[HALLINAN, C.J., AND ZEKIA, J.]

(January 2, 1953)

YIANGOS PILAVAKIS AND ANOTHER, *Appellants*,

v.

THE QUEEN, *Respondent.*

(*Criminal Appeal No.* 1930.)

Criminal Law—Inadmissible and very prejudicial statement on depositions—No substantial miscarriage of justice.

The appellants were accused of stealing sugar and A. a well-known person of standing in the community was jointly charged with receiving. A. made a statement on arrest which implicated the appellants. The statement was attached to the depositions. A. pleaded guilty. The prosecution referred in opening to A.'s statement. A. was not called as a witness, and was not sentenced until the end of the trial when the appellants were convicted.

Held : (1) A's statement should not have been opened by the prosecution ; but the real difficulty in the case lay in the fact that a very damaging statement was on the depositions. In general it is assumed that the judges of Assize Court with their training, experience and impartiality find their verdict on the evidence alone ; only in very special circumstances can any doubts arise. In the circumstances of the present case the information must have influenced members of the Court.

(2) However, applying the test in Haddy's case (29 Cr. App. R., 182), there had been no substantial miscarriage of justice.

Appeal dismissed.

Observations by the Court so that such statement might in future be kept off the depositions.

Appeal by accused from the judgment of the Assize Court, Limassol (Case No. 7316/52).

M. Houry, P. N. Paschalis and *J. Potamitis* for appellant No. 1.

Sir Panayiotis Cacoyiannis, A. Anastassiades and *A. Loizou* for appellant No. 2.

R. R. Denktash, Crown Counsel, for the respondent.

HALLINAN, C.J. : This case concerns a theft of sugar out of a government store under the management and control of the Supplies Section of the Secretariat. The 1st appellant was on 31st May (the date of the offence) a permanent clerk in the Supplies Office at Limassol and 2nd appellant was a temporary clerk. The duties of the 1st appellant include the issue of a permit under a letter of authority from the Secretariat and also of an invoice to a purchaser of supplies from the Government Stores at Limassol ; and the duties of the 2nd appellant include that

of storekeeper for these stores. Both appellants were jointly responsible for an issue from the stores which had to be made in the presence of both. On 31st May the appellants issued 1,600 okes of sugar to Christodoulos Efthymiou, i.e. 20 bags, each containing 80 okes. The bags were placed on a scale 5 at a time in the presence of the appellants. On the invoice the 1st appellant merely recorded the issue of and payment for 1,200 okes of sugar (15 bags); and on the tally-card in the stores where all issues were recorded this issue was recorded as for 1,200 okes only; the tally-card was initialled by both the appellants. The police who appeared to have some information about this transaction watched the issue of this sugar from the store and held the lorry which had taken the bags away before they could be off-loaded.

Christodoulos Efthymiou is the managing director of the Cyprus Perfumes and Soft Drinks Co. otherwise known as K.E.A.N. Products. He is also the main shareholder in that company. He holds a degree in chemistry. He was arrested on the day he received the sugar and thereupon made the following statement:—

"About eight days ago Lambros, the clerk of the Controller of Supplies, came to the factory in my absence and asked my employee to tell me that he wanted me at his office urgently. My employee is Marcos Michael. As a matter of fact I went to his office on the following day and he told me that it was necessary until Saturday, that is to say until to-day, that I should get sugar and that there was a small surplus in the store and that I should get it.

I had my hesitations in this matter; I emphasized the fact that it would not be honourable to do it and I understood the risks which would be run by me, by him and by the Company, which depends entirely on sugar.

Lambros told me that there was no danger and that it would not be a dishonourable act either, because we would not be stealing the property of Government in that case, but that it was a case of a number of surpluses.

I understood that it was his wish that this thing should be done, and after all, I promised to see to it that we facilitated matters.

Naturally, for the Company, this was neither a chance nor an advantage nor an opportunity, because the Company would be paying at the same price at which it pays for rationed sugar.

If I yielded and did it, I did it rather out of gratitude (ἀπὸ ὑποχρέωσιν), because I considered myself under an obligation (διότι ἐθεωροῦσα τὸν ἑαυτόν μου ὑποχρεωμένον) and for this reason to-day I went and took the

sugar. What was found in the car in excess of the quantity which I bought is the quantity which I took as surplus."

He was committed for trial jointly with the appellants, being charged with receiving the 400 okes of sugar knowing them to be unlawfully obtained.

His statement was attached to the file of proceedings of the preliminary enquiry which was supplied to the members of the Court. When the trial opened Efthymiou pleaded guilty. In opening the case for the prosecution Counsel for the Crown read to the Court the statement made by Efthymiou on his arrest. The statement was never put in evidence and Efthymiou was not called as a witness. At the close of the trial both the appellants were convicted of stealing the sugar.

It may be said at once that the opening of Efthymiou's statement to the Court at the beginning of the trial (especially when the Crown knew that he would not be called as a witness) was an irregularity, but this mistake by the prosecution probably made little difference, for Efthymiou's statement was on the depositions and had probably been read by each member of the Court before the trial began. The important and difficult point which this appeal raises is whether in our system of trial without jury an appellate court must assume that the trial court has not been influenced by matters which are on the depositions but which are not in evidence against the accused person whose guilt or innocence is in issue.

On a trial by jury (assuming that the prosecution do not open the statement of the accused who pleads guilty) there can be no prejudice for the jury do not see the depositions. The difficulty in this case is peculiar to our system of judicature, and the English authorities are of little assistance.

The circumstances of the present case are unusual and raise in an extremely acute form the question which we have to determine.

The appellants could not, in the face of the evidence, deny that they had issued the unauthorized 400 okes of sugar to Efthymiou. Their only possible defence was mistake. But Efthymiou's statement, if true, completely destroyed their defence: he said in effect that he took the extra sugar knowing it was an illicit transaction being pushed into this action by the solicitation of 1st appellant. Efthymiou is a person of established position in the business community and he was well known for his ability and character. That he should make such a statement and plead guilty to the charge is almost inconceivable unless this transaction between himself and the appellants was (as he alleges) deliberate and not a mistake. Had the

Crown requested this Court to sentence him and had then called him as a witness, whatever he then said, however damaging to the appellants, would be evidence against them. But this course was not followed ; the statement, inadmissible against the appellants, was placed before the Court, Efthymiou's plea of guilty was taken ; and in this setting the trial of the appellants proceeded.

In general it is assumed that the judges of Assize Court with their training, experience and impartiality find their verdict on the evidence alone ; only in very special circumstances can any doubts arise. But the circumstances of the present case are extraordinary. Information of a kind most damaging to the appellants is brought to the notice of the Court as part of the proceedings and in circumstances which must compel belief in its truth. It is impossible for this Court to hold that such information would not influence the members of the trial Court. However, even though the Supreme Court is of opinion that the point raised in this appeal might be decided in favour of the appellants, the appeal cannot be allowed if no substantial miscarriage of justice has actually occurred.

In deciding whether a substantial miscarriage of justice has actually occurred, the test adopted in *Haddy's* case (29 Cr. App. R., 182) was whether on the whole facts and with a correct direction, the only reasonable and proper verdict would have been one of guilty. On this matter, *Haddy's* case has been cited with approval by the House of Lords in *Stirland* v. *Director of Public Prosecutions*, 30 Cr. App. R., 40. Applying this test to the present case we are satisfied that on the whole facts other than Efthymiou's statement and the circumstances which surrounded it, the only reasonable and proper verdict would have been one of guilty.

This appeal must therefore be dismissed.

Cases such as the present must seldom occur but when they do it is most desirable that the Crown should call as a witness the accused who has pleaded guilty ; this can be done if he is convicted and sentenced before the trial of the other accused is begun. If this course is not followed, the Crown might enter a " *nolle prosequi* " ; a fresh preliminary enquiry can then be held so that the offending statement is not on the depositions. That admittedly would be an awkward procedure ; but it may be necessary in the interests of justice. Furthermore, it should not be beyond the foresight of the law officers, the police, the magistrates and counsel for the defence to recognise the exceptional case where such a difficulty is likely to arise, and to take steps to have separate preliminary enquiries held in the first instance.