientious objection to obedience of the law, depends on its nature and its implications on the enforcement of the law. In *Solomou,* supra, it was stressed that in the present circumstances of Cyprus, military service is a matter of grave consequence.

It is difficult for anyone acquainted with the present tragic circumstances of Cyprus to over-emphasize the significance of service in the National Guard charged with the defence of the country. The proper manning and military effectiveness of the National Guard are vital for the preservation of the State, indeed its survival. Therefore, refusal to do military service in the present circumstances of Cyprus, is not only an act of defiance of the law but, conduct calculated to weaken its defence as well. Conscientious objection to military service conflicts with the requirements of the law in an area where its strict enforcement is inextricably connected with the struggle for survival of the country. We are not extolling the virtues of military service but stressing its necessity for the sustainance of the country. Consequently, we are unable to uphold the submission of counsel for the accused, shared by counsel for the prosecution that, the length of imprisonment in this case, 12 months, is excessive. The decision in *Solomou* did not aim to establish a pattern or give guidelines on the length of a term of imprisonment for similar offences. It was confined to the circumstances of the case. Nor can we overlook that *Solomou* was the first case to come before the Supreme Court so far as we are aware, where the question of sentence arose in circumstances similar to the present case. It should have served as a warning, as well as bring to the notice of everyone that no derogation

from the law can be suffered. There was no proper response, it seems, to this warning. Two years later, we see no justification to interfere with the sentence of 12 months' imprisonment; hence the appeal is dismissed.

5 *Appeal dismissed.*