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MICHAEL ANTONI PETRI
v
THE POLICE

[VASSILIADES, P TRIANTAFYLLIDES, JOSEPHIDES, STAVRINIDES AND LOIZOU, JJ]

MICHAEL ANTONI PETRI,

Appellant,

v

THE POLICE,

Respondents

(*Criminal Appeal No* 2980)

Criminal law—Public Officers—"Fraud and breach of trust" by public officer contrary to section 133 *of the Criminal Code, Cap* 154—"*Fraud*" *in section* 133—*The term imports the element of actual fraud* i e *of* dolus malus, *of moral fraud, of the dishonest mind of a person who so acts intentionally—This view is strengthened by English cases construing the expressions "intent to defraud" and "intent to deceive"—Therefore mens rea is a necessary ingredient—Otherwise the term "fraud"* lato sensu *when used simply as a generic term signifying conduct which falls short of the standard which equity prescribes in the case of fiduciary relationship—Where "fraud" is deemed to have been proved without actual fraudulent intent—Compare The Civil Wrongs Law, Cap* 148, *section* 36, *The Criminal Code, Cap* 154, *section* 331, *the English Forgery Act,* 1914, *section* 4 (1)—"*Breach of trust*" *in section* 133 *of Cap.* 154—*See immediately below*

Criminal Law—Public Officers—"Breach of trust" by public officer contrary to section 133 *of the Criminal Code, Cap* 154—*Meaning and effect of the expression—Whether, assuming that all other ingredients exist, ordinary negligence would suffice to establish "breach of trust"—Or whether, it would be necessary to establish at least wilful negligence* i e *an intentional breach of duty or reckless carelessness in the sense of not caring whether one's act or omission is or is not a breach of duty—In the present case, however, the appellant cannot be held to have been guilty even of ordinary negligence—Compare The Criminal Code, Cap* 154, *sections* 105, 134, 314, *the Canadian Criminal Code, section* 160, *R S C* 1927, *c* 36—*See, also, immediately herebelow*

Criminal Law—Public Officers—"Breach of trust affecting the public" contrary to section 133 *of the Criminal Code, Cap* 154—*Trustee who owes a duty to the Government (which in-*

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cludes " the public ")—Collective organ—The Tender Board in the Ministry of Agriculture and Natural Resources—Assuming that the members of such Board are trustees who owe as such a duty to the Government—But even then such members do not owe a similar duty to one another.

Public Officers—" Fraud and breach of trust " in the discharge of their duties—Section 133 *of the Criminal Code—See above.*

Fraud—By public officers—See above.

Breach of trust—By public officers—See above.

Words and Phrases—" Fraud " and " breach of trust " in section 133 *of the Criminal Code, Cap.* 154*—" Fraud "—" Moral fraud "—" Actual fraud "—" Dolus malus "—As distinguished from " fraud " lato sensu—" Negligence "—" Ordinary negligence "—" Wilful negligence "—" Fraud or breach of trust affecting the public " in section* 133 *of Cap.* 154, supra *— " Intent to defraud ", " intent to deceive "—See, above.*

Negligence—Ordinary negligence—Wilful negligence—See above.

" Intent to defraud "—See above.

" Intent to deceive "—See above.

Collective Organ—The Tender Board—Whether trustees within section 133 *of the Criminal Code* (supra)*—Its members do not owe a duty to one another as trustees, even if they owe a similar duty to the Government—Duty to keep proper records of their meetings—See, also, above.*

Tender Board—In the Ministry of Agriculture—See above under Collective Organ.

Confessions—Statements to the police—Admissibility of such statements—In the circumstances of this case the formal caution was not enough—The Police ought to have told the accused that he was a suspected person regarding the matter under investigation—On the whole the interrogation by the Police was unfair and oppressive in taking the statement under consideration—And the trial Judge ought in the exercise of his discretionary powers to have rejected it as not being voluntary—Judges should approach the issue of the admissibility with caution—The proper exercise of the judicial discretion in this respect would tend to discourage unfair and oppressive abuse of powers by overjealous investigating officers—Judges' Rules—They were made for the guidance of the Police, and not for

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the circumscription of the judicial power–The Criminal Procedure Law Cap. 155, *section* 8—*See, also, herebelow under trial in Criminal Cases.*

Evidence—Confessions—Statements to the police—Admissibility—See above.

Judges' Rules—See above.

Trial in Criminal Cases—Side trial in the main trial—Regarding the issue of the admissibility of confessions or statements made by the accused to the Police—A finding whether such confession or statement is free or voluntary is all that is usually needed—But demolishing the credibility of the accused at that stage by going further than necessary in such ruling, may well strike at the root of the whole defence—And should be avoided.

Side Trial—Trial in the main trial regarding the issue of the admissibility of confessions—See above.

Criminal Procedure—Appeal—Findings of fact made by trial Court—Unwarranted and unsatisfactory—Witnesses—Credibility.

Findings of fact—See above.

Witness—Credibility—See above.

Criminal Procedure—Appeal—Fresh evidence on appeal—Principles upon which an application to receive such evidence may be granted—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 25 (3).

Appeal—Fresh evidence—See above.

Evidence—Fresh evidence on appeal—See above.

Fresh evidence on appeal- See above.

Criminal Procedure—Trials in criminal cases—Disjoinder of the cases of two accused, while the first accused was giving evidence in his own defence--Irregularity—Whether there has been a miscarriage of justice—The Criminal Procedure Law, Cap. 155, *section* 75 *not warranting such a course at that stage.*

Joinder of trials—Disjoinder of trials—See above.

Disjoinder of trials of co-accused—See above.

Criminal Procedure—Charge—Amendment on appeal—In the circumstances of the present case the Court would have not allowed the amendment as suggested by counsel for the prosecution—The Criminal Procedure Law, Cap. 155, *section* 145 (1) (*c*).

Charge—Amendment—See above.

Amendment—Of the charge—See above.

Criminal Procedure—Attorney-General—Assize Court—Court of summary jurisdiction—Powers of the Attorney-General under section 155 (*b*) *of the Criminal Procedure Law, Cap.* 155 *to have a case remitted for summary trial notwithstanding that such offence could not otherwise be triable by such Court—The Supreme Court did not agree with the course taken in this case as above by the Attorney-General—Observing that the present case is a case for trial by the Assize Court.*

Criminal Law—Attempt—Attempt to procure payment of an amount of money by false pretences—Sections 298 *and* 396 *of the Criminal Code, Cap.* 154.

Attempt—Attempt to procure payment by false representations—Sections 298 *and* 396 *of the Criminal Code, Cap.* 154.

This is an appeal against conviction in the District Court of Nicosia on four counts (counts 10, 16, 18 and 19 on the charge sheet); three of them viz. counts 10, 16 and 29 for fraud or breach of trust by public officer, under section 133 of the Criminal Code, Cap. 154 and one (count 18) for attempt, connected with the facts of count 19, to procure payment of money by false pretences, under sections 298 and 366 of the Code. It seems that this is the first case of its kind under the aforesaid section 133 of Cap. 154. The charge on which the appellant was prosecuted, jointly with another person, contained nineteen counts. On seven out of these both accused were jointly charged, including count 1 charging both accused with conspiracy to "cheat and defraud the Government of Cyprus by inducing them (the Government) to part with money" to a firm of importers of veterinary medical preparations, of which the second accused was a partner by false representations and other false and fraudulent devices. On the other twelve counts, the appellant was charged alone.

At the close of the case for the prosecution counsel for the first accused (the appellant) submitted under section 74 (1) (b) of the Criminal Procedure Law, Cap. 155, that his client should not be called upon for his defence, on the ground that the prosecution failed to make out a *prima facie* case. The trial Judge accepted the submission for fifteen out of the nincteen counts and acquitted the appellant accor-

dingly ; but overruled the submission on four counts *viz.* counts 10, 16, 18 and 19 (*supra*), on which he called upon the appellant to make his defence.

After taking appellant's evidence from the witness box and hearing a witness called for the defence, the trial Judge discarded the evidence of the appellant as " unreliable " and " untruthful " and went as far as to find that the appellant, in trying to extricate himself from his difficulties, did not hesitate to throw in a false alibi (*infra*) ; and convicted the appellant on all four counts on which he called upon him ; and sentenced him to one year's imprisonment on each of the three counts 10, 16 and 19 under section 133 of the Criminal Code for fraud or breach of trust (to run concurrently). He passed no sentence on the count for attempt (*viz.* count 18).

It should be noted that while the appellant was giving evidence in his own defence, the trial Judge, on the application of counsel for the second accused and without any objection either from counsel for the appellant or from counsel for the prosecution, ordered the disjoinder of the cases of the two accused, basing himself on section 75 of the Criminal Procedure Law, Cap. 155.

Appellant was at the material times the Director of the Veterinary Services in the Ministry of Agriculture and Natural Resources. He was, *inter alia*, responsible for the preparation of the specifications required for the invitation of tenders for the supply of drugs and other medical preparations to his Department. And he was also one of the five members of the Tender Board whose duty was to consider such tenders.

Section 133 of the Criminal Code Cap. 154, reads as follows :

" 133. Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a misdemeanour ".

Counts 10 and 16 under section 133 allege that the appellant " wilfully and fraudulently omitted to disclose " to the Tender Board at their meeting of the 3rd March, 1966, that the tenders of the firm Stamatis and Sons (of which the second

accused was a partner) were not in accordance with the specifications on which the tenders were invited. Four items of drugs were involved in these counts 10 and 16—two in each one of them. All these four items were among those awarded to the said firm. Their description on the samples accompanying the tender was, admittedly, not according to the specifications.

Count 18 is the attempt count under sections 298 and 366 (*supra*) arising from the meeting of the Tender Board on the 12th September, 1966 and is connected with the next count. And count 19 (always under section 133) alleges that the appellant wilfully and fraudulently gave false particulars to the Board, at their meeting of the 12th September, 1966, regarding a tender of the said firm Stamatis and Sons for the supply of a veterinary vaccine of the value of £2,700. The false particulars alleged are that the tender was for the supply of the vaccine in smaller vials (which was an advantage) than those offered by the other tenderer, whose price was cheaper.

As stated above, the trial Judge convicted the appellant on all four counts (10, 16, 18 and 19 *supra*) having found that the appellant acted in relation thereto wilfully and fraudulently ; and that he did so knowingly and intentionally. Thus the question of appellant's credibility as a witness was a matter which went to the root of the whole case.

The case for the prosecution regarding counts 10 and 16 (*supra*) was that the appellant had thoroughly studied the tenders on March 2, 1966, in the offices of the Department for almost the whole morning, together with the witness E. and A. Therefore, the prosecution contended, he must have noticed the discrepancies between the tender of the aforesaid firm Stamatis and Sons and the specifications upon which the tenders were invited. His failure to disclose such discrepancies at the meeting of the Tender Board on the following day (3rd March, 1966), they argued was wilful and fraudulent. Witnesses E. and A. fully supported that version. Appellant's version, on the other hand, was that he never had the chance to study the tenders on Wednesday the 2nd March, because on that morning he was busy escorting on his official calls, away from the offices of the Department, Mr. R. Huck, Senior Research Officer in the Ministry of Agriculture of the U.K., who came to Cyprus on a mission under the auspices of the Food and Agriculture Organization

of the United Nations. As the appellant could not take part in the preparation of the tenders for next day's Board meeting, he asked, he said in evidence, the two witnesses in question, to get on with the necessary work without him ; and on the following day he requested both of them, (one being a qualified pharmacist) to attend this meeting of the Tender Board so as to be available for any information which might be required by the Board regarding the tenders. Mr. Huck resides abroad and his evidence was not available at the time of the trial. An application for taking his evidence under section 25 (3) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) was granted on February 6, at the opening of this appeal ; and the said witness who had been brought to Cyprus for the purpose gave before us his evidence, fully supporting the aforesaid version of the appellant as to the latter's movements on that morning Wednesday the 2nd March, 1966. Thus at that early stage in the appeal the Supreme Court had the means of testing the trial Judge's evaluation of the evidence on which he reached his verdict, with the result that the evidence of the two prosecution witnesses E. and A. who impressed the trial Judge as truthful and reliable, was proved to the satisfaction of the Supreme Court and beyond all doubt, to be unacceptable as untrue in a very material part : the part which the trial Judge found to have been thrown in by the appellant as a false *alibi*. While, on the other hand, appellant's evidence in this connection, was positively established as correct.

The present case, the first of its kind under section 133 of the Criminal Code, is of outstanding interest, *inter alia*, in view of the numerous legal points arising from that section and regarding notions such as " fraud " and " breach of trust ". It should, also, be pointed out that, in dealing with the appellant's statement to the Police (Exhibit 14) and holding that it was wrongly admitted in evidence, the Supreme Court had occasion to clarify and strengthen the safeguards laid down, in the interest of the liberty of the citizen, in connection with criminal investigations.

This appeal was taken on eight grounds which may be put in four groups : (*a*) that the trial Judge's assessment of the evidence of the main witnesses, on whose evidence the conviction rests, was unreasonable and erroneous ; (*b*) that in any event the evidence on record could not support a conviction on any of the four counts ; (*c*) the conviction

was wrong in law ; and (*d*) that the course adopted by the trial Judge in this joint trial, to conclude the trial of the appellant as if he were being tried alone, before taking the case of his co-accused, was an irregularity in the trial to the prejudice of the defence, resulting in a miscarriage of justice.

On the other hand it was argued by counsel for the prosecution that even if the conduct of the appellant at the Tender Board meeting of the 3rd March, 1966 (*supra*), was not intentional as found by the trial Judge, nevertheless, the appellant could still be found guilty of " fraud " or at least " breach of trust " within the meaning of section 133 of the Criminal Code, Cap. 154 (*supra*), especially in view of his failure to point out at that meeting the differences between the specifications and the samples of the aforesaid tenders *viz.* Stamatis and Sons.

In allowing the appeal, quashing the convictions and sentence, and acquitting and discharging the appellant, the Court :—

Held, (I) as to the application to receive fresh evidence on appeal :

(1) In granting on February 6, 1968, the application to hear further evidence in the appeal, namely the evidence of Mr. Huck, we said that this Court was unanimously of the opinion that this evidence was material and that the application should be granted, reasons in more detail to be given later.

(2) The circumstances in which this Court will entertain an application to receive evidence on appeal and will exercise its power to do so under section 25 (3) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960), were considered in several cases such as *Yannakis Kyriakou Pourikkos* v. *Mehmet Fevzi* (*No.* 2) 1962 C.L.R. 283, and *Periclis Ioannou Kolias* v. *The Police* (1963) 1 C.L.R. 52. See also the *Finnigan* case in the newspaper " The Times " of the 15th February, 1968. We need not take time by going further into the matter. It is sufficient to say that the necessary formalities having been duly complied with, we were satisfied that the circumstances of this case fully justified the application in the interest of justice.

Held, (II) on the question of admissibility of appellant's statement to the Police Exhibit 14 *:*

(1) In the circumstances of this case, we are of opinion, that fairness in the interests of justice required that, apart

of the formal caution, the appellant should have been told that the investigation concerned him as a suspect *i.e.* a person under suspicion that he was involved in the case under investigation. The Police did not do that, beyond administering the formal caution. We think, therefore, that the trial Judge should have excluded the statement in question (Exhibit 14) in the exercise of his discretionary powers. As Lord Devlin has put it in his book The Criminal Prosecution in England (1960) at pp. 38–39: " The essence of the thing is that a Judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence notwithstanding that there is no rule which specifically prohibits it..... It must never be forgotten that the Judges' Rules were made for the guidance of the police and not for the circumscription of the judicial power ".

(2)—(*a*) This Court has time and again warned trial Judges against the danger of exercising their discretion in favour of admitting such statements, made in circumstances which apparently place the maker of the statement (a person facing a criminal prosecution) at an unfair disadvantage before a police investigator.

(*b*) The attention of the trial Judge was drawn in this connection, to a recent case (*Costas Kokkinos* v. *The Police* (1967) 2 C.L.R. 217) where this matter was discussed on appeal with the result that the statement was found to have been wrongly admitted. Nevertheless, the trial Judge in the present case, admitted the statement of the appellant Exhibit 14, basing his ruling on the view that this was " not a case falling within that class of confessions ".

(3) This case presents one more instance of the need for caution with which trial Judges should approach the issue of the admissibility of such statement, when the prosecution seek to produce them as part of their case. Furthermore, the proper exercise of the judicial discretion in this respect, would tend to discourage unfair and oppressive abuse of power by overjealous investigating officers.

(4)—(*a*) Trial Judges as a rule decide the issue of the admissibility of a statement or confession, when raised, in a side trial within the trial, by ruling on the objection. A finding on the question whether the statement was free and voluntary is all that is usually needed at that stage. A useful

example is *Michael Volettos* v. *The Republic*, 1961 C.L.R. 169, where the trial Court had no less than eight such objections to decide, one after another in the course of a murder trial.

(*b*) But demolishing the credibility of the accused by going further than necessary in such a ruling, may well strike at the root of the whole defence in the case, and should be avoided.

(*c*) We, therefore, think that deciding at that stage the credibility of the appellant, as he did in ruling in the side trial on the objection to the admissibility of his statement Exhibit 14, the trial Judge formed a view of doubtful correctness which affected seriously his judgment on other vital issues involving the credibility of the appellant.

Held, (*III*) *as to the findings of fact and the assessment of the credibility of witnesses, made by the trial Judge :*

(*A*) *Regarding counts* 10 *and* 16 (supra) *in relation to the Tender Board meeting of the* 3*rd March*, 1966 (supra) :

(1) An application for taking Mr. Huck's evidence under section 25 (3) of the Courts of Justice Law, 1960 was granted on February 6, 1968, at the opening of this appeal (*supra*). Thus, this witness gave evidence before us in a most convincing and satisfactory manner. His version of his movements on that first day of his official work in Cyprus *i.e.* on the 2nd of March, 1966, provided this Court with the means to test and measure the correctness of the evidence from each side as to what actually happened on that morning ; and to assess unmistakably in that connection the credibility of the two presecution witnesses, E. and A. on the one hand, and of the appellant on the other. Counsel for the prosecution conceded that the fresh evidence was correct in preference to any prosecution evidence to the contrary.

(2) We thus had at that early stage in the appeal the means of testing the trial Judge's evaluation of the main evidence on which he reached his verdict. The evidence of the said two witnesses E. and A. who impressed the trial Judge as truthful and reliable, was proved to our satisfaction and beyond all doubt, to be unacceptable as untrue in a very

material part : The part which the Judge found to have been thrown in by the appellant as a *false alibi*. While, on the other hand, appellant's evidence in this connection was positively established as correct.

(3)—(*a*) According to the Judge's finding, not only the appellant had actually worked together with the aforesaid witnesses E. and A. for the whole of that Wednesday (2nd March, 1966) morning studying the tenders (which he was now denying) in view of the Tender Board's meeting on the next day (3rd March), but had also "*thrown in as* alibi *the story about taking round the expert of the Food and Agriculture Organization of the United Nations*".

(*b*) This finding as well as the evaluation of the evidence on which the conviction on counts 10 and 16 mainly rests, have completely collapsed, in the light of the fresh evidence of Mr. Huck (*supra*), the correctness of which is not in dispute.

(*c*) It is clear that once the appellant was disbelieved, wrongly as it has now been shown, on this point, he stood no chance of being believed at the trial that his non-pointing out, at the meeting of the Tender Board of the 30th March, 1966, the differences between specifications and samples, was not intentional and fraudulent as found by the Judge in convicting him on counts 10 and 16 (*supra*).

(*B*) *Regarding counts* 18 *and* 19 :

(1) Counts 18 and 19 (*supra*) arise from another meeting of the Tender Board on a subsequent occasion, on September 12, 1966. The trial Judge arrived at the conviction on these two counts mainly on the evidence of witness Ioannides, the Accountant-General. The appellant gave a different version, supported in this connection by the witness Thrassyvoulides, a Senior Officer in the Ministry of Commerce.

(2) Had the appellant not been regarded by the trial Judge as a deliberate liar on his oath—inventing, even, a false *alibi* about the events on the 2nd March, 1966 (*supra*)—then the appellant's evidence as to how the tender of the aforesaid firm Stamatis and Sons came to be accepted by the Tender Board

on 12th September, 1966, coupled with the evidence of witness Thrassyvoulides (*supra*), should have raised, at least, a reasonable doubt in the mind of the trial Judge as to whether or not the appellant did make a statement, regarding his preference for smaller vials (*supra*), in the context suggested by the Accountant-General (*i.e.* to include granting the contract to Stamatis and Sons) or in the different context alleged by the appellant and witness Thrassyvoulides (*i.e.* by way of general observation). Especially when one bears in mind that the only other tender for the supply of the vaccine in question was admittedly not in compliance with the terms of the tender, while that offered by Stamatis and Sons had been successfully used for mass vaccinations by the Department in the preceding two seasons.

(3) Moreover, had the appellant not been regarded already as a lying witness, then his good faith in the matter would have been found to be decisively borne out by the fact that on his own initiative he proceeded, later, to rescind this contract worth £2,700 granted to Stamatis and Sons for lack of funds.

(4) In the light of the evidence on record, apart of the fact that the conviction on counts 18 and 19 could not be sustained in view of what was said earlier regarding the credibility of the appellant, we are of the view that it could not be safely and reasonably concluded by the trial Judge that the appellant could have made the statement regarding the size of the vials as stated to have been understood by witness Ioannides, the Accountant-General, *i.e.* with fraudulent intent. Thus the verdict in respect of these counts was unwarranted and unsatisfactory. (*Koumbaris* v. *The Republic* (1967) 2 C.L.R. 1 ; *Meitanis* v. *The Republic* (1967) 2 C.L.R. 31).

(5) A thing which has also given rise to considerable doubt regarding what happened at the aforesaid meeting of the Tender Board of the 12th September, 1966, in the absence of minutes compatible with good administration. A collective executive organ with such important responsibilities as this Tender Board carried, makes collective decisions, the responsibility for which is shared collectively by all its members.

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None can shift his responsibility on other members by saying that he acted on the other's opinion (expert or otherwise) unless this is duly recorded in the minutes so that greater or lesser responsibility may rest where it lies according to the signed record

Held, (*IV*) *regarding the legal aspect of the case and the correct construction of section* 133 *of the Criminal Code, Cap* 154, which section *provides*.

"*Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a misdemeanour*"

(A) *FRAUD in section* 133 *of the Criminal Code*, supra

(1)—(*a*) Counsel for the prosecution submitted that the expression "fraud" in section 133 means that the standard of conduct expected on the part of a public officer, is higher than that expected from an ordinary person, and he invited the Court to hold that no *mens rea* was necessary in proving fraud under section 133, same as in the case of fiduciary relationship where fraud is deemed to have been proved without actual fraudulent intent In support of that proposition he cited Snell on Equity, 24th edition, p. 504, and the case of *Nocton* v *Ashburton* [1914] A C 932, at pp. 945 to 954 In short he invited the Court to hold that "fraud" in section 133 does not necessarily connote any moral obliquity, as in the case of fraud in the strict sense according to the common law, but it is simply a generic term signifying conduct which falls short of the standard, which equity prescribes

(*b*) Considering the learned judgment of Viscount Haldane L.C. in the *Nocton* case (*supra*), it would appear that before that case was decided by the House of Lords in 1914, there was considerable confusion as to these two different views of fraud which was settled by the profound historical knowledge of Viscount Haldane

(*c*) In the *Nocton* case it was held that *Derry* v *Peek* [1889] 14 App Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of

its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive jurisdiction of a Court of Equity. Such actions, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising through a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties (see headnote in the *Nocton* case, *supra* at p. 932), or an action in the form of the old bill in chancery to enforce compensation for breach of a fiduciary obligation (see *Nocton* case supra at p. 946, 952–953, 955, 956, 957).

(*d*) Moral fraud need not be proved in such a case in a Court of Equity as at Law where it is necessary for the plaintiff to prove moral fraud in order to succeed in an action for deceit. See *Derry* v. *Peek* *supra* where it was clearly laid down that it was necessary to prove actual fraud *i.e.* that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Incidentally, this definition of fraud at common law appears to have been substantially reproduced in our Civil Wrongs Law, Cap. 148, section 36.

(2) According to Viscount Haldane L.C. (*Nocton* case *supra*, at p. 955), prior to *Derry* v. *Peek* (*supra*) the distinction between the different classes of case had not been sharply drawn ; and there was some confusion between fraud as descriptive of the dishonest mind of the person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the Courts would not allow him to say that he was ignorant.

(3) Having considered this masterly review of the law by Viscount Haldane L.C. in his speech concerning the meaning of "fraud" at common law and in equity respectively, we are not prepared to accept the view that in the case of the criminal offence laid down in section 133 of our Criminal Code, which originates

in the common law (see *R.* v. *Bembridge* (1783) 22 State Tr. 1) the meaning of the term " fraud " is that employed by the Court of Chancery as distinguished from that applied at common law. We take the view that the term " fraud " in section 133 imports the elements of *dolus malus*, of *moral fraud*, of the dishonest mind of a person who so acts intentionally.

(4) This view is strengthened by English cases construing the expression " intent to defraud " and " intent to deceive ". Such cases tend to show that " intent to defraud " imports something graver than " intent to deceive ". (See *Welham* v. *The Director of Public Prosecutions* [1961] A.C. 103 (H.L.) at p. 133 per Lord Denning ; In *re London Globe Finance Corporation Ltd.* [1903] 1 Ch. 728, at p. 732, per Buckley J., *Reg.* v. *Moon* [1967] 1 W.L.R. 1536, at p. 1543 per Edmund Davies L.J.).

(5) In the light of the foregoing we have no difficulty in holding that the appellant could not have been convicted of fraud under section 133 of the Criminal Code, Cap. 154.

(B) " *BREACH OF TRUST* " *in section* 133 (supra) :

(1)—(*a*) Counsel for the prosecution submitted that this expression in section 133 (*supra*) means breach of confidence or misconduct, on the basis of the case of *R.* v. *Bembridge* (1783) 22 State Tr. 1 ; and not a breach of trust in the equity sense of that expression. He further submitted that motive and intention were irrelevant to the offence of " breach of trust " under section 133. Counsel further argued that, if his submission as to the construction of the term " fraud " under section 133 were not accepted, the conviction on counts 10 and 16 could be supported as " breach of trust " on the basis that the appellant " wilfully " but not " fraudulently " omitted to disclose to the other members of the Tender Board the discrepancies between the specifications and the samples submitted by the aforesaid firm Stamatis and Sons. Counsel further submitted that, even if this Court did not find that the appellant's convictions under counts 10 and 16, for " wilfully " omitting to disclose, could

be supported, this would be a proper case for the Court to convict the appellant after amending the particulars in counts 10 and 16 to read : " . . . . that he negligently and in breach of his duties towards the Tender Board he failed to disclose etc. etc. . . . ".

(*b*) In England any public officer is guilty of a " common law misdemeanour who commits a breach of trust, fraud, or . . . . . in a matter affecting the public, even although the same conduct, if in a private transaction would, as between individuals, have only given rise to an action " (*10 Halsbury's Laws of England*, 3rd Ed., page 618, paragraph 1162). Six cases are quoted in support, the leading case being that of *R.* v. *Bembridge* 22 State Tr. 1, at p. 155 et seq.; 3 Doug. K.B. 327, at p. 332 ; also reported in 99 English Reports 679 (*Note :* Those cases are being considered in the judgment of the Court).

(*c*) Reverting to section 133 of our Criminal Code, which provides that any public officer who " in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of misdemeanour ", this would seem to embody the second principle laid down in Lord Mansfield's judgment (in the *Bembridge* case, *supra*, at p. 156) in substantially the same words. In the following section 134, there is express provision for the punishment of a public officer who wilfully neglects to perform any duty which he is bound by law to perform. Compare also the offence of " abuse of office " under section 105 of our Criminal Code, and " false accounting by public officers " under section 314.

(2)—(*a*) The question which arises is whether there is a trust binding the members of the Tender Board, including, of course, its Chairman, the Accountant-General. If there is such trust then all members are deemed to be trustees who owe a duty to the Government (which includes " the public " *supra*).

(*b*) But such members (of the Tender Board) do not owe a similar duty to one another. This answers the submission that the appellant owed a duty to the

other members of the Board to inform them on technical matters and that he failed in that duty by omitting to disclose to them certain differences between the specifications and the tenders made by a particular tenderer (counts 10 and 16).

(3)—(*a*) But assuming, without deciding, that there is a trust in the present case, the next question would be, did the appellant commit a breach of trust?

(*b*) Counsel for the prosecution relied on the dictum in the canadian case *Rex* v. *McMorran* (1948) Ontario Reports 384 (Court of Appeal) that ordinary negligence would suffice to establish breach of trust under section 133 (*supra*). It might be said that in dealing with a statutory offence in our Criminal Code, ordinary negligence would not be sufficient to prove the offence of breach of trust but that it would require wilful negligence, that is, a will to be negligent—an intentional breach of duty or reckless carelessness in the sense of not caring whether one's act or omission is or is not a breach of duty.

(*c*) A wilful act, which (act) amounts to negligence, is not wilful negligence unless there be a will to be negligent. As Warrington L.J. said in the case of *In re Trusts of Leeds City Brewery* [1925] 1 Ch. 532, at p. 544, " then it becomes important to consider what is meant by a wilful breach of trust or *wilful negligence or wilful failure* to perform his duty. I think it means this. I think it means deliberately and purposely doing something which he knows, when he does it, is a breach of trust, consisting in a failure to perform his duty as trustee ".

(4) We find it, however, unnecessary to decide whether ordinary negligence would suffice for the purposes of section 133 or whether wilful negligence would be required because on the facts of the present case the appellant could not be held liable for breach of trust even through ordinary negligence.

(5) Even if, however, we had reached the contrary conclusion, and had held that the appellant was guilty of negligent conduct in relation to the meeting of the 3rd March, 1966 (*supra*), we would not be prepared

to amend counts 10 and 16, as suggested by counsel by the prosecution, or substitute therefor new counts so as to convict the appellant of breach of trust through negligence. The case against him has been prosecuted all along as a case of conspiracy and fraud and it has been defended as such, only. Thus, the appellant never had the opportunity to meet a charge of negligent conduct, nor did he have any opportunity to conduct his defence accordingly. It would, therefore, be clearly contrary to the accepted principles governing criminal trials to exercise our discretionary powers under section 145 (1) (c) of the Criminal Procedure Law, Cap. 155 and convict him at this late stage of negligent conduct, when he never had a chance to meet properly, at the proper stage, such a charge.

Held, (*V*) *regarding the procedural matter of disjoinder of the cases of the two accused* (*the appellant and Stamatis*) :

(1) While the appellant (1st accused) was giving evidence in his own defence, the trial Judge, on the application of counsel for the second accused, without any objection by counsel for the appellant or from counsel for the prosecution, directed the disjoinder of the cases of the two accused, basing himself on section 75 of the Criminal Procedure Law, Cap. 155.

(2) In our view neither section 75 nor any other provision in the Criminal Procedure Law, nor any rule of practice, permitted the course adopted by the trial Judge, at that stage. As far as we have been able to ascertain such course is without precedent and amounts, in our opinion, to an irregularity in the proceedings.

(3) In view, however, of the fact that the conviction of the appellant has already collapsed on other grounds, it is not necessary to decide whether such irregularity has resulted in a substantial miscarriage of justice as suggested by counsel for the appellant.

Appeal allowed. Conviction and sentence quashed. Appellant acquitted and discharged.

Per curiam : In the present case, the appellant was committed for trial by the Assize Court on October 30, 1967. But the Attorney-General, had the case remitted for summary trial under directions made in the exercise of his powers under section 155 (b) of the Criminal Procedure Law, Cap. 155, which enables him to do so where he is of opinion that the case " may suitably be dealt with summarily under the powers possessed by a Court of summary jurisdiction ..... notwithstanding that such offence could not otherwise be triable by such Court ". We feel we must observe at this stage looking at the whole case in retrospect that in view of the nature of the charges, (including a conspiracy charge) against a Head of Department, in which his subordinates were the main prosecution witnesses, this, in our opinion, was indeed a case for trial by an Assize Court.

Cases referred to :

Kokkinos v. Police (1967) 2 C.L.R. 217 ;

Yannakis Kyriacou Pourikkos v. *Mehmet Fevzi* (*No.* 2), 1962 C.L.R. 283 ;

Periclis Ioannou Kolias v. *The Police* (1963) 1 C.L.R. 52 ;

Finnigan case in the newspaper " The Times " of the 15th February, 1968 ;

Michael Vassili Volettos v. *The Republic*, 1961 C.L.R. 169 ;

Koumbaris v. *The Republic* (1967) 2 C.L.R. 1 ;

Meitanis v. *The Republic* (1967) 2 C.L.R. 31 ;

Nocton v. *Ashburton* [1914] A.C. 932, at pp. 945 to 954, pp. 955, 956 and 957, per Viscount Haldane L.C. ;

Chesterfield v. *Janssen* (1750) 2 Ves. Sen. 125 ;

Derry v. *Peek* [1889] 14 App. Cas. 337 ;

Welham v. *The Director of Public Prosecutions* [1961] A.C. 103 (H.L.) ;

In re London Globe Finance Corporation Ltd. [1903] 1 Ch. 728, at p. 732 per Buckley, J. ;

Reg. v. *Moon* [1967] 1 W.L.R. 1536, at p. 1543 per Edmund Davies L.J. ;

R. v. *Bembridge* (1783) 22 State Tr. 1, at p. 155 et seq. per Lord Mansfield C.J. ; reported also in : 3 Doug. K.B. 327, at p. 332 ; 99 English Reports 679 ;

Rex v. *McMorran* (1948) Ontario Reports 384 (Court of Appeal) ;

In re Trusts Leeds City Brewery [1925] 1 Ch. 532, at p. 544 per Warrington L.J.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Michael Antoni Petri who was convicted on the 29th December, 1967, at the District Court of Nicosia (Criminal Case No. 8241/67) on 3 counts of the offence of fraud or breach of trust by public officer, contrary to section 133 of the Criminal Code Cap. 154 and on one count of the offence of attempt to induce payment of money by false pretences contrary to sections 298 and 366 of the Criminal Code and was sentenced by Loizou P.D.C. to one year's imprisonment on each of the fraud or breach of trust counts, the sentences to run concurrently and no sentence was passed on him on the count for the attempt.

Sir P. Cacoyiannis with *E. Efstathiou*, for the appellant.

L. Loucaides, Counsel of the Republic, for the respondents.

Cur. adv. vult.

The following judgment was delivered on the 23rd February, 1968 by :

VASSILIADES, P. : On the 9th January, 1968 this Court, in refusing the appellant's application for bail* pending the appeal, directed, in view of the circumstances of the case, an early hearing of the present appeal, which was heard for 10 days between the 6th and 19th February.

The Court having considered the appeal in the light of the learned and lengthy submissions of counsel has reached unanimously the following conclusions :

(*a*) that the convictions of the appellant on counts 10, 16 and 19, for breach of trust and fraud, contrary to section 133 of the Criminal Code, Cap. 154, have to be quashed, because the finding of the trial Court that the relevant conduct of the appellant was, as charged therein, wilful and fraudulent cannot be upheld ; and that his conviction on count 18 for attempt to induce payment of money by false pretences, contrary to section 298 of the Criminal Code—which is based on substantially the same facts as that of count 19—has also to be quashed for the same reason ; and

* *Note* : Vide judgment reported in this Part at p. 1 *ante*.

(*b*) that on the evidence adduced in this case the appellant cannot be convicted, under section 133 of the Criminal Code, of breach of trust through negligence.

Due to the nature of the case and the numerous points involved—this being the first case of its kind under the aforesaid section 133—it has been considered desirable to take the necessary time to write full reasons for our conclusions ; we propose announcing such reasons later.

In view, however, of the fact that on refusing bail an early hearing was ordered, we have felt duty-bound, in the interests of justice and the liberty of the citizen, to announce today our conclusions regarding the outcome of this appeal, so that the appellant—whom we have found entitled to be acquitted—shoud not be kept in prison during the time required to write the full reasons for the judgment.

In the result this appeal is allowed, all the convictions of the appellant are quashed and the sentences passed on him are set aside ; appellant is accordingly acquitted and discharged.

REASONS FOR JUDGMENT

The following reasons for the judgment of the Court delivered on the 23rd February, 1968 (reported hereinbefore, *vide* pp. 59–60) were delivered on the 13th April, 1968, by:—

VASSILIADES, P. : This is an appeal against a conviction in the District Court of Nicosia, on four counts ; three for fraud or breach of trust by public officer, under section 133 of the Criminal Code (Cap. 154) and one for attempt, under sections 298 and 366, connected with one of the other counts.

The charge on which the appellant was prosecuted jointly with another person, contained nineteen counts. On seven out of these, both accused were jointly charged. On the other 12 counts, the appellant was charged alone.

The first count charged both accused with conspiracy " to cheat and defraud the Government of Cyprus by inducing them (the Government) to part with money " to a firm of importers of veterinary medical preparations, of which the second accused was a partner, " by false representations and other false and fraudulent devices ".

This count was followed by five counts for fraudulent and false accounting contrary to section 313 of the Criminal

Code (Cap. 154), all concerning the appellant only ; five counts for fraud or breach of trust by a public officer contrary to section 133 of the Criminal Code, also concerning the appellant only ; seven counts for obtaining money by false pretences contrary to section 298 of the Criminal Code, mostly concerning both accused ; and one count for attempt to induce payment of money by false pretences contrary to sections 298 and 366 of the Criminal Code, concerning the appellant only.

In support of this formidable array of charges, the prosecution called 38 witnesses, whose evidence covers some 390 pages of the bulky record of this case, and produced a great number of exhibits (225 of them).

At the close of the case for the prosecution, however, Counsel for the appellant submitted under section 74(1)(*b*) of the Criminal Procedure Law (Cap. 155), that his client should not be called upon for his defence, as the prosecution had failed to make out a *prima facie* case sufficiently on any of the counts in the charge, to require a defence. The trial Judge accepted the submission for 15 out of the 19 counts in the information—including the conspiracy count—and acquitted the appellant accordingly ; but overruled the submission on four counts, on which he called upon the appellant to make his defence. These are counts 10, 16, 18 and 19 ; three of them (10, 16 and 19) for fraud or breach of trust by public officer under section 133 ; and one (count 18) for attempt to induce payment of money by false pretences under sections 298 and 366.

After taking appellant's evidence from the box and hearing a witness called for the defence, the learned trial Judge convicted the appellant on all four counts on which he called upon him ; and sentenced him to one year's imprisonment on each of the three counts under section 133 (to run concurrently). He passed no sentence on the count for the attempt.

Immediately after conviction, this appeal was taken on eight different grounds stated in the notice of appeal, which may be put in four groups ; (*a*) that the trial Judge's assessment of the testimony of the main witnesses, on whose evidence the conviction rests, was unreasonable and erroneous in the light of the evidence in the case as a whole ; (*b*) that in any event the evidence on record could not support a conviction on any of the four counts ; (*c*) the conviction was wrong in law ; and (*d*) that the course adopted by the

trial Judge in this joint trial, to conclude the trial of the appellant as if he were being tried alone, before taking the case of his co-accused, was an irregularity in the trial to the prejudice of the defence, resulting in a miscarriage of justice.

In view of the public importance of this case and the seriousness of its effects on the appellant, it was considered desirable to fix the appeal before a full Bench, as is the Court's practice in all such cases. After ten days hearing in the appeal, between the 6th and the 19th February, the Court reserved judgment and proceeded to consider the matter in the light of the extensive and elaborate submissions made by learned counsel on both sides ; on the bulky material in the form of evidence and exhibits before us ; and in the light of new evidence from a witness whom the Court heard at the opening of the appeal, on the application of the appellant, under section 25 (3) of the Courts of Justice Law (14/1960).

Finding ourselves unanimous as to the result, four days after the closing of the appeal, we delivered the Court's judgment on the 23rd February, quashing the convictions and acquitting the appellant. The reasons for our judgment we said that we would be giving later, which we now proceed to do.

Before going into the merits of the appeal, we think it useful to place the case in the background of the events which led to this prosecution, by giving as briefly as we can, the history of the steps which led to the charge with the 19 counts described earlier in this judgment.

It is common ground that following a report of the Government Auditors to the police, regarding irregularities concerning a store-keeper of the Veterinary Department, at the beginning of October, 1966, the police embarked on an investigation in the working of the department. At least one of the officers involved in the matter, was a main prosecution-witness in this case against the appellant.

Presumably to facilitate the police investigation, the appellant was interdicted from his duties in the Veterinary Department on the 7th November, 1966, and was kept away from his office ever since. More than two months later, on January 27, 1967, the police took a statement from the appellant ; and on the following day, January 28, he was charged before the District Court of Nicosia in Criminal Case No. 1136/67 filed on that day.

As the charge contained counts for forgery and malicious injury to Government property, triable by an Assize Court, a preliminary inquiry commenced in the District Court, on March 2, 1967, which was completed on March 16, resulting in the committal of the appellant for trial by the Assize Court of Nicosia, on June 5, 1967.

In the meantime and while that case was pending, the appellant was called at the police headquarters, where a senior officer conducting the investigations took a long statement from the appellant, continuing for several days, in circumstances to which we shall revert later in this judgment.

On May 22, 1967, a second prosecution was filed against the appellant in the District Court of Nicosia under No. 8241/67, containing the charges herein together with other charges triable by an Assize Court, for which another preliminary inquiry became necessary.

On June 5, 1967, when the appellant appeared for trial before the Assize Court, in the first prosecution, the necessary information was filed in the case, but the trial was adjourned until the next Assizes in October, presumably to have the preliminary enquiry on the second case completed in the meantime. This second preliminary enquiry commenced on September 11, 1967, and was completed on October 5, resulting in another committal of the appellant for trial by the Assize Court on October 30, 1967.

On the day of the trial, however, before the Assizes, counsel conducting the prosecution on behalf of the Attorney-General entered a *nolle prosequi* regarding all the charges in the first case (No. 1136/67); and the appellant was discharged accordingly. Regarding the second case, No. 8247/67, the Attorney-General had the case remitted for summary trial under directions made in the exercise of his powers under section 155 (*b*) of the Criminal Procedure Law (Cap. 155) which enables him to do so where he is of opinion that the case "may suitably be dealt with summarily under the powers possessed by a Court of summary jurisdiction .... notwithstanding that such offence could not otherwise be triable by such Court". This is the case in hand, the trial of which, commencing on November 6, 1967, on the charge-sheet described above, resulted in the conviction of the appellant on December 29, last, after a long and strongly contested trial. We feel that we must observe at this stage, looking at the whole case in retrospect that in view of the nature of the charges, (including a conspi-

racy charge) against a head of Department, in which his subordinates were the main prosecution witnesses, this, in our opinion, was indeed a case for trial by an Assize Court.

The appellant, as stated by the learned trial Judge in his judgment was, at the material time, the Director of the Veterinary Services in the Ministry of Agriculture and Natural Resources. He is a qualified Veterinary Surgeon, since 1952, appointed a Veterinary Officer, Class I in 1957, and promoted to his present post about seven years later, on May 1st, 1964. He is a married man, 42 years of age, with more than twenty years of Government service.

His duties in the Department, as stated in the judgment were " to be in charge of the Veterinary Department of the Ministry of Agriculture and Natural Resources and to perform any other duties which may be assigned to him ". He was, *inter alia*, responsible for the preparation of the specifications required for the invitation of tenders for the supply of drugs and other medical preparations, to his Department, and he was also one of the five members of the Tender Board whose duty was to consider such tenders, in accordance with the Government regulations in force, a printed copy of which is before the Court as exhibit 22. In February 1965, the appellant introduced in his Department the practice of a book now known as the register of tenders, where particulars were entered of matters connected with tenders, for consideration by the Tender Board. This book is exhibit 57 in the present proceedings.

We now come to the substance of the appeal. The first matter to consider is the evaluation of the testimony of the main witnesses whose evidence led to the conviction. These are two of appellant's subordinate officers in the Department. Their testimony constitutes the backbone of the prosecution, and the main evidence on which the conviction rests. They are witnesses Costas Economides (P.W. 20), a pharmacist who was at the material time performing the duties of store-keeper in the Department ; and Andreas Athanassiades, (P.W. 31) a clerk connected with the accounts and registers in the Department. The Judge's evaluation of the testimony of these witnesses, as it appears in his judgment, is that it comes from truthful and reliable persons, who have impressed him as such. Appellant's evidence on the other hand, which was materially different from that of the two prosecution witnesses in question, was discarded as " unreliable " and " untruthful ". The learned trial Judge went as far as to find that the appellant, in trying to extricate himself from his difficulties, did not hesitate to throw in a false alibi.

This evaluation of the evidence in question, was strenuously and ably attacked by learned counsel for the appellant, who went carefully and thoroughly into great detail of the material in the record, in order to show that the trial Judge's evaluation was wrong ; and that it led him to erroneous findings on the material facts, on which he rested the conviction.

The evidence of the two witnesses who impressed the trial Judge as truthful and reliable, was proved to our satisfaction and beyond all doubt, to be unacceptable as untrue in a very material part : the part which the Judge found to have been thrown in by the appellant as a false alibi. While, on the other hand, appellant's evidence in this connection, was positively established as correct.

The two witnesses in question stated positively, in definite terms that on the 2nd March, 1966, a Wednesday, the appellant worked with them for most of that morning, viz. from about 9 or 9.30 a.m. till 1 p.m. at the Veterinary offices, preparing the material for the Tender Board who were to consider tenders with numerous items, on the following morning. On the other hand, appellant's version on this point, was that during that morning, he had no opportunity to take part in the preparation of the material from the tenders for next day's Board, because he had to accompany on his first-day official calls an OP.EX (Operational and Executive) appointee to Government Departments and to the British High Commission, before he took up work in Cyprus.

The Operational and Executive appointee (OP.EX officer) in question, was Mr. R. A. Huck, Senior Research Officer in the Ministry of Agriculture of the Unied Kingdom and a member of the Royal College of Veterinary Surgeons, who came to Cyprus under the auspices of the Food and Agriculture Organization of the United Nations, in connection with the establishment of a laboratory to operate in relation to diagnosis and other work associated with laboratories.

As the appellant could not take part in the preparation of the tenders for next day's Board meeting, he asked, he said, the two witnesses in question, to get on with the necessary work without him ; and on the following day he requested both of them (one being a qualified pharmacist) to attend the meeting of the Tender Board so as to be available for any information which might be required by the Board regarding the tenders.

Mr. Huck resides abroad and his evidence was not available in Cyprus at the time of the trial. An application for taking his evidence under section 25 (3) of the Courts of Justice Law, 1960 (No. 14 of 1960) was granted on February 6, at the opening of the appeal ; and the witness, who had been brought out to Cyprus for the purpose, was duly examined as to his arrival in Cyprus on March 1, 1966, and his relevant movements the following morning, Wednesday, March 2, the day before the Tender Board meeting of the 3rd March.

In making our ruling on the application to hear this further evidence in the appeal, we said that the Court was unanimously of the opinion that the evidence was material and that the application should be granted. We also said that we would give our reasons in more detail later.

The circumstances in which this Court will entertain an application to receive evidence in a case on appeal, and will exercise its power to do so under section 25 (3) of Law 14 of 1960, were considered in several cases such as *Yiannakis Kyriacou Pourikkos* v. *Mehmed Fevzi* (No. 2) 1962 C.L.R. 283, and *Periclis Ioannou Kolias* v. *The Police* (1963) 1 C.L.R. 52. See also the *Finnigan case* (1968) The Times 15.2.1968. We need not take time by going further into this matter. It is sufficient to say that the necessary formalities having been duly complied with, we were satisfied that the circumstances of the case fully justified the application in the interest of justice.

The witness answering the questions put to him from both sides, stated to the Court his movements on that first day of his official work in Cyprus. His version of the events, given in a most convincing and satisfactory manner, provided the Court with the means to test and measure the correctness of the evidence from each side as to what actually happened on that morning; and to assess unmistakably in that connection, the credibility of the two prosecution witnesses, Economides and Athanassiades on the one hand, and of the appellant on the other. This evidence, which the Court gave full opportunity to counsel for the prosecution to check and rebut generally, or in any of its detail, remained uncontested, Counsel for the prosecution conceded that it was correct in preference to any prosecution evidence to the contrary.

We thus had at that early stage in the appeal, the means of testing the trial Judge's evaluation of the main evidence on which he reached his verdict. In the light of this fresh

evidence, it becomes unnecessary for us to deal here in detail, with the submissions made on both sides regarding the credibility of the two main prosecution witnesses on the one hand, and the credibility of the appellant on the other.

We now propose to consider the factual aspect of the case regarding the four counts in question. In relation to counts 10 and 16, there are two outstanding facts which, in our opinion, have been definitely established : (*a*) that the drugs offered by the film of Stamatis & Sons, one of the tenderers, were not in accordance with the specifications on the basis of which the tenders had been invited ; and (*b*) that the differences or discrepancies between the drugs offered by this firm and the specifications in the invitation for tenders, were apparent on a mere comparison of the samples which accompanied the firm's tender, and the specifications relating to such tenders. They could be detected by any person who could read the latin alphabet and cared to make the comparison of sample and specification. They are apparent on the exhibits before us ; and could certainly be detected by a qualified pharmacist, such as prosecution-witness Economides, who had been asked to do this work and was actually involved in the examination of the tenders.

The case of the prosecution at the trial, was that the appellant had studied the tenders on March 2, that crucial Wednesday, for almost the whole morning, together with witnesses Economides and Athanassiades. Therefore, the prosecution contended, he must have noticed the discrepancies between the tender of Stamatis firm and the specifications upon which the tenders were invited. His (appellant's) failure to disclose such discrepancies at the meeting of the Tender Board on the following day, March 3, they argued, was wilful and fraudulent ; especially as the appellant was a member of the Tender Board representing the Veterinary Department.

Witnesses Economides and Athanassiades were positive in their evidence that the preparatory work in question took place in the offices of the Department, for practically the whole of that Wednesday morning until 1 p.m. The prosecution invited the trial Court to accept that evidence, in preference to that of the appellant ; and to find accordingly.

Appellant's version on the other hand, was that he never had the chance to study the tenders on Wednesday because on that morning he was busy escording on his official calls, away from the office, the F.A.O. Expert, who had

arrived on the previous day. So he instructed, appellant stated, the appropriate officers in his staff, Economides and Athanassiades, to prepare the work for next day's Tender Board. They assured him that they had done so ; and the following morning he asked both of them to attend the Board meeting with him, because the witnesses had done the work the previous day, while the appellant was away from the office with Mr. Huck.

As we have already said, the trial Judge accepted completely the evidence of the prosecution regarding the events of that morning ; and disbelieved the appellant. According to the Judge's finding, not only the appellant had actually worked together with Economides and Athanassiades for the whole of that Wednesday morning, studying the tenders which he was now denying, but had also " thrown in as an alibi the story about taking round the F.A.O. Expert." This finding as well as the evaluation of the evidence on which the conviction on counts 10 and 16 mainly rests, have completely collapsed, in the light of the evidence of witness Huck, the correctness of which is not in dispute.

It is clear that once the appellant was disbelieved, wrongly as it has now been shown, on this point, he stood no chance of being believed at the trial that his non-pointing out, at the meeting of the Tender Board, the difference between specifications and samples, was not intentional and fraudulent as found by the Judge in convicting him on counts 10 and 16.

Counts 18 and 19 now. These arise from another meeting of the Tender Board on a subsequent occasion, about six months later, on September 12, 1966. The trial Court arrived at the conviction on these two counts mainly on the evidence of witness Ioannides, the Accountant-General who presided over that meeting of the Tender Board. This witness stated that what made him decide to award the contract on September, 12 to the same firm, Stamatis & Sons, instead of the other tenderer whose price was cheaper, was a statement made by the appellant at the Board-meeting that the vaccine supplied by Stamatis & Sons, was offered in smaller vials, which was preferable, he said, from the point of view of economical use of the vaccine. Witness Economides (P.W. 20) supported the Accountant-General that appellant made such a statement.

The appellant denied having made that statement in that context. He admitted that he mentioned by way of general remark, at some stage in the meeting, that smaller vials were some times preferable from the point of view of

economical use ; but that was not said for the purpose of securing the contract for Stamatis and Sons. The appellant was supported in this connection by witness Thrassyvoulides, a senior officer of the Ministry of Commerce and Industry, who was also a member of the Tender Board during the material period.

The trial Judge disbelieved the appellant on this point as well ; and treated the evidence of witness Thrassyvoulides as unreliable due to weak memory, as the learned Judge put it. We have not had the advantage of hearing the witness, but the record shows that he is now a man of 45 years of age who entered Government service at the age of 20 as a Treasury Clerk and has reached his present senior and responsible post, after serving in different capacities for about twenty-five years. He was definite as to what happened regarding the size of the vials and appellant's remark about it. And the Judge did not find the witness untruthful.

Be that as it may, however, it is abundantly clear from the judgment, that the trial Judge found that the appellant acted wilfully and fraudulently in relation to all the four counts in question ; and that he did so knowingly and intentionally. The actual evidence of the appellant was, therefore, of vital importance in deciding the issue of his guilt or innocence in respect of all the counts in the charge. All the question of his credibility as a witness was a matter which went to the root of the whole case.

Had the appellant not been regarded by the trial Court as a deliberate liar on his oath—inventing, even, a false alibi about the 2nd March, 1966—then the appellant's evidence as to how the tender of Stamatis & Sons for the vaccines in question came to be accepted by the Tender Board on the 12th September, 1966, coupled with the evidence of witness Thrassyvoulides, should have raised, at least, a reasonable doubt in the mind of the trial Judge as to whether or not the appellant did make a statement, regarding his preference for smaller vials, in the context suggested by the Accountant-General (*i.e.* to induce granting the contract to Stamatis & Sons) or in the context alleged by the appellant, and witness Thrassyvoulides (*i.e.* by way of general observation). Especially when one bears in mind that the only other tender for the supply of the said vaccine was admittedly not in compliance with the terms of the tender, while the vaccine offered by Stamatis had been successfully used for mass vaccinations, by the Department, in the preceding two seasons.

Moreover, had the appellant not been regarded already as a lying witness, then his good faith in the matter would have been found to be decisively borne out by the fact that on his own initiative he proceeded, later, to rescind the contract granted to Stamatis & Sons for the vaccines in question ; and he did so for lack of funds even though he could apply and obtain the necessary funds for the purposes of a contract already granted by the Tender Board.

It is convenient at this stage to deal with another matter concerning appellant's credibility. Early at the trial when the question of the admissibility of his statement to the Police was being considered, the appellant was found by the trial Judge to have given false evidence. This finding was strongly attacked in the appeal. Counsel pressed a submission that the trial Judge erred in deciding on the credibility of the appellant at that early stage of the trial, in a manner which made it extremely difficult for him to come to a different conclusion regarding appellant's evidence on the substance of the case. We think that there is merit and considerable force in this submission.

Trial Judges as a rule, decide the issue of the admissibility of a statement or confession, when raised in a side trial within a trial, by ruling on the objection. A finding on the question whether the statement was free and voluntary is all that is usually needed at that stage. There are numerous cases with such rulings. Cases where there may be several statements by the accused with a side trial on the admissibility of each of them. A useful example is *Michael Vassili Volettos* v. *The Republic*, 1961 C.L.R. p. 169, where the trial Court had no less than eight such objections to decide, one after another in the course of a murder trial. Demolishing the credibility of the accused by going further than necessary in such a ruling, may well strike at the root of the whole defence in the case, and should be avoided.

After hearing three police officers (one of them being Superintendent T. Demetriou—referred to by the trial Judge as Phanis) on the issue of the admissibility of a statement obtained from the appellant (now exhibit 14) which the prosecution sought to put in as part of their case, the trial Judge took the appellant's evidence on the same issue, and reserved his ruling. He delivered it two days later in the form of a considered decision running for ten pages of the record. There was a difference in the version of the prosecution and that of the defence as to the circumstances in which the statement was obtained. The appellant had

already put himself in the hands of his lawyers and was acting on their advice. We shall have to deal later with the taking of this statement. What we are now concerned with, is the learned Judge's ruling, and the way it affected the whole case by the Judge committing himself regarding the credibility of the appellant at that early stage of the trial.

> " The accused is neither naive nor illiterate, the Judge said in his ruling. He is a man of education and standing with long experience in Government service. He had by that time received due advice as it appears from the cable sent by his lawyers and from the statement he wanted to be recorded .
>
> What I believe that transpired between the accused and Phanis at this particular meeting was as stated by Phanis and that the accused being a person of standing and not devoid of any integrity, was not prepared to pursue his lies that Phanis had trapped him . . . when his statement was to his knowledge untrue and that the two other officers there knew that it was untrue, hence he continued for two more sessions to answer questions being certain or optimistic that there would be nothing incriminating against him."

After such evaluation of his client's credibility on the record, as well as in the Judge's mind, counsel argued, the fate of the defence at the trial, resting mainly on appellant's credibility, was sealed.

We shall deal with the admissibility of appellant's statement, exhibit 14, later. But we can say that after hearing counsel on both sides in this connection, we feel that there do exist serious grounds for at least doubting the correctness of the view taken by the trial Judge regarding the evidence of the appellant in the side-issue, and his credibility in connection thereto. We are particularly disturbed by the fact that the Judge accepted the version of the investigating officer, witness Demetriou, in preference to that of the appellant regarding the latter's refusal to make a statement, on the advice of his lawyer, in any matter concerning him ; although the officer admitted that he failed to record, as it was his duty to do, next day (when the statement was to be continued) appellant's protest that he had been misled by being told that the investigation did not concern him ; the exact terms of such protest being of far reaching repercussions in this case. We, therefore, think that deciding at that stage the credibility of the appellant, as he did, the trial

Judge formed a view of doubtful correctness which affected seriously his judgment on other vital issues involving the credibility of the appellant.

We must now deal as shortly as we can, with the taking of this statement, exhibit 14 : The police investigations commenced in October, 1966. The appellant was interdicted on November 7, 1966. A statement was taken from him on January 27, 1967, i.e. about two-and-a-half months after the police had been conducting investigations in a case of this nature, under the supervision of experienced police officers. As a result, a prosecution was instituted with serious charges against the appellant on January, 28 1967, i.e. the day after the taking of a statement from him.

A few days later, on February 7, 1967, the appellant was called at the police headquarters by the same senior officer, for a statement in connection with the investigations in what was described to the appellant as a different case. Was the appellant in those circumstances, a person under suspicion that he was involved in this second case ? The answer to this question must, we think, be in the affirmative. If so, fairness, which is firmly embedded at the root of our law governing criminal investigation, requires that in such circumstances the suspected person should be warned against the danger of making statements to his prejudice, unless he freely and voluntarily wishes to do so.

In the present case, when called at the police headquarters on February 7, the appellant was not informed correctly or adequately of the reason for which he had been called ; and he was not informed that he was suspected of complicity in the commission of the crime, in connection with which he had been called to the police. According to the officer's own version from the witnessbox, the appellant, on arrival, asked the Superintendent, what was he wanted for, adding that he had instructions from his lawyers not to say anything, as his case was pending before the Court and whatever he had to say it will be said there. The Superintendent intervened, as he admits, stating to the appellant that the case for which he had sent for him, had nothing to do with the case pending before the Court. He had sent for him, the Superintendent added, to obtain a statement from him in connection with a conspiracy for the supply of drugs to the Veterinary Department which he (the officer) was investigating. And he administered the formal caution that the appellant was not bound to say anything unless he wished to do so. Thereupon, according to the officer's version,

the appellant replied that so long as this had nothing to do with the court-case against him, there was no reason why he should not make a statement.

The first four and a half pages of the statement were taken on that day. It was then interrupted to be continued the following morning. In the evening of the same day, February 7, appellant's advocate sent to Superintendent Demetriou a telegraphic protest the text of which exceeds one hundred words, in which the advocate made his client's position perfectly clear. His client was making a statement upon the Superintendent's assurance that the investigation had nothing to do with the case against him. The telegram is exhibit 1 in the side trial, and speaks for itself.

Notwithstanding these protests and clarifications, the taking of the statement continued on February 8, in the form of questions and answers, as the appellant was advised by his lawyers to facilitate the police investigation in matters of his Department, so long as it had nothing to do with any case where he was personally involved.

The taking of the statement was continued on the whole of that day, morning and afternoon ; and contains questions and answers covering fifteen full pages in close handwriting. It is obvious from the questions that these were carefully thought out and prepared in advance ; and that some of them required a long answer from memory, referring to complicated matters and records.

When the statement was to be continued on February 13, the appellant reiterated the position described in his advocate's telegram, and said that on the latter's advice, he was not going to answer any more questions from the investigating officer, as whatever more he had to say it will be said in Court.

One would think that that would be the end of this statement. But it was not so. The officer came out with his next written question. The answer was a reference to the previous one. And this went on with the investigating officer's written questions one after another; and appellant's identical answer during the rest of that session ; and during its continuation on the next day until, apparently, the list of questions was exhausted. The appellant declined the officer's request to sign the statement on the ground, duly recorded now, that his lawyer had so advised him, as this was not a voluntary statement.

When the prosecution sought to produce it as part of their case, in appellant's trial about nine months later, objection was raised by the defence, on the same ground. But the trial Judge ruled that it was a voluntary statement ; and admitted it as evidence for the prosecution, giving the long ruling referred to earlier.

And the question now arises : Was that statement taken or used in the interest of justice ? In the circumstances of this case, we are of opinion, that fairness in the interest of justice required, that apart of the formal caution, the appellant should have been told that the new investigation concerned him as a suspect ; and therefore the trial Judge should have excluded the statement in the exercise of his discretionary powers. As Lord Devlin has put it in his book The Criminal Prosecution in England (1960) at pp. 38–39 :

> " The essence of the thing is that a judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence notwithstanding that there is no rule which specifically prohibits it : if he is not so satisfied he will admit the evidence even though there may have been some technical breach of one of the Rules. It must never be forgotten that the Judge's Rules were made for the guidance of the police and not for the circumscription of the judicial power."

This Court has time and again warned trial Judges against the danger of exercising their discretion in favour of admitting such statements, made in circumstances which apparently place the maker of the statement (a person facing a criminal prosecution) at an unfair disadvantage before a police investigator. The attention of the trial Judge was drawn in this connection, to a recent case (*Costas Kokkinos* v. *The Police* (1967) 2 C.L.R. 217) where this matter was discussed on appeal with the result that the statement was found to have been wrongly admitted. Nevertheless, the trial Judge in the present case, admitted the statement, basing his ruling on the view that this was " not a case falling withing that class of confessions ".

This case presents one more instance of the need for caution, with which trial Judges should approach the issue of the admissibility of such statements when the prosecution seek to produce them as part of their case. Furthermore, the proper exercise of the judicial discretion in this respect, would tend to discourage unfair and oppressive abuse of power by over-zealous investigating officers.

We now come to deal in some detail with the evidence regarding the events at the two meetings of the Tender Board where the appellant is alleged to have committed the offences of which he was convicted. Counts 10 and 16 arise from the meeting of the Tender Board on March 3, 1966 ; and counts 18 and 19 from the meeting of September, 12 1966.

Count 10 alleges that the appellant " wilfully and fraudulently omitted to disclose " to the Tender Board that the tender of Stamatis & Sons was not in accordance with the specifications on which the tenders were invited.

Count 16 alleges that he (the appellant) likewise omitted to disclose to the same Board that the tender of the tenderer in question was again not in accordance with the specifications, in respect of another medical preparation.

Count 18 is the attempt count arising from the September meeting of the Tender Board and is connected with the next count ; and *Count* 19 alleges that the appellant fraudulently and wilfully gave false particulars to the Tender Board regarding a tender of Stamatis and Sons for the supply of 60,000 doses of a veterinary vaccine, of the value of about £2,700. The false particulars alleged, are that the tender was for the supply of the vaccine in smaller vials (which was an advantage) than those offered by the other tenderer, whose price was cheaper.

It is common ground that the first Board (3rd March) consisted of four senior officials of different Government Departments and of the appellant, representing his Department. It was presided by an accountant, witness Nathanael (P.W. 21) representing the Accountant-General at the Main Tender Boards for a couple of years prior to this occasion (p. 220). Present were also the secretary of the Board and witnesses Economides (P.W. 20) and Athanassiades (P.W.31). Both had been asked by the appellant to study and enter the tenders in the register the previous day and were requested to attend the Board meeting for any explanations that might be required, as no more than six items had actually been completed in the register.

The tenders were for 56 items as specified in the invitations for tender No. 1/66, 2/66 and 3/66 ; and there were several tenders. The minutes of the Board-meeting, as they appear in exhibit 25 (Main Tender Board—Minute Book) show that the Board considered on that day, tenders

for the 56 items in question. Contracts were awarded to no less than twelve different firms including Stamatis & Sons.

We are concerned with two of these items in count 10 for a preparation referred to as imofuroxone ; and two items in count 16 for a preparation referred to as chlortetrazone. All these four items were among those awarded to Stamatis & Sons. Their description on the samples accompanying the tender was, admittedly, not according to the specifications.

The case for the prosecution was that the appellant, on whom the other members of the Board relied for such information, did not inform the Board of such difference. In fact it is now established that in the typing of the specifications, the composition of the item in count 10 was for 98% " Furazolidone " (highly poisonous apparently) and 2% oligoelements ; while the drug actually required was one with 2% " Furazolidone ". This is a useful indication as to whether this was a case of a wilful and fraudulent omission to inform the Board ; or, a case of not knowing sufficient about the samples, due to his not taking part in the preparatory work on 2nd March, 1966.

As regards the drug in count 16, chlortetrazone, there was no mistake in preparing the specifications and the difference between them and the samples offered by Stamatis was again obvious. They were apparent on the sample's label, as one can see on the exhibit ; and as the Judge found.

None of these differences was discussed at the meeting. Probably nobody had noticed them. In fact items were discussed at the Board meeting ; and samples went round handed over by the pharmacist to the appellant and by the latter to other members of the Board. But none of the differences in the counts in question were actually discussed.

Appellant admitted that he did not point out these differences to the Board. His evidence that he did not have them in mind, having taken no part in the preparatory work the previous day, was not believed by the trial Judge. His explanation that he was away from the office that morning, taking the COMEX Director round, was also disbelieved as a " thrown in alibi ". The Judge preferred the evidence of witnesses Economides and Athanassiades. They stated that the appellant had worked with them on the tenders almost the whole of that morning.

We have already dealt with this evaluation of the relevant evidence by the trial Judge. The evidence on which the Judge found that the appellant " wilfully and fraudulently and with full knowledge of their consequences" omitted to disclose to the Board the differences in question, as pointed out earlier, has completely collapsed. There remains, however, the question of appellant's failure to be sufficiently prepared with the tenders concerning his Department, when he attended the Board meeting on March 3 ; sufficiently prepared as to be able to point out to the Board such differences. We shall deal with this matter later.

We must now proceed to consider the allegation in count 19, that the appellant " fraudulently and wilfully " gave false particulars to the Tender Board at their meeting on September 12, 1966, regarding the tender of the second accused for the supply of 60,000 doses of a certain vaccine. The attempt charged in count 18, to procure fraudulently, payment of £2,700 to the second accused as supplier, by false pretences, arises from the same facts.

The false pretences charged, are that the vaccine offered in this tender was " in vials of smaller quantity " than those offered by a competitor with a cheaper price.

On this occasion the Tender Board consisted of the Accountant-General personally (P.W. 5) two of the members present in the March meeting (Thrassyvoulides (D.W. 2) and Josephides) and the appellant ; four in all. The secretary of the Board (P.W. 14) and witness Economides (P.W. 20) were also in attendance ; the latter at appellant's request.

The minutes of the meeting in the Minute Book of the Main Tender Board (Exhibit 26 now) is quite short. After giving the names of the members present (omitting that of the appellant) it reads :—

" at prices tendered. { "Item 2 to tenderer No. 1 Messrs. Stamatis
Item 3 " "
Item 4 " "
Item 7 " "
Item 8 " "
Item 11 " "
Item 10 to tenderer No. 5 D. I. Shiiukiu-roglou.
No award for other items. "

And there follow the four signatures including that of the appellant. One of the items awarded to Stamatis & Sons

(item 3) is that for the supply of 60,000 vaccines valued at about £2,700. While at this point, we may mention that although the award was communicated to the tenderer and a formal contract was signed, it was subsequently cancelled at the instance of the appellant, owing to lack of the necessary funds. Hence the charge for attempt only.

The conviction on these two counts, rests on the finding that at the Board meeting the appellant "recommended in respect of item 3 of tender 2/66, that the tender be awarded to the more expensive one" mainly for the reason that the vaccine offered by Stamatis & Sons was in smaller vials than those of the competitor tenderer (The Pharmaceutical Organization) which was offered in vials of 250 ml. The trial Judge found that the appellant made this representation knowing it to be false and with intent to defraud, his object being to procure the contract for the supply of the vaccine to Stamatis.

As we have already stated the appellant denied making such a statement in this context. He admitted referring to the size of the containers, in reply to a question by witness Thrassyvoulides (D.W. 2) in a different context; and when such a statement could not have affected the decision regarding this item in the tenders.

There were two tenders for this item ; one from Stamatis' firm, exhibit 117 ; and one from a competitor firm (The Pharmaceutical Organization) exhibit 187. The former was offered at 45 mils per dose of 6 mls; the latter, at 39 mils per same dose. No size of container was mentioned in the former; "in bottles, of 250 mls" was stated in the latter. The suppliers of the former were a known French firm ; the latter came from an Italian manufacturer unknown to the Department.

It is common ground at this stage, that the French firm and the quality of their vaccine was well known to the Department. While the Italian vaccine and its makers were unknown ; moreover that the tender was not accompanied by the required certificates from the country of origin.

As to the size of the containers, the literature accompanying the French vaccine gave it in bottles of 50 ml., 100 ml., and 250 ml. (evidence of P.W. 5). And while according to the evidence of the Accountant-General, the size of the vials and appellant's statement in connection thereto, was one of the matters that weighed in his mind in deciding on this item, nothing was written in the minutes about it ;

and what is perhaps more significant in this connection, is that in the Accountant-General's letter of September 15, to the Veterinary Department, to inform them officially of the awards made at the meeting of September 12, nothing is said about the size of the containers of the vaccine in question (item 3) unlike other items, where the size of the containers is specified. (*Vide* exhibit 104). Moreover, nothing was said about it in the contract.

The other member of the Board who gave evidence on the point (D.W. 2, Thrassyvoulides) supported the appellant that the size of the vials of the French supplier was not put forward by the appellant as the main factor for deciding to award the contract to Stamatis & Sons. The third member Mr. Josephides, who gave a statement to the police was not called. He could not remember anything supporting the prosecution case. This was fairly conceded at the hearing of the appeal.

In the light of the evidence on record, and particularly the relative exhibits, we are inclined to the view that what weighed with the Tender Board in deciding to award this expensive item to the tenderer with the higher price was the fact that the French vaccine was a known and tried product from a known and reputable firm, while the other product was not, and the tender was not in order. It could well be recommended on this ground by the appellant ; and in fact it was so recommended. Other incidental talk was apparently not considered of sufficient importance to make anybody suggest postponing a decision (as it was done for other items where the Board made " no award " on that day) ; or, to have the size of the container included in the minutes to justify the decision made in favour of the more expensive vaccine. So that, apart of the fact that the conviction on counts 18 and 19 could not be sustained in view of what was said earlier regarding the credibility of the appellant, we are of the view that it could not be safely and reasonably concluded by the trial Judge that the appellant could have made the statement regarding the size of the vials as stated to have been understood by witness Joannides (P.W. 5) *i.e.* with fraudulent intent. Thus the verdict in respect of these counts was unwarranted and unsatisfactory. (*Koumbaris* v. *The Republic* (1967) 2 C.L.R. 1 ; *Meitanis* v. *The Republic* (1967) 2 C.L.R. 31).

A thing which has also given rise to considerable doubt regarding what happened at the meeting of the Tender Board of the 12th September is the absence of minutes

compatible with good administration. We feel that we should make it clear that this Court are of the opinion that a collective executive organ with such important responsibilities as this Tender Board carried, makes collective decisions, the responsibility for which is shared collectively by all its members. None can shift his responsibility on other members by saying that he acted on the other's opinion (expert or otherwise) unless this is duly recorded in the minutes so that greater or lesser responsibility may rest where it lies according to the signed record.

We may now proceed to deal with the legal aspect of the case, as counsel for the prosecution submitted that even if the conduct of the appellant at the Tender Board meeting of the 3rd March, 1966, was not intentional as found by the trial Judge, nevertheless, the appellant could still be found guilty of fraud or at least breach of trust within the meaning of section 133 of the Criminal Code (Cap. 154), especially in view of his failure to be sufficiently prepared for such meeting and his failure to point out at the meeting the differences between the specifications and the samples of Stamatis & Sons.

(*A*) "*FRAUD*" *in section* 133.

Section 133 of the Criminal Code, Cap. 154, reads as follows :

> "133. Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a misdemeanour."

Counsel for the prosecution submitted that the expression "fraud" in section 133 means that the standard of conduct expected on the part of a public officer, is higher than that expected from an ordinary person ; and he invited the Court to hold that no *mens rea* was necessary in proving fraud under section 133, same as in the case of fiduciary relationship where fraud is deemed to have been proved without actual fraudulent intent.

In support of that proposition he cited Snell on Equity, 24th edition, page 504, and the case of *Nocton* v. *Ashburton* [1914] A.C. 932, at pages 945 to 954. In short he invited this Court to hold that Fraud in section 133, does not necessarily connote any moral obliquity, as in the case of fraud in the strict sense according to the common law, but it is simply a generic term signifying conduct which falls short of the standard, which equity prescribes.

Before we consider whether it would be right in the case of a statutory offence in the Criminal Code to adopt the equity view of fraud, as opposed to the common law view, it is, we think, necessary to consider in some detail the learned judgment of Viscount Haldane L.C., in the *Nocton* case. It would appear that, before that case was decided by the House of Lords in 1914, there was considerable confusion as to these two different views of fraud which was settled by the profound historical knowledge of Viscount Haldane.

In the *Nocton* case it was held that *Derry* v. *Peek* [1889] 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive jurisdiction of a Court of Equity. Such actions, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising through a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties (see headnote in the *Nocton* report, at page 932).

It was alleged in that case that Nocton, a solicitor, had improperly and in bad faith advised and induced Lord Ashburton to release from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for £15,000 in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, while it was in fact insufficient; and that loss, both of security for the principal sum of £65,000 and of interest had occurred in consequence of the release. The trial Judge found that, although the respondent "fell far short of the duty which he was under as solicitor" to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. Viscount Haldane L.C. in his Judgment said (at page 956):—

> "When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a

mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction, of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of Lord Hatherley L.C. in *Burdick* v. *Garrick* [1870] L.R. 5 Ch. 233, the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands."

And at page 957 :

> " It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence."

The form of procedure, according to Viscount Haldane, was the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. Moral fraud need not be proved in such a case in a Court of Equity as at law, where it is necessary for the plaintiff to prove moral fraud in order to succeed in an action for deceit (page 946). In *Derry* v. *Peek* it was clearly laid down that in an action of deceit it was necessary to prove actual fraud, that is to show that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true, might be evidence of fraud ; but the inference could be displaced by showing that it was made under an honest impression that it was true. Incidentally, this definition of fraud at common law appears to have been substantially reproduced in our Civil Wrongs Law, Cap. 148, section 36.

In cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times. But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that court as cases of fraud, yet did not necessarily import the

element of *dolus malus*. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in *Chesterfield* v. *Janssen* (1750) 2 Ves. Sen. 125. The books are full of cases in which the Court of Chancery has dealt with contracts in respect of which it was never necessary to allege or prove that the defendants were wilfully guilty of moral fraud in what they had done (pages 952-3).

According to Viscount Haldane, prior to *Derry* v. *Peek* the distinction between the different classes of case had not been sharply drawn ; and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say that he was ignorant (at page 955).

Having considered this masterly review of the law by Viscount Haldane in his speech concerning the meaning of the term " fraud " at common law and in equity respectively, we are not prepared to accept the view that in the case of the criminal offence laid down in section 133 of our Criminal Code, which originates in the common law (see *R.* v. *Bembridge* infra) the meaning of the term " fraud " is that employed by the Court of Chancery as distinguished from that applied at common law. We take the view that the term " fraud " in section 133 imports the element of *dolus malus*, of moral fraud, of the dishonest mind of a person who so acts intentionally.

This view is strengthened by English cases construing the expression " intent to defraud " and " intent to deceive ". Such cases tend to show that intent to defraud imports something graver than intent to deceive. In *Welham* v. *The Director of Public Prosecutions*, [1961] A.C. 103 H.L., reference was made to the following dictum by Buckley J. in *In re London Globe Finance Corporation Ltd.* [1903] 1 Ch. 728 at page 732 :

> " To deceive ", he said, " is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit ; it is by deceit to induce a man to act to his

> injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind ; to defraud is by deceit to induce a course of action."

In the *Welham* case Lord Denning (at page 133) said : " ' To deceive ' here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction ". That was a case on the construction of the expression " intent to defraud " which occurs in the English Forgery Act, 1914, section 4 (1) ; and in section 331 of our Criminal Code (forgery). The *Welham* case was recently considered and applied in *Regina* v. *Moon* [1967] 1 W.L.R. 1536, a forgery case. After dealing with the matter and referring to several cases on the point, Edmund Davies L.J. delivering the judgment of the Court of Appeal, is reported to have said (at p. 1543) :—

> " It may in certain cases be indeed difficult to draw a distinction between the two types of intent, but an attempt must be made and most certainly a jury must not be told, as this jury was repeatedly and expressly told, that either intent was sufficient."

In the light of the foregoing we have no difficulty in holding that the appellant could not have been convicted of fraud under section 133.

(*B*) " *BREACH OF TRUST* " *in section* 133 :

We now come to the expression " breach of trust " in section 133 of our code. Counsel for the prosecution submitted that this expression in section 133, means breach of confidence or misconduct, on the basis of the case of *R.* v. *Bembridge* (1783) 22 State Tr. 1 ; and not a breach of trust in the equity sense of that expression. He further submitted that both motive and intention were irrelevant ; and that they were not necessary ingredients of the offence under section 133.

Counsel further argued that, if his submission as to the construction of the term " fraud " under section 133 were not accepted, the conviction on counts 10 and 16 could be supported as breach of trust on the basis that the appellant " wilfully " but not " fraudulently " omitted to disclose to the other members of the Tender Board the discrepancies between the specifications and the samples submitted by Stamatis & Sons. Counsel further submitted that, even if this Court did not find that the appellant's convictions

under counts 10 and 16, for " wilfully " omitting to disclose, could be supported, this would be a proper case for the Court to convict the appellant after amending the particulars in counts 10 and 16 to read : " . . . that he negligently and in breach of his duties towards the Tender Board he failed to disclose, etc. ". He conceded, however, that if the Court convicted the appellant of negligence, on these two counts, as amended, such conviction would not justify imprisonment.

In England " any public officer is guilty of a common law misdemeanour who commits a breach of trust, fraud, or imposition in a matter affecting the public, even although the same conduct, if in a private transaction, would, as between individuals, have only given rise to an action " (10 Halsbury's Law, 3rd Ed., page 618, paragraph 1162). Six cases are quoted in support of that statement of the law in Halsbury's Laws (note (t)), which we shall proceed to consider.

The leading case is that of *R* v. *Bembridge* (1783) 22 State Tr. 1, at page 155 *et seq.*; 3 Doug. K.B. 327, at page 332 ; also reported in 99 English Reports 679. The facts briefly were that Bembridge was an accountant in the office of the Receiver and Paymaster-General of the Forces and he was charged and found guilty of *wilfully and fraudulently* refusing and neglecting to disclose to the Auditor any charges upon a former Receiver and Paymaster of the Forces which had been omitted from the accounts, although he knew that several sums of money had not been included in the said accounts ; and that he permitted and suffered the Auditor to close the final accounts without the said sums having been brought into the account. It will thus be seen that that was a clear case of fraud and not a case of breach of trust. Lord Mansfield in the course of his judgment on the motion in arrest of judgment said : " The objection then is, that at most this amounts to a breach of trust, a concealment, a fraud of a pecuniary nature, which is a civil injury, and therefore not indictable ; that he is accountable—an agent, a trustee that embezzles money, or by neglect suffers it to be lost, is accountable,—for a civil injury, and not for a public offence " (22 State Trials, at page 155). Pausing there, it should be noted that Lord Mansfield refers to a trustee who embezzles money or by neglect suffers it to be lost, and who is then accountable.

Further on in his judgment Lord Mansfield says that there are two principles which seem to him clearly applicable to that prosecution. He says : " The first I will venture

to lay down is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the King for his execution of that office ; and he can only answer to the king in a criminal prosecution, for the King cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office . . . " ; and he goes on " there is a precedent in Vidian's Entries, an information against the *custos brevium* for so negligently keeping the records of the court that one of them was lost ; had that been the steward of a manor, who had lost one of his lord's rolls, an action would have laid ; but the duty of this office concerning the public, it was a matter of an information, and yet the office was appointed by the chief justice, not constituted by the King."

" There is another principle too ", Lord Mansfield said " which I think applicable to this prosecution, and that is this ; where there is a breach of trust, a fruad, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the King and the public (I use them as synonymous terms), it is indictable ; that is another principle of which you will make the application to the present case, without my losing time in doing it " (page 156). In support of that second principle Lord Mansfield quotes the following authorities :

(*a*) In the reign of Edward III an indictment would lie for an omission or concealment of a pecuniary nature, to the prejudice of the King ; and, therefore, in 27 Assize, Placito 17, it was presented that a person had levied 100 marks of the county for the array of certain archers, which money had never come to the profit of the King ; had this been between subject and subject, it would have been an action for money had and received ; that would have been no crime . . ; but concerning the public—concerning the King—so long ago as the reign of Edward III, it was held to be indictable ;

(*b*) Lord Coke says (in first Rolle's Reports) that, either the collector for murage or any other, who collects anything *pro bono publico*, if he does not apply it accordingly, he may be indicted.

Lord Mansfield further refers to another authority (6 Modern, folio 96) where the court says that any public officer is indictable for " misbehaviour in his office " (page 157).

Reverting to section 133 of our Criminal Code, which provides that any public officer who "in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of misdemeanour", this would seem to embody the second principle laid down in Lord Mansfield's Judgment in substantially the same words; that is to say, that a public officer is guilty of a misdemeanour who commits "any fraud or breach of trust" affecting the public. In the following section 134, there is express provision for the punishment of a public officer who wilfully neglects to perform any duty which he is bound by law to perform. Compare also the offence of "abuse of office" under section 105 of our Criminal Code, and "false accounting by public officers" under section 314.

The only case cited to us by respondent's counsel concerning breach of trust through negligence by a public officer in the discharge of his duties and affecting the public, was a Candian case—*Rex* v. *McMorran* (1948) Ontario Reports 384 (Court of Appeal). As the full report was not available in Cyprus we caused a photostat copy to be brought over to Cyprus which we made available to both sides to enable them to make their submissions on the point.

The Canadian section under which the accused was charged was section 160 of the Canadian Criminal Code, R.S.C. 1927, c.36, which was substantially the same as section 133 of our Criminal Code. The Canadian section read as follows :—

> "Every public officer is guilty of an indictable offence and liable to five years' imprisonment who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud of trust would have been criminal or not if committed against a private person."

In the *McMorran* case the Ontario Court of Appeal construed the term "breach of trust" in the equity sense of that expression, and not as breach of confidence. It was held by that Court that the evidence established that the breach of trust on the part of the accused was not caused by what is termed "ordinary negligence", but that the acts of the accused were "premeditated, deliberate and intentional". The Court, however, considered at some length the ingredients of the offence of breach of trust by a public officer in the discharge of his duties and affecting the public, and expressed the view that a breach of trust by

such officer is an offence under section 160 of the Code, even though it is caused by ordinary negligence which, as between individuals, would found only an action for damages; but they held that the trial Judge's direction to the jury on this point was unnecessary since the acts of the accused were, as already stated, clearly shown to have been premeditated, deliberate and intentional.

The accused was an Allocations Officer of the Wool Administration of the Wartime Prices and Trade Board. He has been appointed in 1941 as a technical adviser to the office of Wool Administration, under the Government Wartime Prices and Trade Board, and in 1945 a suit-priority scheme was instituted to regulate and control the distribution of cloth available to the public according to a system of priorities. The accused was charged with the task of administering such scheme and issuing such priorities. In a written statement, which was admitted in evidence, the accused admitted that he had shown a preference, over other firms using textiles, to his own business (carried on under another name) in allocating textiles to it for his own benefit. The Court of Appeal held that *mens rea* was a necessary ingredient of the offence under section 160 of the Canadian Criminal Code and found that the accused 's admission " was sufficient to constitute what is known in law as *mens rea* ", and that the intention on the part of the accused to act contrary to his duties was undoubtedly clear to the jury from the evidence adduced at the trial.

The Court of Appeal in the *McMorran* case, after referring to the definition of breach of trust given in Underhill on Trusts and Trustees, 9th edition (1939), page 3 said that " A trustee is liable for loss caused by his negligence, as, for instance, if a trustee neglects to sell property when it is his duty to do so, he is answerable for any loss sustained by the trust estate ", and approved the trial Judge's direction on the question of breach of trust through ordinary civil negligence. They went on to refer to the statement in Halsbury's Laws under the heading " Breach of Trust, etc., by Public Officer " (to which we have referred earlier in this judgment), and to quote from the judgment of Lord Mansfield in the *Bembridge* case ; and they concluded by saying that in the " present case (*McMorran case*), the matter of breach of trust caused by ordinary negligence, that is to say, neglect of duty giving, in ordinary or usual circumstances, merely a right of action for damages, is not a material factor", as the acts of the accused were premeditated, deliberate and intentional.

Reverting to the present case we would observe that in the case of the Government Tender Board, of which the appellant was one of the members at the material time, and of which the Accountant-General of the Republic or his representative was the Chairman, the question which arises is whether there is a trust binding the members of that Board, including, of course, the Chairman. If there is such a trust then all the members are deemed to be trustees who owe a duty to the Government (which includes the public). But such members do not owe a similar duty to one another. This answers the submission of respondent's counsel that the appellant owed a duty to the other members of the Board to inform them on technical matters and that he failed in that duty by omitting to disclose to them certain differences between the specifications and the tenders made by a particular tenderer (counts 10 and 16).

But, assuming, without deciding, that there is a trust in the present case, the next question would be, did the appellant commit a breach of trust ?

Counsel for the prosecution relied on the dictum in the *McMorran* case that ordinary negligence would suffice to establish breach of trust under section 133. It might well be said that in dealing with a statutory offence in our Criminal Code, ordinary negligence would not be sufficient to prove the offence of breach of trust but that it would require wilful negligence, that is, a will to be negligent—an intentional breach of duty or reckless carelessness in the sense of not caring whether one's act or omission is or is not a breach of duty.

A wilful act, which (act) amounts to negligence, is not wilful negligence unless there be a will to be negligent. As Warrington L. J. said in the case of *In re Trusts of Leeds City Brewery* [1925] 1 Ch. 532, at page 544, " then it becomes important to consider what is meant by a wilful breach of trust or wilful negligence or wilful failure to perform his duty. I think it means this. I think it means deliberately and purposely doing something which he knows, when he does it, is a breach of trust, consisting in a failure to perform his duty as trustee ".

We find it, however, unnecessary to decide whether ordinary negligence would suffice for the purposes of section 133 or whether wilful negligence would be required because on the facts of the present case the appellant could not be held liable for breach of trust even through ordinary negligence.

The finding of the trial Judge as to the credibility of the appellant having been held earlier in this judgment to be erroneous, we approach this matter, in order to see whether as suggested by counsel for the prosecution he could be found guilty of ordinary negligence on the basis of his own version.

As already indicated we think that he could not be so found, for the following reasons : The appellant on two days immediately preceding the Tender Board meeting of the 3rd March, 1966, was otherwise busy in meeting and in taking round an official guest of the Cyprus Government. On the 1st March he had time to deal with only 6 items of the first tender, and for the remaining 50 items he had instructed witnesses Economides and Athanassiades to complete the Register of Tenders for production and use by the Tender Board at its meeting. Athanassiades was a clerk and he was performing clerical duties in recording in the Register what was dictated to him. But Economides was a registered pharmacist with 20 years' experience and he had been appointed as a Veterinary Pharmacist. The Scheme of Service under which he was appointed provided that he should be a registered pharmacist under the Law, and his duties included " dispensing of veterinary prescriptions in a Veterinary Hospital, . . . keeping of drug ledgers, prescription books, dangerous drugs register, indents and accounts ; control and storing of drugs in hospitals ; and any other duties that may be assigned to him ".

The appellant asked this registered pharmacist (Economides) to go through the tenders, compare them with the specifications and complete the Register. This was on the 1st March, 1966. By the 3rd of March, when the meeting of the Tender Board was to be held, Economides informed the appellant, who had been otherwise engaged on official business, that he had gone through the tenders and specifications and that he was ready to give all the necessary information to the Tender Board. The appellant relying on that assurance of his qualified subordinate, went to the Board accompanied by him (Economides) who did not disclose to the members the difference between the specifications and the tender in the case of two drugs (counts 10 and 16). The question which arises is this : " was the appellant guilty of negligence in these circumstances, or was he justified in trusting a qualified subordinate to perform such duties honestly ? " In the circumstances of this case we have no hesitation in holding that the appellant was not guilty of negligence as he was justified in trusting Economides to perform such duties.

We hold the view that in the case of a Director of a Government Department or, for that matter, of a Director of a Ministry or Head of an Independent Office under the Constitution, in respect of duties which may properly be left to a subordinate who is qualified to perform such duties, in the absence of grounds of suspicion, he is justified in trusting that official to perform such duties honestly. It would seem that in the case of the Medical Department the Director never attends the meetings of the Tender Board, and that he is represented by the Chief Pharmacist.

A Director, provided he acts honestly, he must of necessity trust to the appropriate officials of his department to perform properly and honestly the duties allocated to them ; otherwise, his life as a public officer would become intolerable if he ran the risk of being criminally responsible for any omission of his subordinates. We are here concerned with a criminal offence, and not a civil action for ordinary negligence where a principal or a master could be held vicariously liable for the negligence of his agents or servants.

Even if, however, we had reached the contrary conclusion, and had held that the appellant was guilty of negligent conduct in relation to the meeting of the Tender Board of the 3rd March, we would not be prepared to amend counts 10 and 16, or substitute new counts in their place, so as to convict the appellant of breach of trust through negligence : In these proceedings the appellant has been charged only with counts concerning conspiracy and fraudulent conduct and there is nothing in the charge-sheet, in the alternative or otherwise, charging him with negligent conduct. The case against him has been prosecuted all along as a case of conspiracy and fraud and it has been defended as such, only. Thus, the appellant never had to meet a charge of negligent conduct, nor did he have any opportunity of conducting his defence accordingly. It would be clearly contrary to the accepted principles governing criminal trials to exercise our discretionary powers under section 145 (1) (*c*) of Cap. 155 and convict him at this late stage, of negligent conduct, when he never had a chance to meet properly, at the proper stage, such a charge.

We may now deal briefly with the procedural ground of appeal regarding the disjoinder of the cases of the two accused (the appellant and Stamatis) while the appellant was giving evidence in his own defence.

This course was taken on the application of counsel for accused Stamatis, without any objection either from counsel

for the appellant or from counsel for the prosecution, though indeed the latter did point out to the trial Judge that it was doubtful whether such a course was open to the Court. Nevertheless, the trial Judge proceeded to separate the cases of the two accused, basing himself on section 75 of Cap. 155.

In our view neither section 75 nor any other provision in the Criminal Procedure Law, nor any rule of practice, permitted the course adopted by the trial Judge, at that stage. As far as we have been able to ascertain such course is without precedent and amounts in our opinion, to an irregularity in the proceedings.

In view, however, of the fact that the conviction of the appellant has already collapsed on other grounds, it is not necessary to decide whether such irregularity has resulted in a substantial miscarriage of justice.

In the result the appeal against conviction succeeds on the merits and is allowed in respect of all four counts accordingly. The conviction of the appellant is set aside. The appellant has already been acquitted and discharged on the 23rd February, 1968, when the judgment of the Court was announced.

The proceedings before us have been very lengthy, raising difficult and novel issues. However, our task has been made easier by the trial Judge's fully reasoned judgment. Further we have been greatly assisted by the able presentation of the appeal by learned counsel for the appellant who took great pains with the preparation of the case and by learned counsel for the prosecution who worked very conscientiously and did his best in a difficult case.

Appeal allowed. Appellant acquitted and discharged.