CrimA 10828/03

Taha Najar

v

State of Israel

The Supreme Court sitting as the Court of Criminal Appeals

[28 July 2005]

Before Justices M. Naor, E. Rubinstein, Y. Adiel

Appeal of the judgment of the Haifa District Court (Vice-President H. Pizam and Justices S. Stemer, R. Shapiro) on 15 December 2002 in CrimC 221/01.

Facts: The appellant, a Bedouin, stabbed his sister to death. Initially, he said that the reason why he did this was that his sister, who was unmarried, intended to travel alone to Egypt, and this would dishonour the family. At his trial, the appellant testified that in addition his sister had made a statement questioning his paternity of his children. The appellant claimed that the killing of his sister was the result of provocation, and therefore he should be convicted of manslaughter rather than murder. *Inter alia* he argued that the court should take into account the fact that in Bedouin culture it was unacceptable for unmarried women to travel alone.

Held: No argument of 'family honour' as a motive for killing someone will be allowed by the court in Israel. The human dignity of the victim and the sanctity of life take precedence over family honour.

Appeal denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, s. 1.

Penal Law, 5737-1977, ss. 300, 300(a), 300(a)(2), 300A, 301.

Israeli Supreme Court cases cited:

CrimA 6167/99 *Ben Shalush v. State of Israel* [2003] IsrSC 57(6) 577. [1]

CrimA 290/87 *Sabah v. State of Israel* [1988] IsrSC 42(3) 358. [2]

CrimA 228/01 *Kalev v. State of Israel* [2003] IsrSC 57(5) 365. [3]

CrimA 339/84 *Rabinovitch v. State of Israel* [1985] IsrSC 39(4) 253. [4]

CrimA 299/81 *Tatruashwili v. State of Israel* [1982] IsrSC 36(1) 141. [5]

CrimA 6819/01 *Gershuni v. State of Israel* (not yet reported). [6]

CrimA 402/87 *State of Israel v. Jondi* [1988] IsrSC 42(3) 383. [7]

CrimA 686/80 *Siman-Tov v. State of Israel* [1982] IsrSC 36(2) 253. [8]

CrimA 396/69 *Benno v. State of Israel* [1970] IsrSC 24(1) 580. [9]

CrimA 655/78 *Schmidman v. Attorney-General* [1980] IsrSC 34(1) 63. [10]

CrimA 5413/97 *Zorbeliov v. State of Israel* [2001] IsrSC 55(2) 541. [11]

CrimA 759/97 *Aliabiev v. State of Israel* [2001] IsrSC 55(3) 459. [12]

/03 *A v. State of Israel* [2004] IsrSC 8CrimA 125 58(6) 625. [13]

CrimA 3071/92 *Azualos v. State of Israel* [1996] IsrSC 50(2) 573. [14]

CrimA 3800/05 *Abu Balal v. State of Israel* (not yet reported). [15]

CrimA 7126/03 *Ohanna v. State of Israel* (unreported). [16]

Jewish law sources cited:

Exodus 20, 12. [17]

Babylonian Talmud, *Sanhedrin* 56b. [18]

Genesis 9, 6. [19]

Maimonides, *Hilechot Melachim (Laws of Kings)* [20] 9, 1; 9, 4.
N. Rakover, *Law and the Noahides*. [21]

For the appellant — M. Gilad.
For the respondent — A. Hulta.

JUDGMENT

Justice E. Rubinstein

1. This is an appeal of the judgment of the Haifa District Court (Vice-President Pizam and Justices Stemer and Shapiro) in CrimC 221/01, which was given on 15 December 2002, in which the appellant was convicted of murder with malice aforethought under s. 300 of the Penal Law, 5737-1977. The victim of the murder was his late sister Samia.

2. (a) According to what is set out in the indictment and in the judgment of the court, on 9 May 2001 the appellant stabbed his 43 year old sister Samia eleven times with a knife, ten times in her back and once in her left hand, and thereby brought about her death.

The judgment found that the appellant discovered that the deceased, who was unmarried and lived with other unmarried sisters in their mother's home, intended to go within a short time on a trip to Egypt on her own. The appellant opposed the deceased's trip, because he thought that this was 'unacceptable behaviour' according to the customs of the Bedouin community with regard to unmarried women, and he tried to dissuade her from going. On the day of the deed, the appellant came to the deceased's home and demanded that she give up the planned trip. The deceased refused. Because of her refusal, the appellant decided to kill her, and he subsequently left her home, went to his home, took a knife, hid it under his clothes and returned to her home. The appellant spoke to the deceased once again and demanded that she did not go to Egypt, but her mind remained unchanged. As a result, the appellant stabbed her and brought about her death; he

began to stab her while she was standing, and continued even when she collapsed.

(b) The District Court convicted the appellant of an offence of murder with malice aforethought, under s. 300 of the Penal Law, 5737-19 (hereafter: the law). In a detailed verdict, the trial court reviewed the evidence and explained that, in the opinion of the court, the elements of the offence existed.

(c) The main question that was in dispute, before the trial court and now, is whether the prosecution proved the elements of the offence of 'murder with malice aforethought.' and especially the intention of the appellant to kill the deceased and the element of a lack of provocation. No one disputes the existence of the *actus reus*. The aspect of *mens rea* is composed, under the law — s. 301 of the law and case law — of three elements: a decision to kill, preparation, and an absence of provocation. With regard to the first element — *a decision to kill* — the District Court found that since this element is based on the fatal outcome and a desire that this outcome will indeed be realized, in our case the appellant confessed in his statement to the police (prosecution exhibit 16, unlike his testimony in the court, which we shall discuss below) that he had formed the desire to kill the deceased already when he went to bring the knife from his home. The manner of killing the deceased also testified to his intention to kill her; the many wounds made with a knife in sensitive parts of the body places the appellant under a presumption that he intended to cause the fatal outcome. The court reached the conclusion that the appellant did not act as an automaton, without any ability of stopping himself, but with independent thought, in a 'logical' sequence of actions that led to the realization of his purpose.

With regard to the element of *preparation*, the District Court held that the acts whereby the appellant went to his home, brought the knife and hid it on his person were sufficient to satisfy this element; this element would have been satisfied even if the knife had been in his possession the whole time, since it would have been sufficient for him to direct it at the deceased in order to satisfy the element of preparation.

In the trial court the appellant argued that the prosecution did not prove the element of the *absence of provocation*, in view of statements which he alleged the deceased made to him that his children were not his, a matter that was raised only in his testimony in the court, and also in view of the fact that the deceased wanted to travel to Egypt in defiance of the customs of his community. The court held that the deceased did not say anything to the appellant about his children, and even if she did say something, neither that nor her desire to travel to Egypt could constitute either an objective or a subjective provocation.

3. (a) The appeal before us is against the conviction.

(b) The appellant's main argument is that he did not intend to kill the deceased, and that the element of a lack of provocation was not satisfied. In this context, the appellant says that because he belongs to the Bedouin community, he refrained from raising the claim with regard to the true nature of the provocation, namely the insult with regard to his children, until his testimony in the court.

Alternatively, it was argued that the appellant's act was carried out at a time when he was in an emotional state in which his ability to control his behaviour was limited, and therefore the case falls within the scope of s. 300(a) of the Penal Code, which allows a reduced sentence to be given in such cases instead of life imprisonment as a mandatory sentence.

4. *Deliberation and decision*

(a) Section 300(a)(2) of the Penal Law provides that someone who brings about the death of a person with malice aforethought shall be charged with murder. Section 301 of the law provides — as aforesaid — the three elements of the component of malice aforethought: the decision to kill, the element of preparation and the absence of provocation.

(b) *The decision to kill*

(1) The *decision to kill* requires a *mens rea* of an intention that is reflected in the rational and voluntary sphere — an expectation of the

fatal outcome and a desire or wish to realize it (CrimA 6167/99 *Ben Shalush v. State of Israel* [1], *per* Justice Procaccia). Proving the existence of the element of *mens rea* requires a subjective examination that addresses the expectation of the outcome and the desire to achieve it. In order to examine this, the courts are assisted by presumptions and objective evidence that can cast light on the intention. Thus, for example, case law has adopted a presumption that a person intends the natural consequences that ensure from his actions; in addition, it has formulated a set of subtests in order to reach conclusions about the existence of a decision to kill, in relation to all of the circumstances that accompany the incident (see CrimA 290/87 *Sabah v. State of Israel* [2], at pp. 364-366, *per* Justice D. Levin). In CrimA 228/01 *Kalev v. State of Israel* [3], at pp. 375-377, Justice Beinisch surveyed the various indications that point to the existence of a decision to kill:

> 'Thus, for example, an implement that was used for committing the murder can serve as a significant indication of the existence of expectation and intention… the manner of the act and the nature of the injury also testify to the making of the decision to kill; for example, an injury in a sensitive part of the body has been recognized as an indication that proves a decision to kill, even if was only one blow, but it was in a sensitive and dangerous place' (and see the references cited there).

The same is true of 'the nature of the incident that led to the murder or previous statements that were made between the parties, and that can show a decision that was made with a sound mind and without provocation' (*ibid*., at pp. 376-377).

(2) In our case, the evidence that was proved with regard to the circumstances of the incident and the sequence of events leads to the inevitable conclusion that the appellant reached a decision to kill his sister. In his confession to the police (prosecution exhibit 16A, at p. 2) he says clearly: 'I said if she was convinced and said to me "I am not going," I would not kill her, but if she insisted, I would kill her.' When the deceased did not give in to the appellant's request to cancel

the trip to Egypt and continued to refuse to do so, he took a knife that was approximately 13 cm. long and approximately 4.6 cm. wide and he stabbed her — as aforesaid — *eleven times* in sensitive parts of her body. Two stab wounds on the right side of the back pierced the right lung, the inferior vena cava and the liver. Seven stab wounds on the left side of the back went through the left lung, an addition wound in the lower back went through the back muscles and another wound pierced the muscles of the left forearm. The number and location of the wounds and the lethal instrument that was used show that the appellant acted with malice aforethought, was aware of the consequences of his actions and desired to bring about the fatal outcome.

(3) As has been seen, the appellant's claim that he stabbed his sister without having any possibility of controlling his actions is inconsistent with the evidence that was presented with regard to the sequence of events and the manner in which he behaved thereafter, as described above. The appellant made a decision in his heart that if the deceased would not give in to his demand to cancel the trip to Egypt, he would kill her. After the cruel act, he went out to the courtyard and told the members of the family who were present there that he had killed 'Amu,' washed his hands and the knife and covered the body with a rug. The appellant's brother telephoned the police and the appellant himself spoke with the duty officer and told him of the death of the deceased.

(c) *Preparation*

The element of preparation has been interpreted in case law as a physical element in which the court examines the preparatory acts that accompanied the act of murder or the preparation of the implement that was used to commit the murder (CrimA 339/84 *Rabinovitch v. State of Israel* [4], at p. 259, *per* Justice E. Goldberg). It has also been said that 'the act of preparation may take place on the spot, when the decision to kill is made. In practice, in many cases these two elements interconnect, when they arise and take place very shortly before the actual act of causing the death' (CrimA 299/81 *Tatruashwili v. State of Israel* [5], at p. 147, *per* Justice D. Levin).

Thus, for example, in *Tatruashwili v. State of Israel* [5], by taking the axe that the appellant found in the house, lifting it up and bringing it down on the deceased's head, the act of preparation was begun and completed.

In the case before us, the District Court as aforesaid reached the substantiated conclusion that the appellant returned to his home after an argument with his late sister in order to bring the knife, and he hid it under his clothes. Notwithstanding, like the trial court I too am of the opinion that even according to the version, which was raised at a late stage, that the knife was in the appellant's possession all day, bringing it out from under his clothes and directing it at the deceased was sufficient to satisfy the element of *mens rea*. It would appear that the issues in our case with regard to this point are not complex and speak for themselves.

(d) *Absence of provocation*

(1) The provocation, whose absence must be proved under s. 301 of the Penal Law is an external provocative act that takes place immediately prior to the act of the killing, and it must be of sufficient intensity to deprive the accused of the power of self-control and his ability to comprehend the possible outcome of his reaction (see the recent case of CrimA 6819/01 *Gershuni v. State of Israel* [6], *per* Justice Levy, and the case law cited in my opinion there). Was the appellant provoked? The answer to this cannot be yes.

(2) It is well known that provocation is made up of an objective element and a subjective element.

The subjective element concerns the question whether the provocative or offensive conduct did in practice have an effect on the accused to such an extent that it caused him to lose his self-control (CrimA 402/87 *State of Israel v. Jondi* [7], at p. 390, *per* President Shamgar).

The objective element concerns the question whether a civilized person, were he to be placed in the specific situation, would have lost his control and responded in the way in which the accused responded; 'the objective test is mainly an ethical barrier, which is intended to

impose norms of conduct' (CrimA 686/80 *Siman-Tov v. State of Israel* [8], at p. 264, *per* Justice Shamgar) and its purpose is to provide an answer to the question whether the provocation directed at the appellant was so serious, in view of the circumstances of the case, 'that it can be concluded that most people would have great difficulty in not submitting to its effect and therefore they would be liable to respond in the fatal manner as the accused responded' (CrimA 396/69 *Benno v. State of Israel* [9], *per* President Agranat). In order to clarify this test, we should point out that it has already been held that 'with regard to uttering curses, in response to which such great pressure was exerted on the neck that it was capable of resulting in the breaking of the bone, it makes no difference whether the appellant was accustomed to cursing in the past or experienced it before the incident for the first time… this cannot be regarded as a provocation that is capable of depriving him of malice aforethought' (CrimA 655/78 *Schmidman v. Attorney-General* [10], at p. 73, *per* Justice Shamgar; see also CrimA 5413/97 *Zorbeliov v. State of Israel* [11], at p. 554, *per* Justice Levy).

(3) In our case, the following is the appellant's version of events, as it developed:

(a) The provocation began with his sister's 'declaration of independence' that she was going to Egypt as an unmarried woman, and it continued with the suppressed version that was raised in the court — an insult to his personal dignity by casting a doubt on whether he was the father of his children. In several statements made by the appellant on the date of the tragic event (9 May 2001) it can be clearly seen that the reason for the killing was the deceased's desire to go to Egypt. Thus, in the arrest report made by Advanced Staff Sergeant-Major Yitzhak Cohen (prosecution exhibit no. 49) at 1:45 p.m., the appellant said 'I killed her because she wanted to go to Egypt and I did not agree; I have made the mistake of my life.' In a memorandum on that day, which was made by Advanced Staff Sergeant-Major Mansour Nazia (prosecution exhibit no. 42), when the appellant was interrogated after making an initial statement that 'what happened, happened,' 'he [the appellant] said to me that he

stabbed his sister Samia after he tried to dissuade her from going to Egypt and she insisted' (p. 3). In a memorandum made by Advanced Staff Sergeant-Major Avi Sabah (prosecution exhibit no. 41), while the appellant was waiting to be interrogated, it is stated that the appellant expressed remorse for his deeds 'and the whole time said: why did I stab her, I was concerned for my children… he knew and understood exactly what he had done and why, because according to him his sister (the deceased) wanted to go on a trip to Egypt and he refused and she insisted and therefore he murdered her.' See also prosecution exhibits nos. 15 and 15a of the same date at 2:50 p.m. (Advanced Staff Sergeant-Major Samiah Mansour) and also prosecution exhibit no. 16 — the appellant's statement — that when she insisted that if she did not go to Egypt she would leave the house, 'I got up and killed her, now I am sorry… she did not deserve to be killed.' All the evidence that we have listed hitherto describes the desire of the deceased to travel to Egypt as the reason for the murder. There is no other reason. In prosecution exhibit no. 15 the appellant also said: 'she argued with me until the end and said to me… you are not my father, my father is dead… and I, since the day that my father died, am responsible for everything in the home, and she did not accept that and said: you are not my father.'

(b) However, a new version with regard to the reason for the killing was raised in the appellant's testimony in the court (p. 132 of the court record, on 17 February 2002). Admittedly, he still explained that the trip to Egypt was the reason for the quarrel, since it was not in accordance with the customs of the Bedouin community with regard to the proper conduct for unmarried women: 'from the viewpoint of family honour, I will have no more respect from people if she goes to Egypt. How can I let an unmarried girl travel alone to Egypt… this diminishes my honour and I will feel like a rubbish bin. This is my honour. This is a part of me, this is my flesh and blood' (p. 131). But (at p. 132) a new factor was added, according to which after the quarrel 'she [the deceased] said: first of all, you are not my father. You will not decide for me whether I will go or not. Before you decide for me, go and look at your children; you are a kind of

black colour, and your children are white… I understood from this that the children were not mine, I lost control, I did not know what I was going to do and what I did, and the incident occurred.' Later, at p. 133, he said: 'I saw everything black, as if my wife was having an adulterous relationship with another man… would I keep an adulterous wife in the house?' The appellant explained his suppression of this story until his testimony in the trial (at p. 135) as follows: 'It is a question of my honour that people in the village should not hear what she said.' He claimed that he did not tell this to the psychiatrists who examined him, for the same reason, because of honour (p. 147), but only to his own expert, Dr Naftali. It is not superfluous to point out that in his statement at the police station on the day of the event (prosecution exhibit no. 15a, at p. 16) the appellant was asked whether there was another reason for the murder that he did not wish to disclose, and he replied: 'No, I say that this was the only reason.'

(c) We have before us, *prima facie*, two alleged issues of family honour: one is the honour that was offended by the trip of an unmarried woman alone; but since he understood — apparently — that this reason alone would not be accepted, as was certainly made clear to the appellant in various ways after the killing, the appellant raised the version of the personal insult to his dignity, and he also recruited for this purpose his mother, who did not mention her son's statement in her statement on 9 May 2002 (prosecution exhibit no. 11), but spoke about it in the court (pp. 24-25). This, then, is the essence of the defence argument: the provocation arose from the insult to the honour of the family, and especially to the personal dignity of the appellant.

(4) Defence witness Sheikh Atrash Aakal explained in support (p. 156):

> 'Family honour is one of the most sensitive issues with Bedouins, especially so in the Bedouin tribe; every Bedouin has his family honour and tribal honour, and respect for customs. He will not acquiesce to any injury to

his honour and the honour of his family, especially where sexual offences are concerned.'

Later, at p. 157, he said: 'A trip by a Bedouin girl alone is one of the most serious red lines which no one allows himself to cross in the honour of the Bedouin family and tribe.' The same applies to the implication that the children were not his: 'This is an insult of the first order… it will not be forgiven.' He also said with regard to family honour (p. 161): 'In Bedouin society we do not justify the murder, but we are caught between the mentality and the customs and Israeli law, which is in our opinion a very respected and just law, and we believe in it, but we pay the price.'

(5) Do these claims support the existence of the subjective element of provocation? In order to consider whether we should accept this at all, it was necessary to believe the appellant's version with regard to the deceased's insult with regard to his being the father of his children, as a result of which he allegedly drew out the knife on the spot and killed his sister. The trial court did not believe this at all, and it concluded that the sole motive for killing his sister was the planned trip to Egypt, which was, according to the appellant, an insult to the family and its honour. From reading the evidence it is very hard to imagine that these remarks were made, since it is logical to suppose that had they been said, the appellant would have given expression to them at least to his doctors or someone close in his family during the long months — nine in total, from May 2001 to February 2002 — between the murder and his testimony in court. Indeed, the trial court did not accept the appellant's explanations with regard to the suppression of this version. Moreover, the intensity of the emotion for provocation must be such 'that it deprives the person of any ability to understand the consequences of his acts' (*per* Justice Procaccia, in CrimA 759/97 *Aliabiev v. State of Israel* [12], at p. 475; S.Z. Feller, *Fundamentals of Criminal Law*, at p. 565). This is not what happened in our case, according to all the assembled evidence. It is well known that this court does not tend to intervene in the factual findings, and especially in the determinations of credibility, /03 *A v. State of Israel* 8that are made by the trial court (CrimA 125

[13]). Indeed, these statements were not only suppressed for a long time, but they were made at a time when the only version that can be heard is that of the appellant, since the deceased regrettably is no longer with us in order to give her version of this. With regard to the suppressed version, even according to the view that a person's honour is violated by statements made with regard to his family honour and his personal honour, such as the paternity of his children, it is necessary to believe that the alleged provocation deprived him of self-control in such as way that it led to the act of murder, and life experience tells us that if this were the case, there would have been an immediate expression of this in some way or another, and the version would not have been suppressed in its entirety for such a long time, as it was.

(6) (a) But even if this factual claim of the appellant were accepted, which is not the case, and even if it were sufficient to satisfy the element of subjective provocation, which is not the case, this does not lead at all to a conclusion that a civilized person would, in response to an insult thrown at him in the course of a quarrel, lose his self-control to such an extent that he would take a knife and stab his sister again and again and again. In other words, even were we to assume the existence of the subjective element, the objective element certainly did not exist in my opinion. Who is the 'civilized person' whose temper we are examining within the framework of the objective test? Does this include a specific approach to various segments of the population and various cultures and their attitude to 'murder for reasons of family honour'?

(b) The answer to this was given by President Shamgar in *State of Israel v. Jondi* [7], at p. 393:

> 'We are speaking of a theoretical criterion, which is created by the court on the basis of a kind of synthesis of ideals and reality. The court creates for itself a theoretical image that reflects the expected manner of behaviour of the reasonable person in our society. In other words, we do not create an objective test on the basis of collecting information with regard to the accepted level of conduct

> in a particular group, but according to a theoretical construction which is the creation of the court, which the court fashions in an image that is admittedly fictional but is also humane. In other words, this is an image that may also fail to deal with a specific situation. Obviously this image is one of the specific time and not of past ages, but it does not mean that the court, in fashioning this image, must necessarily accept, whether it likes it or not, the average of corrupt behaviours and customs, in a specific period, of various groups or persons of various origins or tempers, and that it is not entitled to include within the characteristics of its creation elements of a desirable cultural norm... the objective test does not make any provision for subgroups... which include persons who watch violent films as opposed to those who only watch educational films, or those who place the immediate satisfaction of material desires at the centre of their existence as opposed to those who live a spiritual life.'

It should be noted that in *State of Israel v. Jondi* [7] the approach of the District Court, which held by a majority that the objective test of the absence of provocation had not been proved, was overturned, and President Shamgar (with the agreement of Justices S. Levin and E. Goldberg) disagreed with the finding of the District Court that 'it was very difficult indeed to define the nature and character of "civilized"' for this purpose.

(c) With respect, the remarks of President Shamgar are, in my opinion, as valid today as then. Admittedly, in a multi-faceted and multi-cultural society like Israeli society there will be areas where significance and attention will be given to various segments of the population, but there is no place for giving significance to this within the framework of the criminal law, especially in its physical manifestations, and certainly not when we are speaking of taking the life of another against a background of what is called family honour. The criterion is first and foremost an ethical one: the sanctity of life (see s. 1 of the Basic Law: Human Dignity and Liberty).

(d) Admittedly, much ink has been spilled with regard to the dilemmas that are presented by the approach of cultural relativity. On the one hand, arguments have been made against the creation of universal moral values and universal human rights that seek to impose 'enlightened' western culture on various segments of the population, as a symptom of an approach that does not recognize pluralism and multiculturalism. On the other hand, a dialogue that makes allowances — which is legitimate in itself — for the unique history and culture of every group may act as a magic word, which sometimes clouds its real significance and allows an abuse of that relativity in order to protect values that are incompatible with basic human rights as they have been formulated in our times. 'Family honour murders' are one of these. I am aware of the remarks of Prof. Y. Shefer in 'The Reasonable Man and the Criminal Law,' 39 *HaPraklit* 78, an article written in 1990 in which he found that in the serious areas of criminal law no place has been allowed in Israeli case law, *inter alia*, for provocation of the 'reasonable person' in the offence of murder, but I am unable to accept his conclusion, for ethical reasons.

(e) In Dr O. Kamir's article, 'How Reasonableness Killed Women — the Hot Blood of the "Reasonable Person" and the "Average Israeli Woman" in the Doctrine of Provocation in *Azualos v. State of Israel*,' 6 *Pelilim* (1998) 137, at pp. 162-168), which concerns the judgment in CrimA 3071/92 *Azualos v. State of Israel* [14], *per* President Barak, criticism was directed, *inter alia*, also at the judgment in *State of Israel v. Jondi* [7], and the definition cited above from the remarks of President Shamgar (at p. 161). It should be pointed out that in *Azualos v. State of Israel* [14] the wife of the accused was found in the arms of another man; the accused killed them both, and provocation was proved, such that the offence of manslaughter was substituted for murder. In her article, Dr Kamir discussed the 'reasonable man' who invokes the protection of the defence of provocation, and as she says, in a scathing description of the characterization: ' "The reasonable man" is a person of honour, vulnerable and sensitive. When his right to his property is violated or

his masculinity is violated, he must restore his honour and in the heat of the moment he kills his wife and her lover.' In her book, *A Question of Honour: Israeli Women and Human Dignity* and in her article 'A Love as Strong as Death or a Threat of Harassment' in *Cases concerning Love* (O. Ben-Naftali and H. Naveh, eds.), at p. 475, Dr Kamir argues that the concept of honour incorporates four separate concepts: honour, dignity, glory and respect (at p. 476), and that in many 'honour societies,' like those of the Mediterranean, the honour of a man as a value — which is the issue that concerns us — depends upon two components: 'The one is his own extrovert, bold, independent, generous, proud and aggressive behaviour'; and the other is 'the modesty, naivety, piety, obedience and devotion of the women close to him (his mother, sister, wife and daughters).' Special importance is attributed to the sexual inaccessibility of the women, since violating the sexuality of a woman is regarded as a source of shame, which violates not only her honour, but also the honour of the man who is responsible for guarding the access to her sexuality; therefore a father or brother of a girl is liable to punish her, and this symbolizes the control of her family over her, since, as aforesaid, by violating the norm of modesty she brings shame on those with whom she grew up. See also Manar Hassan, 'The Politics of Honour: the Patriarchate, the State and the Murder of Women in the name of Family Honour,' in *Sex, Gender and Politics* (1999) (D. Yizraeli et al., eds.) , at p. 267, which regards family honour as 'a fortified wall behind which all the forces that restrict the liberty of the woman are gathered' (p. 303); in one place, she describes the murder of a woman by her cousin because she refused to stop smoking, and elsewhere a woman was murdered because she refused to work outside the home. Kanaan Ahlas was murdered because she accepted a position of leadership; and a young murderer quotes the person who murdered his sister, because she said 'that no one will tell me how to behave' (see pp. 302-303).

(f) This is not the place to discuss at length the character of the reasonable man and the place that should be given to various outlooks within the framework of this concept, but it is clear that any

argument concerning cultural differences and relativity cannot be a cloak for the subjugation and oppression of a segment of the population, which in our case is women, in the name of the value of family honour, and it certainly cannot justify the intolerable way that women are killed in the name of this value. There is no alternative but to make it clear to everyone: there is no place for any argument of 'family honour' as a motive for killing someone, whether a family member or not. No act of killing for the reason that family honour has been violated will be shown any understanding by the court in Israel. There is no difference, in this respect, between one murder and another; the human dignity of the victim, which has been irreversibly violated, takes precedence over the honour of the family. The right that is higher than all others is the one that requires no explanation, and was included in the Ten Commandments, 'You shall not murder' [17]), which is the sixth commandment. Even before 12(Exodus 20, that, the spilling of blood appears among the seven commandments given to Noah, which according to Jewish tradition apply to the whole human race (see Babylonian Talmud, *Sanhedrin* 56b [18]): 'Whoever spills the blood of man, by man his blood shall be spilled, for in the image of God He made man' (Genesis 9, 6 [19]). See also Maimonides, *Hilechot Melachim (Laws of Kings)*, 9, 1 [20], who says with regard to this and other commandments, 'and logic dictates them'; in other words, these commandments are dictated also by human reason and common sense; see also *ibid.*, 9, 4 [20]. See also N. Rakover, *Law and the Noahides* [21]. In Israel, as aforesaid, the right to life has been incorporated in the Basic Law: Human Dignity and Liberty.

(g) The issue naturally raises a question that goes beyond the scope of this tragic incident and concerns educating people to be tolerant and to eliminate situations in which one person raises his hand against another or turns his knife on another for reasons of family honour. We are now approaching the end of the sixth decade of the existence of the State of Israel, and we are in the twenty-first century, and still concepts of honour of this kind — which I do not denigrate as a matter of tradition, cultural, social and political

experience and values — are also being used as an 'explanation.' I am aware that learned counsel for the defence does not identify with the explanation, but merely attributed it to his client, to the murder, and nothing more. There are authorities and parties whose task it is — and the court plays a certain role, but not a central one, in this — to act in order to eradicate these concepts in the social context, in addition to the criminal one: the education system, local and community leadership, etc.. It has been argued that it is a part of a value system, but it is not a decree from the Heavens, even if it is not easy to change it. Sheikh Atrash Aakal, who testified, spoke of the difficult position of Bedouins in this context; academic writers show that this old custom still prevails in various places. But it is the task of the Sheikh and others like him, and it is the task of the education system first and foremost, to act to eradicate the erroneous and perverse application of the issue of family honour. An educational process by the education authorities and the relevant leadership is essential, in my opinion, and the sooner the better.

(h) Admittedly, this court recently showed leniency in a case of an offence of a seventy year old man, who was sentenced to 9 months imprisonment for offences against his daughter, which, it was claimed, were committed against a background of family honour. Leniency was shown in view of his age and family circumstances, including the attitude of the daughter (CrimA 3800/05 *Abu Balal v. State of Israel* [15]). But it was expressly stated in that case (*per* Vice-President Cheshin):

> 'Our remarks should not be interpreted as if we are saying that persons who commit an offence against a background of "family honour" should be treated leniently or that offences that are committed against a background of "family honour" should be considered with a tolerant approach. Certainly not.'

(i) I should mention that there is a further hearing pending in this court on the question whether, in determining the existence of the element of the absence of provocation, there is also a justification for considering the objective test (CrimFH 1042/04 *Biton v. State of*

Israel). In *Gershuni v. State of Israel* [6], I said that I do not agree with those who believe that the objective test should be cancelled, since even in a society that respects the autonomy of the individual, within the framework of human dignity, the sanctity of human life is one of the basic principles in the Basic Law: Human Dignity and Liberty, and it is a normative infrastructure that is shared by all members of society; if we do not assume this, then in my opinion we will undermine the essential basic values of every civilized society.

(j) With regard to the appellant's claim concerning an emotional disturbance that did not allow him to control his behaviour (s. 300A of the Penal Law), it would appear from the description of the sequence of events that the acts of the appellant were carried out with malice aforethought — not as a spontaneous and uncontrolled response, but out of a desire to protect the family honour and his status as head of the family. Moreover, even from the psychological opinions that were filed in the District Court it does not emerge that the appellant suffers from any psychological illness. In this context I accept the conclusion of the District Court, that even if the appellant suffered from a serious psychological disturbance at the time of committing the murder — an argument that was not accepted — there was no factual or legal causal link between it and his emotional state before the killing; there is no similarity between CrimA 7126/03 *Ohanna v. State of Israel* [16] (in which manslaughter was substituted for murder) and our case.

5. Finally, in summary, the appellant murdered the deceased with malice aforethought, intending to bring about the fatal outcome and without proving the claim of provocation. I therefore propose to my colleagues that we should not allow the appeal, and that we should leave the sentence unchanged.

Justice M. Naor

I agree that the appeal should be denied. The trial court rightly did not accept the suppressed evidence of the appellant with regard to remarks that were purportedly said to him by his late sister, from

which it was possible to understand that his wife had been unfaithful to him. I see no need to discuss, within the framework of this appeal, the question of what the law would be had the applicant's factual claim been accepted, even if only as a result of his being given the benefit of the doubt.

Justice Y. Adiel

I agree that the appeal should be denied, as proposed by Justice E. Rubinstein, and I also agree with the comment of Justice M. Naor.

Appeal denied.

21 Tammuz 5765.
28 July 2005.