[BOURKE, C.J., EDWARDS, S.P.J., and ZEKIA, J.]

SOZOS PANAYI TATTARIS,

Appellant,

v.

THE QUEEN, *Respondent.*

(*Criminal Appeal No.* 2274).

Trial in Criminal Cases—Conspiracy and substantive offence—Joinder of counts—Matter prejudicial to the accused upon the record of the committing Magistrate supplied for the use of the Assize Court—Statement by the Police as to the previous convictions of the accused, made after committal on resisting an application for bail.

Co-accused—One pleading guilty and sentenced—Matters prejudicial to the other said by the former's counsel in the course of his address in mitigation.

Observations of the Court for the guidance of committing Magistrates and Registrars as to what part of the record of the preliminary inquiry should be transmitted to the Assize Court, in accordance with the provisions of the Criminal Procedure Law, Cap. 155 (1959 *Edn.*), *section* 101.

One of the grounds of this appeal was that a count for conspiracy to commit robbery was joined with a count for the substantive offence of robbery. This ground was not pressed and learned counsel for the appellant agreed that he was unable to point out how any prejudice was caused by such joinder. The other two grounds were. (1) that a matter prejudicial to a fair trial appeared upon the record of the committing Magistrate which was supplied for the use of the Judges of the Assize Court trying the appellant, namely a statement going to the character of the accused, made by the Police before the Magistrate after committal when the prosecution was opposing an application for bail ;

(2) that two of the co-accused having pleaded guilty at the trial, their counsel in his address in mitigation suggested at the outset that the appellant was the leader in the perpetration of the offence.

Held (1) No prejudice was caused to the appellant by the joinder of the count of conspiracy with the count for the substantive offence of robbery.

(2) The prejudicial matter as to the bad character of the appellant, contained in the record of the preliminary inquiry transmitted for the use of the Judges of the Assize Court, was not brought to the notice of the trial Court and, had it been, one would have expected a direction by the trial Judges

to exclude it from their minds. As it is, the Court does not know that the prejudicial material came to the notice of the Judges and the Court is not going to assume that the Judges or any one of them must have perused the whole record of the premilinary inquiry, or that, if it did come to notice, there was a failure in direction to disregard the statement.

Yiangos Pilavakis and another v. The Queen 19 C.L.R. 163, *distinguished.*

(3) The Court has no doubt that the experienced Judges of trial did not allow the statement made by counsel of the two other co-accused who pleaded guilty to influence them adversely to the appellant when making up their minds on the evidence.

(4) The Court does not consider that there was any substantial miscarriage of justice on the grounds raised.

Appeal dismissed.

Case referred to:

Yiangos Pilavakis and another v. The Queen 19 C.L.R. 163.

Per curiam: Proceedings recorded on the application to the committing Magistrate for bail should not have been included in the record of the preliminary inquiry transmitted to the Assize Court and the attention of the committing Magistrates and of Registrars is drawn to the provisions of section 101 of the Criminal Procedure Law, Cap. 155 (1959 Edn.) which provides for the transmission of certified copies of parts of the record, that is, the charge, the depositions, the statement of the accused, the recognizances of the witnesses, the bail bonds and such documentary exhibits as can be conveniently copied. The practice followed hitherto to transmit the whole record and indeed sometimes to include addresses of counsel, should be discontinued and the record transmitted should be confined to the requirements of section 101.

Appeal against conviction.

The appellant was convicted on the 27th April 1960 at the Assize Court sitting at Limassol (Zannetides, J., Stavrinides, P.D.C. and Avni, D.J., in Criminal Case No. 2443/60) on two counts of the offences of conspiracy to commit a felony contrary to section 371 of the Criminal Code, Cap. 154 (1959 edn.) and armed robbery contrary to sections 282 and 283 of the Criminal Code. He was sentenced to one year's imprisonment on count 1 and to eight years imprisonment on count, 2, the sentences to run concurrently.

Chryssis Demetriades for the appellant.
Sir James Henry, Q.C., the Attorney-General with *K. Talarides* for the Crown.

The appeal was dismissed on the 8th June 1960, the Court intimating that they would give their reasons later, which they did on the 15th June 1960. They were read by:

Bourke C.J. : This appeal was dismissed on the 8th June, 1960, and we intimated that we would give our reasons later, which we now proceed to do.

The appeal was founded on the allegation of certain irregularities which it was said amounted to a substantial miscarriage of justice. The second ground of appeal in question of the joining of a count for conspiracy with the substantive offence of robbery has not been pressed and we need only say that learned counsel for the appellant agreed that he was quite unable to point out how any prejudice was caused by such joinder in the circumstances of the present case.

It is a ground of appeal that matter prejudicial to a fair trial appeared upon the record of the Magistrate holding the preliminary inquiry that contained the depositions and was supplied for the use of the Judges of the Assize Court trying the appellant. Mr. Demetriades for the appellant has urged upon us that the resolution of the question arising should be in accord with the decision of this Court in *Yiangos Pilavakis & another v. The Queen* 19 C.L.R. 163, in which matter similarly appearing was held to be most damaging to the appellants though in the particular circumstances of that case it was held no substantial miscarriage of justice nad actually occurred. There is, however, the important distinction that in *Pilavakis*' case (*supra*) the very damaging statement was referred to by the prosecution in opening and was so brought to the notice of the trial court "as part of the proceedings and in circumstances which must compel belief in its truth" (ib. p. 166). It is evident from the report, and as Zekia, J., who was a member of the Court determining that appeal, has confirmed, that the circumstances in that case were quite peculiar and this Court felt unable to act upon the assumption that "the judges of the Assize Court with their training, experience and impartiality find their verdict on the evidence alone" (*ib.* p. 166).

In the instant case the matter complained of was not brought to the notice of the court in the course of the proceedings and, had it been, we would have expected a direction by the learned Judges of trial to exclude it from their minds. As it is, we do not know that the prejudicial material came to the notice of the Judges and we are not going to assume that the Judges or any one of them must have perused the whole record of the preliminary proceedings thus noticing the statement as to previous convictions or that, if it did come to notice, that there was a failure in direction to disregard the statement and put it entirely out of mind when coming to a

verdict on the whole evidence. Some Judges, as is well known, who are also Judges of the facts, prefer, out of a sense of precaution and lest they might be influenced by material not forthcoming as evidence in the case at trial, not to peruse even the depositions. The statement in question went to the character and previous convictions of the appellant and was made after the committal for trial by the Police Prosecutor when he was resisting an application for bail. These proceedings recorded on the application for bail should not have been included in the record of the preliminary inquiry transmitted and we draw the attention of committing Magistrates and of Registrars to the provisions of section 101 of the Criminal Procedure Law, Cap. 155 (1959 Edn.), which provides for the transmission of certified copies of parts of the record, that is, the charge, the depositions, the statement of the accused, the recognizances of the witnesses, the bail bonds and such documentary exhibits as can be conveniently copied. We are aware that it has been the long and invariable practice to transmit the whole record and indeed sometimes to include the addresses of counsel. In future this practice should be discontinued and the record transmitted be confined to the requirements of section 101.

We also found no substance in the third ground of appeal. Counsel for the defence did not seek a separate trial and never raised any objection or submitted that there was likely to be prejudice. In asking that the two co-accused should be sentenced at the outset on their plea of guilty the prosecution visualised the need to call them as witnesses. In the event they were not called. Their counsel, following the normal practice in such circumstances, addressed the Court in mitigation and he had something to say reflecting upon the appellant and suggesting that he was the leader in the perpetration of the offence. We have no doubt that the experienced Judges of trial did not allow such matter to influence them adversely to the appellant when making up their minds on the evidence.

We did not consider that there was any substantial miscarriage of justice on the grounds raised and accordingly the appeal was dismissed.

Appeal dismissed.