F.H. 5/63

ATTORNEY-GENERAL

v.

DANI WEIGEL

In the Supreme Court sitting as a Court of Criminal Appeal
[October 31, 1963]
Before Olshan P., Berinson J., Cohn J., Manny J. and Halevi J.

Construction of statute - prostitution offences - mandatory imprisonment - exclusion of probation - Penal Law Amendment (Prostitution Offences) Law, *1962, sec. 10-Probation of Offenders Ordinance, 1944, sec. 3 (2).*

The respondent was convicted at first instance of being a procurer under section 1(b) of the Penal Law Amendment (Prostitution Offences) Law, 1962, but owing to the special circumstances of the case he was not given a prison sentence but put on probation. An appeal to the Supreme Court having failed, the Attorney-General applied for a Further Hearing* regarding the construction of the said section 10 in the light of section 3 (2) of the Probation of Offenders Ordinance, 1944. The sole issue was whether a person convicted under the Law must be sentenced to imprisonment or may instead be put on probation.

Held by a majority (1) An "offence punishable by imprisonment or fine" to which the Probation Ordinance applies is descriptive of the kind of offence for which probation is available. Such an offence does not cease to be of that kind if the penalty is expressly mandatory. "Punishable" is not restrictive so as to exclude a mandatory penalty.

(2) A section of the Law under which "a penalty of imprisonment shall be imposed" is intended (upon sentencing) to exclude a penalty as the sole penalty which is not imprisonment. Probation as such is not a penalty and therefore falls outside the ambit of the section.

* Under section 8 of the Courts Law, 1957, a Further Hearing by five or more judges of the Supreme Court will be granted "in view of the importance, difficulty, or novelty" of a ruling of the Supreme Court sitting with three judges.

(3) To oust existing sentencing powers and restrict the rights of the individual, particularly in criminal matters, express statutory provision is necessary. Section 10 contains such an express provision as regards conditional imprisonment but not as regards probation.

(4) Probation is a method of treatment alternative to imprisonment, intended to assist in the rehabilitation of offenders. Ever since its introduction it has not conflicted with but complemented imprisonment

(5) The cases of prostitution offences in which the courts will direct probation rather than impose imprisonment are very rare. Indeed it would defeat section 10, if they did so to any appreciable extent.

Israel cases referred to:

(1) *Cr.A. 69/63-Attorney-General v.Dani Weigel* (1963) 17 P.D. 712.
(2) *Cr.A. 26/55-Rahel and Yaakov Shakraji* v. *Attorney-General* (1955) 9 P.D. 378.
(3) *Cr.A. 44/52-Kassem Hasin Diab* v. *Attorney-General* (1952) 6 P.D. 922.
(4) H. C. 186/62- *B. Veider v. Minister of the lnterior and oth*ers (1962) 16 P.D. 1547.
(5) *Cr.A. 38/61-Moshe ben David Yitzhak* v. *Attorney-General* (1962) 16 P.D. 514.
(6) *Cr.A. 155/59-Yaakov Darai* v. *Attorney-General* (1960) 16 P.D. 233.
(7) *Cr.A. 24/55-Attorney-General* v. *Barukh Salmander and others* (1954) 8 P.D. 474.
(8) *Cr.A. 558/62-Morris Rabo* v. *Attorney-General* (1963) 17 P.D. 162.
(9) Cr.A.-234/53 Tel *Aviv-Yafo Attorney-General* v. *Avraham ben Yitzhak HaGoel* (1955) 11 P.M. 84.

English case referred to:

(10) *R.* v. *Parry and others* (1952) 2 *All E.R.* 1179.

Z. Bar-Niv, State Attorney, for the appellant.
B. Shagia for the respondent.

OLSHAN P. The sole issue before us is the construction of section 10 of the Penal Law Amendment (Prostitution Offences) Law, 1962, in the light of section 3 (2) of the Probation of Offenders Ordinance, 1944 (hereinafter referred to as "the Ordinance").

Sections 1 and 3 of the said Law define various prostitution offences and prescribe the penalties therefor by the following formulae:

> "Shall be liable to imprisonment for a term of five years" (sections 1, 2 and 5);
>
> "shall be liable to imprisonment for a term of three (five) years" (section 9);
>
> "shall be liable to imprisonment for a term of seven years" (section 3).

Then comes section 10 which provides:

> "Where a person has been convicted of an offence under section 1, 2 or 3 of this Law, a penalty of imprisonment shall be imposed upon him, either as the sole penalty or in conjunction with another penalty, but conditional imprisonment shall not be imposed upon him."

In *Attorney-General v Weigel* (1), the subject of the present hearing, a majority of the judges were of the opinion that section 10 does not prevent the court from applying section 3 (2) of the Ordinance which generally speaking empowers the court, in the event of a person being punishable with imprisonment or fine, to make a probation order instead of sentencing him. Relying on the phrase "shall be imposed" in section 10, the judge in the minority had no doubt that the section places a duty on the court to impose a sentence of imprisonment, either as a sole penalty or in conjunction with another penalty, and that the court is commanded by the legislature, where a person is convicted under section 1, 2 or 3, to impose a penalty and may not let him go free without any penalty, that is to say, that it is impossible to put him on probation in place of imposing a penalty.

According to the interpretation given by the majority therefore the court must first consider in the light of section 3 (2) of the Ordinance whether or not any penalty is to be imposed and only if it thinks that a penalty should be imposed must it be imprisonment. The minority view was that where a person is convicted of a prostitution offence under

section 1, 2 or 3 the court is not free to consider whether or not to impose a penalty but is commanded to impose the penalty of imprisonment.

After hearing counsel representing the parties, I have reached the conclusion that the law is with the minority judge. The submissions of Mr. Bar-Niv, the State Attorney, appeal to me for the following reasons.

(1) The words "shall be imposed" appear to me to be in the imperative mood. A distinction must here be made between "imprisonment shall be imposed" and "shall be liable to imprisonment"; in all the sections of the Criminal Code Ordinance, 1936, the penalty-fixing formula is "is liable to" and only in one section "shall be sentenced" (cf. sections 49, 50, 213 and many others together with section 215 before amendment). Ever since the establishment of the State, whenever the first above formula was intended the legislature employed the words "shall be liable to imprisonment" and whenever the second was intended it used the words "the court shall impose" or "shall be imposed".

Where "is liable to" occurs, the convicted person may be punished with imprisonment and the question of its length will only arise when the court comes to the conclusion that a probation order should not be made in place of imposing a sentence. Were the majority's interpretation of section 10 to be accepted, the legislature would not have needed to use the words "shall be imposed" and it could have adopted the formula "he shall be liable...". Section 10 would also then have been unnecessary.

Having found it proper to use the "shall be imposed" formula in section 10 instead of the "shall be liable" formula in section 1, 2 and 3 of the Law, then - and this is a canon of interpretation - the legislature is not to be assumed to have done so inadvertently. According to the interpretation proposed (by the respondent) we must ignore the words "shall be imposed" and read in place thereof "shall be liable".

(2) According to that interpretation also, the opening words "Where a person has been convicted..." must be read as if they said something like "Where a penalty has been imposed under section 1,2 or 3, the penalty shall be imprisonment... but conditional imprisonment shall not be imposed". But significance attaches to the words "Where a person has been convicted". They instruct the court what to do with the defendant after

conviction, that is, after conviction a penalty is to be imposed and he is not to be allowed to go free without penalty. We are not at liberty to ignore the legislature's formula and replace it with another consistent with the said interpretation.

(3) Why the legislature found it right to add the words "but conditional imprisonment shall not be imposed" but not also "no probation order shall be made", the answer, it seems to me, is that the purpose of the section is to prescribe the obligatory nature of the penalty from among the various penalties found in our law, such as fines, conditional imprisonment and others. It was necessary to exclude conditional imprisonment expressly because according to *Shakraji* v *Attorney-General* (2) imprisonment by itself includes conditional imprisonment. Had the legislature not excluded conditional imprisonment a court could comply with section 10 by imposing the latter-a course not welcome to the legislature. On the other hand, a probation order is not a penalty; section 3 (2) of the Ordinance says that "the court may, in lieu of sentencing him, make a probation order". Hence, the court being bound to impose the penalty of imprisonment, it was not essential to mention the Ordinance which enables relief from penalty.

(4) Purposively there is no great difference between a probation order after conviction and conditional imprisonment. The object of a probation order was explained in the judgment of my honourable friend, Berinson J., in *Weigel* (1) at 719, and I have nothing to add. It seems to me that the imposition of conditional imprisonment is also founded on the belief that if the defendant is given the opportunity, he will mend his ways and refrain from his law-breaking. Upon the enactment of the Penal Law Amendment (Modes of Punishment) (Amendment No. 5) Law, 1963, the identity of the two drew even closer (apart from supervision by a probation officer). Section 7 (4) (b) and (5) (b) provide that if a probationer is convicted of another offence during the period of probation the court may sentence him for the offence for which he was placed on probation. That means that exemption from penalty and placing on probation are subject to the possibility of being sentenced for the first offence, if a breach of the probation order occurs or another offence is committed during probation. According to sections 18D and 18F added in 1963, when a further offence is committed, the court is not bound to activate the conditional imprisonment but may extend it for an additional period. In activating the conditional imprisonment, the court may also order that the sentences be concurrent. Conditional imprisonment is thus directed to those instances where there is a belief or expectation that

its imposition instead of actual imprisonment will help the defendant to mend his ways. That belief and expectation exist when a probation order is made. I do not however say that this identity of purpose should be decisive in interpreting section 10. If it is clear from this section that the legislature directed the court to impose a term of imprisonment upon an offender convicted under sections 1, 2 and 3, since in spite of its high purpose, the imposition of conditional imprisonment has, on any view, also been forbidden by the legislature.

(5) In association with the opening words "Where a person has been convicted", the marginal heading to section 10, "Mandatory imprisonment", means that once convicted of an offence under sections 1, 2 or 3, an obligation arises to impose imprisonment. In general, where the section of a statute is clear, there is no need to refer to the marginal heading; only those who plead that the meaning is obscure will need to do so. In my judgment no such necessity occurs here, but if it does, it supports the conclusion drawn by the minority judge. The question which arises in connection with this submission is the extent to which the marginal heading is part of the law. In *Diab* v. *Attorney-General* (3) Silberg J. indicated (at 926 and 928) the difference that exists in this regard between England and ourselves. It has long been normal in England to embellish a statute with headings and marginal headings *after it has been adopted* by the legislature. Silberg J. held, after comparing Mandatory legislation, that "there is nothing to prevent us from obtaining 'interpretative inspiration' from the headings". He said

> "We see therefore that everything revolves round the cardinal question whether these headings and 'embellishments' have or have not been brought to the attention of and approved by the legislature, whether they have or have not received official approval. The traditional English view is that for Parliament there is only the archaic statutory roll which leads the reader on without name or description, without marginal headings and punctuation, and anything which it does not or need not include is not part of the statute, a kind of incidental nugatory addition by 'irresponsible' people who have no hand in the law-making of the legislature".

The question is therefore what is the situation with regard to Israeli legislation. When a bill is presented to the Knesset, it includes marginal headings. That may be seen from the copies before the Knesset at the second and third readings... . In the bill of the Law so presented, section 10 had the marginal heading "No penalty of a fine alone" and the words "but conditional imprisonment shall not be imposed upon him" did not appear in the body of the section. During the debate the Minister of Justice mentioned that there were lighter penalties as well as probation orders and he proposed that the section be deleted. Others objected to deletion and suggested that the above words should be added and their suggestion was accepted. The Law as adopted and then published contained section 10 in its present form. If the Law in the second and third reading contained marginal headings, it is to be assumed that the value of the heading we are concerned with was the same as that of the others. I do not need to lay down any hard and fast rule as to whether or not the marginal headings are part of the Law since there are decisions on the question in respect of Israeli legislation. In *Voider* v. *Minister of the Interior* (4) it was said (at 1551) that

> "There is no need to deal with the question whether or not marginal headings are part of the Law, since in any event no authority was cited to show that even if they are not, some bar exists against taking them into account when considering the object of the section in connection with its interpretation."

In *Yitzhak* v. *Attorney-General* (5) the court said (at 523) that

> "Although possibly sometimes - when the language is not plain enough and ambiguous - headings may help, it is quite a different matter to base on them an additional offence having no connection at all with the clear definition given in the body of the section."

It seems to me that here the marginal heading certainly does not help respondent's counsel in his endeavour to replace "shall be imposed" with "shall be liable", or to introduce before "shall be imposed upon him" the words "upon being sentenced".

In *Darai* v. *Attorney-General* (6) the appellant was convicted of an attempt to unlawfully cause the death of a person under section 222 of the Criminal Code Ordinance,

1936. Counsel argued that the prosecution must prove "malice aforethought" as in murder and he relied upon the marginal heading "Attempt to murder". That is, he tried to read into the section the element of "malice aforethought" in view of the word "murder" in the heading. He did not succeed. In the case before us indeed the marginal heading is at one with the provisions of the section and not in conflict. Hence words which do not appear therein are not to be introduced.

(6) The Law relating to assaults on policemen, where a minimum term of imprisonment is also provided, has been cited at length. In *Attorney-General* v. *Salmander* (7) this Court decided that that Law is *lex specialis* and its provisions set aside, implicitly if not expressly, the general provisions contained in the Criminal Code Ordinance, 1936, in as far as the two sets of provisions are inconsistent. (The problem there was whether it is possible to impose on an offender convicted under the said Law a fine according to section 42 (1a) or a recognizance to keep the peace according to section 45 of the Criminal Code Ordinance.) It appears to me that the Probation of Offenders Ordinance, 1944, also contains general provisions whilst the Law concerning prostitution is *lex specialis.* The former was enacted at a time when there were no laws prescribing "mandatory imprisonment". Accordingly, upon the enactment of a special Law on prostitution, section 3 (2) of the said Ordinance must be read subject to this special Law. If it patently emerges from the wording of section 10, in the context of the other sections, that upon a conviction for prostitution the offender receives mandatorily a prison sentence, it cannot be argued that the section must be treated as containing something which it does not contain, only because the legislature did not expressly exclude the application of section 3 (2) of the Probation Ordinance, particularly when this special Law deals with the imposition of penalties whereas the Ordinance deals with probation which is not a penalty.

In *Salmander* (7) this Court held that the minimum imprisonment prescribed is a penalty which cannot be reduced, that is, it is mandatory, notwithstanding the use of "shall be liable" (and not "shall be imposed"). The meaning of "shall be liable" in the Law there is that an offender may be punished by imprisonment up to the prescribed maximum but must be punished with the minimum term of imprisonment.

In view of the decision in Salmander we must say, and we may not ignore the fact, that the question whether the offender may be held free of all penalty and be put on

probation according to the Ordinance was not raised in this appeal. Relying on *Attorney-General* v. *HaGoel* (9) - that the provisions of the Law relating to assaults on policemen do not prevent making a probation order instead of imposing a penalty - one may say that "shall be liable" to a minimum term of imprisonment (as obligatory) becomes operative only after the court takes the view that a probation order is not to be made in place of imposing a penalty, since this Law does not employ the language of section 10 ("Where a person has been convicted... shall be imposed"). There is no need to take up any position on the merits of the argument itself.

(7) Section 1 of the Penal Law Revision (Abolition of the Death Penalty for Murder) Law, 1954, abolishes the death penalty for murder and provides that "Where a person has been convicted of murder, the court shall impose the penalty of imprisonment for life, and only that penalty". Here everyone, other than respondent's counsel who must differ if he is to be consistent, agrees that the possibility of making a probation order instead of imposing the penalty is excluded. The argument here is, however, that that is because of the addition of "and only that penalty". This argument, it seems to me, is groundless. If a probation order is not a penalty, then the words cited do not form a provision excluding probation as an alternative to imposing the penalty. Consistently with the suggested interpretation of section 10, this section would also have to be read as if providing "Where a person has been convicted of murder, and the court is of the opinion that he is not to be exempted from penalty and put on probation, the court shall impose the penalty of imprisonment for life, and only that penalty". That is, if a penalty is imposed it must only be life imprisonment. It follows that there is no connection between the words added and the prohibition against making a probation order. The prohibition stems from the words "Where a person has been convicted... the court shall impose", which is similar to the language used by the legislature in section 10, and not from the words "and only that penalty". If the fact that probation has no place in murder is not disputed, then I see no justification for adopting a different interpretation in section 10.

(8) As I have said, "shall be liable" is generally used by the Israeli legislature in place of the Mandatory "is liable" and "shall be imposed upon him" in place of "shall be sentenced". That there is a difference in meaning between the two phrases used by the Israeli legislature is not to be disputed, and I have not heard of any other meaning attributed to "shall be imposed upon him" to distinguish it from "shall be liable".

Prostitution offences were specified in many of the sections of the Criminal Code Ordinance, 1936. In treating some of these offences with particular stringency because they are increasingly plaguing the country, the legislature repealed the sections of the Criminal Code Ordinance, 1936, and replaced them with the Law in question, as *lex specialis.* In this Law section 10 is devoted to the offences mentioned in sections 1, 2 and 3. Although the penalties for offences under sections 5. 6 and 9 were increased the normal course was followed and words of command or mandate were not employed. With regard to these latter offences nothing was said limiting the discretion of the court in choosing the penalty or even in making a probation order. The intention of the legislature, it seems to me, is thus clear. What is involved is the principle of strict construction in favour of the offender, and this principle is not impaired since any other interpretation of section 10 is artificial and cannot be sustained without introducing words which the section does not contain.

(9) Assuming that after enacting the Probation of Offenders Ordinance the Mandatory legislator had amended section 215 of the Criminal Code Ordinance by providing that "upon conviction shall be sentenced to imprisonment for life", in my judgment there would have been no room for the argument that a probation order could be made instead of life imprisonment. The Probation Ordinance is not a "constitutional" law in the light of which all other law is reviewed. That being so, the two Laws must be reconciled, having their respective legislative intent in mind. Plainly, the 1944 Probation Ordinance does not embrace any intention to give section 3 (2) an entrenched position for the future. Had that been the intention, it would have been wholly invalid from the viewpoint of constitutional law. It is therefore to be understood that as regards the future the intention of the Ordinance was that use of section 3 (2) is subject to every new Law which can expressly repeal it or restrict its thrust with regard to some particular offence by prescribing that when an offender is convicted thereof he is to be sentenced by imposing the penalty of imprisonment. But such an intention would have to be clearly expressed in the new Law. Thus we return to the meaning of section 10 which appears to me to be so clear that we may not say to the legislature that, although the meaning is clear, we will ignore the clear intention simply because it did not expressly state that section 3 (2) of the Probation Ordinance is not to apply. To that the legislature would say that the presumption is that it was aware of section 3 (2) of the Ordinance and the failure to mention the necessary words - rightly or not, and as I have said above I think rightly - is not a ground justifying disregard of the clear meaning of section 10.

The many reasons for rejecting the suggested interpretation of section 10 are not evidence that it is not clear or is ambiguous. The many reasons are the consequence of the many arguments advanced which in themselves do not prove that the intention of the legislature is not plain.

In my judgment the appeal should be granted and imprisonment imposed upon the respondent.

BERINSON J. In the previous hearing of this matter we heard exhaustive arguments from the Deputy State Attorney, Mr. Bach, and the late Mr. Toussia-Cohen on the main issue, the interpretation of section 10 of the Penal Law Amendment (Prostitution Offences) Law, 1962, and its relation to section 3 (2) of the Probation of Offenders Ordinance, 1944. The majority and minority judgments appear to me not to have passed over any point worthy of attention, In this Further Hearing the State Attorney appeared and repeated in fact these arguments but more expansively and with the coherence normally characteristic of him. I have no intention of depreciating the value of his submissions by saying briefly that I have found nothing to move me to change my previous view which I explained at length in the earlier hearing. I shall therefore confine myself to a number of brief observations.

In this Further Hearing the question is whether section 10 of the Prostitution Offences Law can stand alongside section 3 (2) of the Probation of Offenders Ordinance, 1944, so that the provisions of the latter are applicable notwithstanding section 10, or whether section 10 ousts the application of section 3 (2). The question turns on the meaning to be given to "offence punishable with imprisonment" in section 3 (2). The view has been voiced that "punishable" refers only to offences for which the court may impose imprisonment and not to offences for which imprisonment is mandatory. I cannot agree to this interpretation. In my opinion, the phrase involved describes a group of offences in respect of which a probation order may be made instead of imposing a penalty (imprisonment or fine) and it is immaterial how the court comes to impose the penalty on the offender, whether permissively or mandatorily. An "offence punishable with imprisonment" does not cease to be such when the imprisonment is mandatory.

The President says that had it not been the intention of the legislature to direct the court to impose a penalty, and precisely the penalty of imprisonment, for prostitution offences under sections 1- 3 of the Law to deny the possibility of making a probation order in place of imposing a penalty, it would not have adopted the imperative mood in section 10, "shall be imposed", and generally there would have been no need for this special section since it had already prescribed for the specific offences the maximum penalty of imprisonment by the terms "shall be liable to imprisonment". I have another explanation. Section 10 is not superfluous in the least because it is intended to limit the kinds of penalties which a court is empowered to impose for prostitution offences. When it imposes a penalty, it must impose the penalty of imprisonment (whether or not in conjunction with another penalty) but no other penalty can serve as a substitute to imprisonment. That, in my opinion, is the meaning of the mandatory imprisonment in section 10. It does not, however, negative the alternative of putting the offender on probation which is not a penalty and may replace it.

The State Attorney persists in arguing that if section 10 of the Prostitution Offences Law does not entirely exclude the possibility of making a probation order, then the same rule should apply also to murder with regard to which the legislature employs exactly the same terms in directing in section 1 of the Penal Law Revision (Abolition of the Death Penalty for Murder) Law, 1954, that where a person has been convicted of murder the court shall impose life imprisonment and that alone. The terms of this Law indeed make it difficult psychologically to accept the view that I have propounded, although an important difference exists between the two Laws. In the first, the penalty is mandatory imprisonment (with or without some other penalty) but the court is completely free to fix the term of imprisonment /is no other penalty. If, however, it is said that this important difference is not determinative for the question before us, then, there being no option, I would not hold back from saying that both should be treated alike and in both a probation order may be made instead of imposing imprisonment. Until the adoption of the Law abolishing the death penalty for murder no difficulty occurred. When the Probation of Offenders Ordinance was enacted in 1944, it was clear that it did not apply to murder. At that time and until its abolition in 1954, death was the only penalty for murder and the Ordinance did not apply because it only covered offences *for* which the penalty was imprisonment or fine. When the Knesset abolished the death penalty and replaced it with life imprisonment but did not say anything about probation, murder also became "an

offence and punishable with imprisonment" within the meaning of section 3 (2) of the Ordinance. It is difficult to imagine a case in which the court would in fact exercise this power but theoretically it is available as it then was in the case of manslaughter the penalty for which was life imprisonment, and today as well when it is a term of 20 years' imprisonment.

In my earlier judgment I explained the view why it cannot be contemplated that by adopting section 10 of the Prostitution Offences Law the legislature intended to avoid indirectly the possibility of placing a person upon probation instead of sentencing him to imprisonment, and I do not need to go over that again. Had the Knesset so desired it would have needed to say so expressly, as it did regarding the non-imposition of a conditional sentence in place of actual imprisonment.

My view remains as it was and in my judgment the Further Hearing should be dismissed and the majority opinion of the previous hearing upheld.

HALEVI J. The question before us is the relationship between section 10 of the Penal Law Amendment (Prostitution Offences) Law, 1962 (hereinafter referred to as "the Prostitution Offences Law") and section 3 (2) of the Probation of Offenders Ordinance, 1944 (hereinafter called "the Probation Ordinance"). Are these two enactments compatible? And if not, which takes precedence?

Sections 1, 2, 3, 5, 6 and 9 of the Prostitution Offences Law define various offences and prescribe for each the maximum penalty which an offender may receive by the formula "shall be liable". Regarding offences under sections 1-3 the legislature goes on to prescribe by section 10, that "where a person is convicted... a penalty of imprisonment shall be imposed..., either as the sole penalty or in conjunction with another penalty, but conditional imprisonment shall not be imposed". The meaning of this provision - and in this regard I join in the view of the President and Cohn J. without hesitation - is that mandatory imprisonment is laid down for the offences mentioned.

On the other hand section 3 (2) of the Probation Ordinance provides that "where any person is convicted... upon information of an offence punishable with imprisonment or fine, and the court is of the opinion that, having regard to the circumstances, including the

character, the antecedents, age, home surroundings, health or mental condition of the offender, the nature of the offence and any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him, make a probation order".

In view of these two sections, the question arises of the relationship between section 10, imposing mandatory imprisonment, and section 3, empowering the court to release an offender on probation instead of sentencing him to prison. Can the two sections exist side by side or are they conflicting? And if they are conflicting, which takes precedence? Opinions are divided and each has some foundation.

One view is that neither affects the other since they concern different things - "a penalty" and "probation" which is not a penalty. Section 10 prescribes "mandatory imprisonment" as the penalty for any person convicted of an offence under section 1 or 2 or 3 of the Prostitution Offences Law, thus restricting the judge's discretion in choosing between different penalties - imprisonment, conditional imprisonment or fine - when sentencing the offender. Section 3 (2) on the other hand does not affect the content of the sentence and the kind of penalty which is to be imposed. It allows the judge in given circumstances to refrain from sentencing and instead make a probation order. According to this outlook there is no conflict between the two sections, but if any substantial inconsistency does exist, section 3 (2) of the Probation Ordinance prevails.

Another view urges that section 10 of the Prostitution Offences Law contradicts and sets aside section 3 (2) of the Probation Ordinance. The provision in section 10 that "where a person has been convicted...a penalty of imprisonment shall be imposed" obliges the judge convicting the defendant to impose a penalty and that penalty has to be imprisonment. The judge will not be doing his duty if he exercises his normal power under section 3 (2) of the Probation Ordinance "to release the offender on probation... in lieu of sentencing him". The duty to impose imprisonment upon any one convicted of one of the offences referred to in section 10 deprives the judge of the power to put the offender on probation. Inevitably, according to this view, in the conflict between section 10 of the Prostitution Offences Law and section 3 (2) of the Probation Ordinance section 10 prevails.

The matter is therefore open to debate but upon consideration the first view seems to me to be preferable to the second. My reasons are as follows.

The Prostitution Offences Law is to be read and understood against the background of the Penal Law Revision (Modes of Punishment) Law, 1954. Section 1 of that Law provides that

> "A court which has convicted a person of an offence may impose on him any penalty not exceeding the penalty prescribed by law for that offence".

Section 10 provides that

> "Where the law prescribes imprisonment and does not prescribe a fine, the court may -
> ...
> (3)...impose imprisonment as prescribed or a fine not exceeding IL 5,000 or both such penalties; provided that where the law makes imprisonment obligatory or prescribes a minimum period of imprisonment, imprisonment shall not be replaced by a fine".

Section 18 before amendment in 1963 provided that

> "(a) Where the court may impose a penalty of imprisonment, it may, in lieu thereof, impose conditional imprisonment".

And after amendment, that

> "(a) Where the court imposes a penalty of imprisonment, it may, in the sentence, direct that whole or part of such penalty shall be conditional"

Section 25 as amended provides that

> "The court which has convicted a person may, in addition to the penalty imposed, order the person sentenced to bind himself by recognizance to abstain from an offence for such period not exceeding three years as the court may prescribe".

These sections taken together prescribe the great rule as to modes of punishment in Israel, that every penalty prescribed by any criminal law is a maximum penalty and that the legislature entrusts to the judge the task to prescribe in his discretion the penalty appropriate to each case both as regards the kind of penalty and as regards its extent, as appears to him to be right and proper. Section 10 of the Prostitution Offences Law makes an exception from this general rule. Apart from this section, a court convicting someone under section 1, 2 or 3 of the Law might, in view of the sections of the Modes of Punishment Law set out above, impose a penalty of imprisonment as prescribed in the section dealing with the offence in question or conditional imprisonment or a fine *of* up to IL 5,000 or a combination of such penalties with or without recognizance. But then section 10 comes along and provides that

> "Where a person has been convicted of an offence under section 1, 2 or 3 of this Law, a penalty of imprisonment shall be imposed upon him, either as the sole penalty or in conjunction with another penalty, but conditional imprisonment shall not be imposed upon him".

The effect and significance of section 10 is to restrict the judge's freedom of choice as between the kinds of penalties mentioned in the Modes of Punishment Law to imprisonment with or without "another penalty" such as fine or recognizance (and according to *Rabo* v. *Attorney-General* (8), also conditional imprisonment). The sole penalty prescribed by section 10 is (unconditional) imprisonment for the offences in question and in this sense the marginal heading that sums up the section, "Mandatory imprisonment", is correct.

As for the wording of section 10 - "Where a person is convicted of an offence... imprisonment shall be imposed upon him" - it is proper to notice the similar wording of section 1 of the Modes of Punishment Law - "A court which has convicted a person of an offence may impose on him any penalty" (Cf. also section 10 of this Law - "Where the law

prescribes imprisonment ... the court may impose"). This parallelism to my mind strengthens the view I have taken that section 10 of the Prostitution Offences Law is to be read in the light of sections 1, 10 and 18 of the Modes of Punishment Law. In order to depart from the maximum-penalty rule laid down in the Modes of Punishment Law (sections 1 and 10) section 10 of the Prostitution Offences Law says that "Where a person has been convicted of an offence... a penalty of imprisonment shall be imposed upon him, either as the sole penalty or in conjunction with another penalty". In order to exclude section 18 of the Modes of Punishment Law in its original version, section 10 employs the same terms but adds "but conditional imprisonment shall not be imposed upon him". The phrase "Mandatory imprisonment" in the margin to section 10 repeats also the language of the end part of section 10 of the Modes of Punishment Law, that "where the law makes imprisonment obligatory... imprisonment shall not be replaced by a fine".

It seems to me that the main purpose of section 10 is merely to exclude the offences mentioned therein from the provisions of the Modes of Punishment Law which give the court freedom of choosing between kinds of punishment in its discretion. Section 10 varies the normal "modes of punishment" by prescribing "mandatory imprisonment" for given offences. But it does not deal with or affect the placing of offenders on probation. As my honourable friend, Berinson J., said, probation is an "alternative" to penalty, a point stressed in section 3 (2) by the words "in lieu of sentencing him". According to that section, the judge must before making the probation order explain its meaning to the offender and *inter alia* that "if he fails... to comply therewith or commits another offence, he will be liable to be sentenced for the original offence". When sentence is pronounced for the original offence (in the event of a breach of the probation order etc.) section 10 of the Prostitution Offences Law will apply and imprisonment will be imposed. Section 10 does not set aside the provisions of the Probation Ordinance nor compel the judge to give a sentence since section 3 (2) of the Ordinance empowers him to abstain from doing so and to put the offender on probation. Section 10 lays down provisions binding as regards the content of the sentence but not as regards to the circumstances in which it is or is not to be given according to an enactment not referred to therein.

Section 3 (2) of the Probation Ordinance applies to every offence "punishable with imprisonment or fine". It cannot be argued that these words are confined to an offence for which just"imprisonment or fine" are prescribed, excluding mandatory imprisonment. The

meaning is undoubtedly "an offence punishable by imprisonment or an offence punishable by fine". The word "punishable" also does not restrict one to a penalty which is not "mandatory". Section 3 (2) of the Probation Ordinance was copied with some small variations from section 1 (2) of the (English) Probation of Offenders Act. 1907. which provides *inter alia* that

> "Where any person has been convicted on indictment of any offence punishable with imprisonment. ... the court may, in lieu of imposing a sentence of imprisonment, make an order etc.".

Until the enactment of the Criminal Justice Act, 1948 (which replaced the 1907 Act) there was no general statute in England which enabled all the courts to impose a fine instead of imprisonment for commission of a felony. Section 13 of the Criminal Justice Act provides that

> "Any court before which an offender is convicted on indictment of felony (not being a felony the sentence for which is fixed by law) shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him".

In *R.* v. *Parry* (10) Lord Goddard C.J. (at 1180) explained the history of section 13 as follows.

> "The history of that section and the reason for importing it into the Criminal Justice Act, 1948, is well known. There were certain felonies, principally those under the Larceny Act, 1916, in which a court of summary jurisdiction had power to fine. That was because it was considered desirable in the case of petty thefts that a court should be able to fine the offender and not send him to prison, but in cases which came before a court of assize or quarter sessions on indictment there was no power to fine until this Act of 1948, except in the case of manslaughter. The reason for that was that the offence of manslaughter varies enormously in seriousness according to the circumstances in

> which it is committed. Over and over again judges have had to deal at assizes with an offence which technically was a felony, where they would have been glad to have imposed a fine had there been power to do so. The court was often left in the position that it had either to send a person of hitherto good character to prison for a comparatively small offence or else bind him over, which was to inflict no punishment. That is the reason why Parliament by the Act of 1948 gave to courts trying cases on indictment the same powers as courts of summary jurisdiction formerly had in certain cases and now have in all cases of felony, i.e., the power of imposing a fine instead of sending to prison."

Thus until 1948 the penalty for most felons in England was "mandatory imprisonment" in the sense of the last part of section 10 of the Modes of Punishment Law and section 10 of the Prostitution Offences Law. Nevertheless the English courts were never denied the power to release a person convicted of any offence apart from murder by binding him over, with or without sureties, to come up for judgment, a course which served as an alternative to sentencing him and imposing mandatory imprisonment. (See the judgment of Lord Goddard in the case cited above and *Archbold, Pleading, Evidence and Practice in Criminal Cases,* 35th ed., paragraph 722.) Another alternative to sentencing was introduced by section 1(2) of the Probation of Offenders Act, 1907 (mentioned above) which empowered the courts to release on probation any person convicted of an offence "punishable with imprisonment", other than those for which the penalty was death. In view of the statutory situation in England until 1948, "punishable with imprisonment" in section 1 (2) of the Probation of Offenders Act, 1907 (which served as the pattern for drafting of section 3 (2) of the 1944 Probation of Offenders Ordinance) included also, and mainly, offences for which imprisonment was mandatory. The intention of the English legislature was to give the courts a new alternative (far more important than the old one of binding over) to imposing mandatory imprisonment on an offender who seemed to merit and be suitable for probation. Throughout the subsistence of the original English Probation Act (from 1907 until 1948) there existed therefore side by side "mandatory imprisonment" and "probation" applicable to the same offences, and not only were they not in conflict but complementary, serving as the legislature had intended, as alternative methods for the courts. There is no reason for attributing a different relationship between mandatory

imprisonment under section 10 of the Prostitution Offences Law and probation under section 3 (2) of the Probation Ordinance.

The English Probation Act of 1907 was, as I have said, replaced by the Criminal Justice Act of 1948, section 3 (1) of which provides *inter ali*a that

> "Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion etc. ... the court may, instead of sentencing him, make a probation order"

Section 80 of the same Act defines

> " 'Offence the sentence for which is fixed by law' means an offence for which the court is required to sentence the offender to death or imprisonment for life or to detention during His Majesty's pleasure".

An offence "for which the court is required to sentence the offender to... imprisonment for life" is non-capital murder under section 9 of the Homicide Act, 1957. Section 3 (1) of the 1948 Act does not directly affect the matter before us and I have only mentioned it in order to show that even under existing English law, a probation order can be made in every criminal offence apart from murder and those for which life imprisonment is prescribed.

I see no need to express an opinion regarding the interpretation of the Penal Law Revision (Abolition of the Death Penalty for Murder) Law, 1954. Even if the legislature did not realise the need for amending the Probation Ordinance as a result of the abolition of the death penalty for murder there is yet a vast difference between life imprisonment as a mandatory penalty (see section 2 of the Modes of Punishment Law) and mandatory imprisonment for one day prescribed by section 10 of the Prostitution Offences Law. Whatever the position regarding mandatory life imprisonment, there is nothing in section 3 (2) of the Probation Ordinance to suggest that mere "mandatory imprisonment" with which we are concerned excludes an offence from the operation of the Ordinance.

The existing legislation regarding the modes of punishment is not of one piece and even if all the difficulties concerning the different enactments in this area have as yet not been resolved, no far-going conclusions in law are to be drawn from that. Accordingly it appears to me that one should not infer from the lack of reasonableness in applying the Probation Ordinance to murder for which the penalty is mandatory life imprisonment, that this Ordinance does not apply to every other offence the penalty for which is mandatory imprisonment.

Since section 3 (2) of the Probation Ordinance does not distinguish between imprisonment which is mandatory and that which is not, the legislature's intention to deny the application of the Probation Ordinance, if it had such intention, should have found expression in section 10 of the Prostitution Offences Law. In order to ascertain the legislature's intention I do not need to rely on the speeches in the Knesset during the debate on the section. According to the usual rules of interpretation, express statutory provision is necessary to negative lawful judicial powers, particularly in criminal matters. The judicial power under section 3 (2) of the Probation Ordinance to release a person convicted on information for an offence punishable by imprisonment and to put him on probation is not negated by any express provision of section 10 of the Prostitution Offences Law. In the judgment of my honourable friend, Cohn J., in *Weigel* (1) the legislature's intention to deny the existing powers under the Probation Ordinance is *implied* from the word "Where a person has been convicted... a penalty of imprisonment shall be imposed upon him", which he construes as "Where a person has been convicted... a penalty of imprisonment shall be imposed upon (but he shall not be released on probation) and the penalty shall be imprisonment (and no other penalty)". With all respect, this seems to me mere inference since there is no "automatic penalty". Section 10 does not say that "notwithstanding the provisions of any other enactment" the penalty of imprisonment shall be imposed. In my view, so fundamental a matter as the setting aside in part of the method of probation cannot rest on inference without express statutory provision, since it restricts the powers of the court, the rights of the individual in criminal matters and the functioning of a probation service intended to rehabilitate the offender and turn him into a useful citizen.

Nevertheless I do find myself bound to stress what my honourable friend, Berinson J., said at the end of his judgment in *Weigel,* that in offences of the kind in question it will be "most rare" for the court actually to exercise its power to place an offender on probation.

The Prostitution Offences Law of 1962 was intended to treat procurers of various kinds with severity and it was found fit in the public interest to increase the penalty to five or seven years' imprisonment, to make imprisonment mandatory and to direct that it should not be commuted to conditional imprisonment. Probation officers and judges would make the Law a sham, were they to go on using probation for offenders who come within section 10. I have mentioned probation officers since under section 3 (2) of the Probation Ordinance, as amended, a court is not to make a probation order until it has received the opinion of a probation officer. Moreover, under section 19(a) of the Modes of Punishment Law, the court may, before imposing a penalty, require a written report by a probation officer, and under section 19(b), as amended, the court may not impose a penalty of unconditional imprisonment on an offender who had not reached the age of 21 at the time when the offence was committed until such a report has been received. Section 19(c) provides that "in a report as aforesaid, the probation officer may recommend to the court the type of penalty which, in his opinion, offers prospects of reforming the prisoner". Thus the probation officer plays an important role when the court effectuates probation and in this sense he is "a partner of the judge", although it is the latter who has the last word. It is in general difficult for an appellate court to interfere with the discretion of a judge who decides to place an offender on probation, and the question whether the learned District Court judge in the present case was right does not arise. In any event, apart from exceptional instances, the right place for procurers and those who promote prostitution is prison.

For these reasons I propose to confirm the decision of the majority in *Weigel* (1) and to dismiss the appeal.

MANNY J. I concur in the judgments of my learned brothers, Berinson J. and Halevi J., and join in the conclusion they have reached.

COHN J. I disagree with the premise of my honourable friend, Halevi J., that section 10 of the Penal Law Amendment (Prostitution Offences) Law is to be read and construed against "the background" of the Penal Law Revision (Modes of Punishment) Law. For me, the opposite is the case: the entire object of section 10 is only to take out the penalties mentioned therein from the rules prescribed in this Law regarding punishment for all other kinds of offences. It is very true that section 10 is not intended to affect the rule of

the maximation of penalties and to this extent the general law applies to it, but it is intended expressly and unambiguously to affect the alternation of penalties, and just as it decrees "mandatory imprisonment" excluding fine and conditional imprisonment, it also decrees imprisonment excluding modes of treatment which do not come within the meaning of penalty.

Likewise I do not draw the analogy which my honourable friend, Halevi J., has drawn between "may impose" in the Modes of Punishment Law and "shall be imposed" in the Prostitution Offences Law. I agree wholly with the learned President that the imperative of "shall be imposed" is not to be ignored, in contrast to the permissiveness and discretion of "may impose". Here as well, the opposite is the case: whilst the Modes of Punishment Law gives the judge a discretion as to the severity of the penalty he may impose, the Prostitution Offences Law denies him that discretion since, whatever he may wish to do, imprisonment shall be imposed.

As I suggested in my previous judgment in this matter, it seems to me that the question of interpreting section 3(2) of the Probation of Offenders Ordinance, 1944, does not arise at all. The appellant's fate must, in my opinion, be decided according only to the interpretation of section 10 of the Prostitution Offences Law; and on the correct interpretation of this section there is no place for applying this provision of the Probation Ordinance whatever its interpretation, because section 10 excludes the application of any statutory provision which empowers the court to deal with a person convicted of an offence under the Law in any manner other than by imposing imprisonment alone.

Accordingly I come to the same conclusion as the learned President and adhere to his view.

Further Hearing dismissed by a majority and the majority decision in the previous hearing upheld.

Judgment given on October 31, 1963.