1984 October 11

[L. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

YIANNAKIS GEORGHIOU TEMENOS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4565).

Military offences—Sentence—Failing to enlist in the National Guard without due cause—Existence of some doubt as to appellant's obligation to serve—Unreasonably long delay in prosecuting him—Appellant a man of good character with a clean record and solemnly declared both in the course of the trial and before Court of Appeal that he was ready and willing to enlist—Sentence of one year's imprisonment manifestly excessive—Reduced.

The appellant was convicted on the 27th July, 1984, by the Military Court sitting at Limassol upon a charge containing two counts for the offences of failing to enlist in the National Guard, without due cause, on the 17th January and 18th July, 1983 respectively, contrary to s.22(a) of the National Guard Laws 1964 to 1981 and was sentenced to one year's imprisonment on each count, the terms to run concurrently.

In passing sentence the Court took into consideration two other cases pending against the appellant (Cases Nos. 146/84 and 147/84) in relation to similar offences committed on various dates as far back as January, 1980.

The appellant, whose father was born in Cyprus, was born in America and was holding an American passport. He came to Cyprus in 1960 and from that time until 1977 he was treated by the Authorities of the Republic as an alien and was allowed to reside here on a temporary resident's permit as a visitor. When in 1977 he was informed by the appropriate Authorities of the Republic that he was a citizen of the Republic and liable

to serve in the National Guard he challenged this Decision by means of a recourse. His recourse was dismissed in 1984 and soon after the dismissal of the recourse the charges for which he was tried and those which were taken into consideration were filed against him.

The trial Judge rejected the evidence of the appellant to the effect, inter alia, that he did not enlist because he believed that he was not liable to serve because he was a citizen of the United States and had an American passport and because he was treated as an alien; but the fact that the appellant was the holder of an American passport, that from 1960 to April, 1977 he was treated as an alien and was only allowed to reside here on a temporary resident's permit as a visitor, that for a period of seven years after he was informed that he was liable to serve in the National Guard he was never prosecuted for failing to do so until after the dismissal of his recourse were undisputed facts mostly introduced in evidence by the prosecution.

Upon appeal against sentence:

Held, that even though the above undisputed facts may not have constituted a "reasonable cause" which is one of the ingredients of the offences for which he was charged, they were, nevertheless, very material in deciding whether the appellant was acting under the bona fide misconception that he was entitled to be exempted from military service a fact that should have been taken into account in mitigation of sentence; that the above facts and the failure of the authorities to take any action against the appellant between 1977 and 1984 could reasonably lead a person to believe that there was, at least, some doubt as to his obligation to serve and, also, that the authorities shared that doubt; that taking into consideration in mitigation of the sentence the unreasonably long delay on behalf of the authorities in bringing the appellant to justice and that both in the course of the trial and before this Court the appellant has solemnly declared that he was now ready and willing to enlist and serve in the National Guard and that he is a man of good character and with a clean record; and that although the offences committed by the appellant are, no doubt, of a serious nature, in the light of all the above circumstances, the sentence imposed is manifestly excessive and that it should be reduced so as to enable him to be released today.

Appeal allowed.

Cases referred to:

Avgousti v. *Republic* (1979) 2 C.L.R. 263;

Christodoulou alias Farfaros v. *Republic* (1963) 1 C.L.R. 36;

Terlas v. *Republic* (1970) 2 C.L.R. 30.

Appeal against conviction and sentence.

Appeal against convection and sentence by Yiannakis Georghiou Temenos who was convicted on the 27th July, 1984 by the Military Court sitting at Limassol (Case No. 199/84) on two counts of the offence of failing to enlist in the National Guard contrary to section 22(a) of the National Guard Laws, 1964–1981 and was sentenced to concurrent terms of imprisonment of one year on each count.

K. Saveriades with *C. Saveriades*, for the appellant.

St. Tamassios, for the respondent.

L. LOIZOU J. gave the following judgment of the Court. The appellant was convicted on the 27th July, 1984, by the Military Court sitting at Limassol in Case No. 199/84 upon a charge containing two counts for the offences of failing to enlist in the National Guard, without due cause, on the 17th January and 18th July, 1983 respectively, contrary to s.22(a) of the National Guard Laws 1964 to 1981. He was sentenced to one year's imprisonment on each count, the terms to run concurrently.

In passing sentence the Court, on the application of counsel for the appellant and with the consent of the prosecution, took into consideration two other cases pending against the appellant (Cases Nos. 146/84 and 147/84) in relation to similar offences committed on various dates as far back as January, 1980.

He appealed both against conviction and sentence but in the course of the hearing the appeal against conviction was abandoned and what we have to consider is the question of sentence.

The relevant facts are briefly as follows:

Appellant's father was born at Morphou, in Cyprus, in 1902. He emigrated to the United States of America in 1927 and in 1955 he acquired American nationality. He died there in 1958.

The appellant was born in America on the 10th June, 1956. On the 14th July, 1960, together with his mother and an invalid brother he returned to Cyprus and they have lived here ever since. He is the holder of an American passport under No. 2247242. From 1960 to the 30th April, 1977, he was treated by the authorities of the Republic as an alien and was allowed to reside here on a temporary resident's permit as a visitor which had to be renewed every year but was subject to revocation on fourteen days' notice. In 1976 he made inquiries regarding his status and was informed by a letter dated 8th December, 1976, that he was a citizen of the Republic and liable to serve in the National Guard. But it would appear that, subsequently, correspondence was exchanged between his then lawyer and the appropriate government department and as a result he was informed by letter dated the 7th October, 1977, addressed to his lawyer by the Migration Officer that he was a citizen of the Republic of Cyprus unless he could produce evidence that his father had renounced his British nationality under the provisions of the British Nationality Act 1948, which was still in force at the time he acquired his American nationality.

In consequence the appellant filed a recourse No. 275/77 challenging the decision of the authorities that he was a citizen of the Republic and liable to military service. His recourse was dismissed on the 14th January, 1984. Soon after the dismissal of his recourse the charges for which he was tried and those which were taken into consideration were filed against him.

In the course of the trial the appellant, when called upon, gave evidence on oath. He stated, inter alia, that in January, 1974, when his friends and his school-mates went to enlist in the National Guard he also went but they refused to enlist him because he was an alien. Nevertheless, he said, that at the time of the Turkish invasion he enlisted as a volunteer and served for two and a half months. He did not receive any notice to enlist after he filed his recourse until 1980. He did not enlist then, he said, because he believed that he was not liable to serve because he was a citizen of the United States and had an American passport and because he was treated as an alien and was only allowed to stay here on a temporary resident's permit as a visitor. Furthermore, he said, in 1980

he set up a business as a sign-writer and was the only supporter of his family which consisted of his mother who was 65 years old and of his brother who was 27 years old but mentally retarted and blind in one eye, neither of whom were in a position to work.

The trial Court in its judgment when dealing with the evidence of the appellant found that it was unnatural and in view of his whole demeanour they rejected it as untrue; and later on when considering the sentence they say that his allegations do not constitute a defence or justification and that they reject them as baseless.

But the fact that the appellant was the holder of an American passport, that from 1960 to April, 1977 he was treated as an alien and was only allowed to reside here on a temporary resident's permit as a visitor, that for a period of seven years after he was informed that he was liable to serve in the National Guard he was never prosecuted for failing to do so until after the dismissal of his recourse are undisputed facts mostly introduced in evidence by the prosecution. And even though such facts may not have constituted a "reasonable cause" which is one of the ingredients of the offences for which he was charged, they were, nevertheless, very material in deciding whether the appellant was acting under the bona fide misconception that he was entitled to be exempted from military service a fact that should have been taken into account in mitigation of sentence. See *Spyros Avgousti* v. *The Republic* (1979) 2 C.L.R. 263.

It seems to us that the above facts and the failure of the authorities to take any action against the appellant between 1977 and 1984 could reasonably lead a person to believe that there was, at least, some doubt as to his obligation to serve and, also, that the authorities shared that doubt.

Another matter that we take into serious consideration in mitigation of the sentence in the present case is the unreasonably long delay on behalf of the authorities in bringing the appellant to justice. Had he been prosecuted within a reasonable time after the commission of the offences, the subject-matter of the charges in these cases, and even assuming that the same sentence was imposed on him, he would have served his sentence long before these proceedings were instituted against him. Useful

reference may be made, in this respect, to *Nicolas Christodoulou alias Farfaros* v. *The Republic* (1963) 1 C.L.R. 36; and *Nicos Charalambous Terlas* v. *The Republic* (1970) 2 C.L.R. 30.

In addition to the above it is on record that both in the course of the trial and before this Court the appellant has solemnly declared that he was now ready and willing to enlist and serve in the National Guard. And that he is a man of good character and with a clean record.

Learned counsel appearing for the Republic has fairly conceded that in all the circumstances of this case the term of imprisonment imposed on the appellant was excessive and that it could have been for half that period.

Although the offences committed by the appellant are, no doubt, of a serious nature, it is our view that, in the light of all the above circumstances, the sentence imposed is manifestly excessive and that it should be reduced so as to enable him to be released today.

The appeal is, therefore, allowed accordingly.

Appeal allowed.