CrimA 111A/99

Arnold Schwartz

v.

State of Israel

The Supreme Court Sitting as the Court of Criminal Appeal

[June 7th, 2000]

Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, Y. Kedmi, T. Strasberg-Cohen, D. Dorner, D. Beinisch

Application to the Supreme Court sitting as the Court of Criminal Appeals for the stay of the execution of a sentence.

Facts: The applicant was convicted in the District Court in Tel-Aviv-Jaffa of two offenses: the commission of rape under section 345(A)(1) of the Penal Law 5737-1977 and the commission of sodomy, an offense under section 347(A) of the Penal Law. The applicant was sentenced to four years in prison, of which three years were of actual imprisonment and one year was on probation. In addition the court ordered the applicant to compensate the complainant in the amount of NIS 10,000. At the time the conviction was handed down, at the request of the applicant's counsel, the District Court stayed the date of commencement of the applicant's sentence by one month. The application was brought before Justice Zamir who determined that execution of the prison sentence imposed would be stayed until a further decision was made on the application. Justice Zamir transferred the application to the President of the Court for a decision as to whether it would be appropriate to transfer the application to a decision before an extended panel of Justices, and the President of the Court ordered consideration of the application before an extended panel of nine justices.

Held: The Court held that it would be appropriate to delineate standards for applications to stay execution of prison sentences of persons who have been convicted and sentenced to a prison term and whose appeal is pending. The Court detailed those standards and considerations and held that while in the specific circumstances of the present case those standards dictate that the execution of the prison sentence should likely not have been stayed, nonetheless, due to the fact that the applicant has been free on bail for a long period of time since the sentence was handed down, and in consideration of the date that had been set for hearing the appeal, the Court did not in fact order the immediate imprisonment of the applicant.

The Court also considered, in a preliminary discussion, the application of the Public Defender's Office to participate in the proceeding as a "friend of the court." The Court held that the joining of the Public Defender as a "friend of the court" was to be allowed in this case.

Justice Kedmi agreed with the final outcome of the judgment but added qualifying comments. In addition, Justice Kedmi disagreed with the holding that allowed the Public Defender to be joined as a "friend of the court."

Legislation cited:

Penal Law 5737-1977, ss. 43, 44, 87, 87(a), 87(c), 345(a)(1), 347(a), ch. 6, sections B, H.

Basic Law: Human Dignity and Liberty, ss. 5, 10.

Basic Law: the Judiciary, s. 17.

Criminal Procedure (Enforcement Powers – Arrests) Law 5756-1996, ss. 21(a)(1)(c), 44.

Bail Ordinance 1944.

Criminal Procedure Law 5725-1965.

Draft legislation cited:

Amendment to Penal Law (Methods of Punishment) Draft Proposal Hatzaot Hok no. 522.

Israeli Supreme Court cases cited:

[1] RA 7929/96 *Kozali and Others v. State of Israel* (not yet reported).

[2] CrimA 608/81 *Benyamin Ben Maier Suissa v. State of Israel* IsrSC 37(1) 477

[3] FH 16/85 *Harrari v. State of Israel*, IsrSC 40(3) 449.

[4] CrimA 757/85 *State of Israel v. Harnoi* IsrSC 39(4) 292.

[5] CrimA 1100/91 *State of Israel v. Jeffrey* IsrSC 47(1)418.

[6] MAppCrim 2161/92 *Fadida v. State of Israel* (unreported).

[7] MApp 123/76 *Ikviah v. State of Israel* IsrSC 30(3) 223.

[8] MA 24/55 *Shlomo Porat (Perlberg) v. Attorney General of Israel* IsrSC 9 673.

[9] MApp 2/52 *Locksner v. Israel Attorney General* IsrSC 1(1) 169.

[10] Mot 118/79 *Richtman v. State of Israel* IsrSC 33(2) 45.

[11] Mot 156/79 *Kobo v. State of Israel* IsrSC 33(2) 63.

[12] Mot 132/81 *Pitusi v. State of Israel* IsrSC 35(2) 817.

[13] MApp 430/82 *Michalshwilli v. State of Israel* IsrSC 36(3) 106.

[14] MApp 10/62 *Cohen v. Attorney General* IsrSC 17 534.

[15] MApp 183/80 *Sharabi v. State of Isr*ael IsrSC 34(4) 517.

[16] Mot 52/50 *Maatari v. Attorney General of Israel* IsrSC 4 414.

[17] MAppCrim 166/87 *State of Israel v. Azran and Others*, IsrSC 41(2).

[18] MAppCrim 2599/94 *Danino v. the State of Israel* (unreported).

[19] CrimA 8549/99 *Ben Harosh v. State of Israel* (unreported).

[20] CrimA 3695/99 *Abu Keif v. State of Israel* (unreported).

[21] CrimA 4263/98 *Luabna v. State of Israel* (unreported).

[22] CrimA 3594/98 *Ploni (John Doe) v. State of Israel* (unreported).

[23] CrimA 1050/98 *Siamo v. State of Israel* (unreported).
[24] MAppCrim 6877/93 *Ploni (John Doe) v. State of Israel* (unreported).
[25] MApp 28/88 *Sussan v. State of Israel* (unreported).
[26] MAppCr 4331/96 *ElMakais v. State of Israel* IsrSC 50(3) 635.
[27] MAppCr 5719/93 *Forman v. State of Israel* (unreported).
[28] MAppCr 6689/94 *Attias and others v. State of Israel* (unreported).
[29] MAppCr 8574/96 *Mercado v. State of Israel* (unreported).
[30] MAppCr 8621/96 *Kuzinski v. State of Israel* (unreported).
[31] MAppCr 4590/98 *Sharabi v. State of Israel* (unreported).
[32] CrimA 7068/98 *Hachami v. State of Israel* (unreported).
[33] CrimA 9/55 *Yegulnitzer v. State of Israel* IsrSC 9 891.
[34] CrimA 125/74 *Merom, Corporation of International Commerce, Ltd. and others v. State of Israel* IsrSC 30(1) 57, at p. 75).
[35] MAppCr 3360/91 *Abu Ras and others v. State of Israel* (unreported).
[36] CrimA 7282/98 *Uda v. State of Israel* (unreported).
[37] HCJ 6055/95 *Sagi Zemach and others v. Minister of Defense and Others* (not yet reported).
[38] HCJ 87/85 *Argov and others v. Commander of the IDF Forces for Judea and Samaria*, IsrSC 42(1) 353.
[39] HCJ 1520/94 *Shalem v. Labour Court and others*, IsrSC 58(3) 227.
[40] MAppCr 2708/95 *Spiegel and others v. State of Israel* IsrSC 59(3) 221.
[41] LCA 5587/97 *Israel Attorney General v. Ploni (John Doe)* IsrSC 51(4) 830.
[42] MApp 15/86 *State of Israel v. Tzur*, IsrSC 40(1) 706.
[43] MAppCr 537/95 *Genimat v. State of Israel* IsrSC 49(3) 335.
[44] HCJ 1715/97 *the Office of Investment Managers in Israel and others v. Ministry of Finance and others*, IsrSC 51(4) 367.
[45] MAppCr 3590/95 *Katrieli v. State of Israel* (unreported).
[46] MAppCr 37171/91 *State of Israel v. Golden* IsrSC 45(4)807.
[47] MAppCr 4092/94 *Tioto v. State of Israel* (unreported).
[48] CrimA 6579/98 *Friedan v. State of Israel* (unreported).
[49] CrimA 3602/99 *Ploni (John Doe) v. State of Israel* (unreported).
[50] CrimA 3976/99 *Ephraimov v. State of Israel* (unreported).

American cases cited:

[51] *U.S. v. Miller* 753 F.2d 19 (1985).
[52] *McKane v. Durston* 153 U.S. 684 (1894).
[53] *Jones v. Barnes* 463 U.S. 745 (1983).

Canadian cases cited:

[54] *R v. Demyen* (1975) 26 C.C.C, 2d 324, 326.
[55] *R v. Pabani* (1991) 10 C.R., 4th. 381.
[56] *Mcauley v. R* (1997) Ont. C.A. Lexis 3.
[57] *Baltovich v. R* (1992) Ont. C.A. Lexis 257.
[58] *R v. Parson* (1994) 30 C.R. 4th 169.

[59] *R. v. Farinacci* (1993) 86 C.C.C. 32.
[60] *Cunningham v. Canada* (1993) 80 C.C.C 492.
[61] *Miller v. The Queen* (1985) 23 C.C.C 99.
[62] *R v. Branco* (1993) 87 C.C.C 71.

Israeli books cited:

[63] S. Levin *The Law of Civil Procedure – Introduction and Basic Principles* (5759-1999)

Israeli articles cited:

[64] S. Levin 'Basic Law: Human Dignity and Freedom and Civil Legal Processes,' *Hapraklit* 52 (1986) 451.

[65] Bendor, 'Criminal Procedure and Law of Evidence: Development of Individual Human Rights in Procedural Criminal Law,' *The Annual Book for Law in Israel* (Tel-Aviv, 1986) 481.

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[66] R. Pattenden English Criminal Appeals 1844-1994 (Oxford, 1996).

[67] Stuart Charter Justice In Canadian Criminal Law (Scarborough, 2nd ed., 1996).

[68] W.R. LaFave, J.H. Israel Criminal Procedure (St. Paul, 2nd ed., 1992).

[69] P.W. Hogg Constitutional Law of Canada (Scarborough, 4th ed., 1997).

Foreign articles cited:

[70] M. Damaska "Structures of Authority and Comparative Criminal Procedure" 84 Yale L.J. (1974-1975) 480.

[71] D.L. Leibowitz "Release Pending Appeal: A Narrow Definition of 'Substantial Question' under the Bail Reform Act of 1984" 54 Fordham L. Rev. (1985-1986) 1081.

[72] M.M. Arkin "Rethinking The Constitutional Right To a Criminal Appeal" 39 UCLA L. Rev. (1991-1992) 503.

[73] A.S. Ellerson "The Right To Appeal And Appellate Procedural Reform" 91 Colum. L. Rev. (1991) 373.

[74] D. Gibson "The Crumbling Pyramid: Constitutional Appeal Rights in Canada" 38 U.N.B. L.J (1989) 1.

[75] T.W. Cushing "Raising a 'Substantial Question': The Key to Unlocking the Door Under the 1984 Bail Reform Act" 62 Notre Dame L. Rev. (1986) 192.

Other:

[76] 8A Am. Jur. 2d (Rochester and San Francisco, 1997).

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For the State —N. Ben-Or, A. Shaham
For the Public Defender-K. Mann, D. Pinto, D. Ohana, R. Yitzhaki

JUDGMENT

Justice D. Beinisch

By what standards will an application to stay execution of a prison sentence of a person who has been convicted and whose appeal is pending be considered? That is the issue brought before us in this application.

The facts in the background of the fundamental discussion before us are as follows:

1. The applicant was convicted in the District Court in Tel-Aviv-Jaffa of the offense of rape under section 345(A)(1) of the Penal Law 5737-1977 (hereinafter: "the Penal Law") and for committing sodomy, an offense under section 347(A) of the Penal Law. Following his conviction, the applicant was sentenced to four years in prison, including three years of actual imprisonment and one year on probation. The court also ordered the applicant to compensate the complainant in the amount of NIS 10,000. At the time the conviction was handed down the District Court granted the application of the applicant's counsel and stayed the date of commencement of the sentence by one month.

2. The applicant appealed the decision to this court. At the time of the filing of the appeal, his counsel submitted the application before us to stay execution of the sentence imposed on him (hereinafter: "application for stay of execution"). On 1.21.99 Justice Zamir determined, after hearing the parties' arguments, that execution of the prison sentence imposed on the applicant would be stayed until a further decision was made on the application. Justice Zamir noted in his decision that in accordance with the accepted policy of this court as to applications for stay of execution "it is doubtful that it is appropriate, in this case, to stay the commencement of the prison term."

However, the judge decided that it would be appropriate for the application before him to be transferred to the President of the Court for a decision as to whether it would be appropriate to transfer the application to a decision before a panel. Justice Zamir explained his decision as follows:

> "Lately thought has been given to the accepted policy of this court regarding applications for stay of the execution of imprisonment until the disposition of the appeal. Various approaches have been expressed by judges in the case law. (See, for example, HCJ 3501/98 *Dekel v. State of Israel*; CrimA 7068/98 *Hachami v. State of Israel*). The doubt as to the accepted policy of the court in this matter has drawn in part from the Basic Law: Human Dignity and Liberty; and in part from the customary practice in certain countries.

> It appears to me that it is not appropriate to go on with the present situation, in which each justice considering applications for stay of execution makes a decision according to his world view, and the time has come for this court develop a policy that will be able to guide every judge considering such applications."

In light of this decision, the President of the Court ordered consideration of the application before an extended panel of nine justices.

3. Before turning to the examination of the substance of the issue which has arisen before us, we must give thought to the preliminary issue that has come up during the course of the consideration of the case, which is the issue of the status of the Public Defender in the framework of the proceedings in this court. After the application was brought for consideration before an expanded panel, the Public Defender submitted an application before the court entitled "application to submit a written brief as a friend of the court." The applicant's counsel consented to the application and the State opposed it. On 5.19.99, after hearing the parties' arguments on the matter, we determined that we would grant the application in such a manner that the Public Defender would be allowed to submit a brief. We further determined that "the decision whether to affirm the argument itself as well as the decision as to the status of the Public Defender in this case – would be considered by the panel in the judgment."

The issue of recognition of the institution of "friend of the court" in our legal system in general, and the status of the Public Defender as "friend of the court" in particular, was considered in the judgment of President Barak in RA 7929/96 *Kozali and others v. the State of Israel* [1]. In his decision on this matter the President distinguished between the question of the authority of the court to order the joinder of a person or entity to a proceeding before it with the status of "friend of the court," and the question of the discretion the court is to exercise when making the decision on an application to join such a party or person. In accordance with that decision, the authority to join exists, in principle, and the court must examine in each and every individual case – according to its circumstances – whether it is to be exercised, in consideration of the totality of considerations relevant to the matter. Such consideration relates primarily to the degree of potential contribution which is entailed in the requested joinder against the concern that such joinder would do damage to the efficiency of the discussion, to the parties and to their rights:

> "One must stand guard in this matter and ensure that indeed there is in the joinder of another party to the proceeding a contribution to be made to the discussion

> itself and the public interest. One is to examine in each and every case, whether such joinder does not cause damage to the efficiency of the deliberation, to the parties to the dispute and to their basic rights… Indeed before a party or a person is given the right to express his position in a proceeding to which he is not an original party, the potential contribution of the proposed position is to be examined. The essence of the applying entity is to be examined. Its expertise, experience and the representation it affords the interest in whose name it seeks to join the proceeding. The type of proceeding and its procedure is to be examined. The parties to the proceeding itself are to be ascertained as well as the stage at which the joinder application was submitted. One is to be aware of the essence of the issue to be decided. All these are not comprehensive criteria. There is not enough in them to determine in advance when it will be appropriate by law to join a party to the proceeding as a "friend of the court," and when not. At the same time these criteria must be weighed, inter alia, before such joinder is to be decided upon." (**Ibid**. paragraph 45)

The issue that arises before us is a question of general importance in the realm of criminal procedure: it arises and is discussed as a matter of course before courts, and by its nature it is relevant to a broad public of accused persons. Our discussion of the matter does not primarily focus on the concrete facts of the case, but the fundamental question which arises, inter alia, against the background of lack of uniformity in the law in practice. In discussion of this type, the Public Defender, whose function by law is the representation of accused persons in criminal proceedings, has a clear interest. In consideration of the expertise and the experience of the Public Defender in the representation of accused persons, their joinder to the proceedings before us may contribute to the deepening of the discussion and its clarification. On the other hand, joinder of the Public Defender, at the phase in which the joinder application was submitted, will not burden the administration of the proceedings significantly, as it is merely an interlocutory proceeding in the framework of a pending appeals case. Taking these considerations into account, we felt that the joinder of the Public Defender to the proceedings before us as "friend of the court" was to be allowed.

Claims of the Parties

4. In detailed and thorough arguments, the parties laid out before us a broad picture, and supported each of their respective arguments with multiple references. The sum of the argument of the applicant,

joined by the Public Defender, is that the accepted approach in our case law as to the stay of execution of a prison term of a convicted person whose appeal is pending (which we will discuss later at length), is not appropriate and requires renewed examination and change. According to the applicant's claim, the law has no provision as to the immediate execution of the prison sentence, but rather the legislature left determination of the commencement of the execution of the prison term to the discretion of the court. This argument relies on s. 44 of the Penal Law, which establishes that a court that imposes a prison term "may order that the sentence commence from the date it shall determine." As to the discretion given to the court to determine the date of commencement of the prison term, counsel for the applicant argues that the court is to adopt a "broadening" policy as relates to applications that deal with stay of execution during the pendency of the convicted person's appeal on the judgment, in a manner that except for exceptional circumstances – which fall within the grounds for detention pending completion of the proceedings – the execution of the prison sentence will be delayed until the disposition of the appeal. The applicant's counsel rests his argument primarily on the status of the right of appeal, whether as a constitutional basic right or whether as a right of recognized central importance in our legal system, and on the presumption that immediate execution of a prison sentence, may, as a rule, harm effective realization of the right of appeal.

The Public Defender claims that the law practiced in Israel today in the matter of stay of execution of prison sentences during the pendency of an appeal is not clear cut; alongside judicial approaches which emphasize the immediate execution of the sentence as a board rule, and the stay of its execution as only an exception, there are to be found in the case law of this court – particularly in recent years – other approaches as well, which tend to broaden the range of cases in which the execution of the prison sentence will be stayed while the convicted person's appeal is pending. Thus, argues the Public Defender, even when the judicial rhetoric is seemingly strict in relation to the possibility of stay of an appeal, the application of the rules, in fact, tends to be lenient with applicants for stay of execution of prison sentences during the pendency of the appeal. It is the argument of the Public Defender, in light of the murkiness as to the law that applies in the matter of stay of execution of prison terms during the pendency of the appeal, that it is appropriate to re-examine the issue. In the framework of this examination, the Public Defender claims, central weight is to be given to concerns of irreversible harm to human liberty if after the imprisonment of the convicted person it turns out after the fact – once the appeal is heard –that the imprisonment was partially or entirely unjustified. Thus, the Public Defender claims that the right of appeal as part of due process, is

derived from the right to dignity and liberty and as such is a protected constitutional right in the provisions of the Basic Law: Human Dignity and Liberty. According to the approach of the Public Defender in the framework of the proper balancing between the basic rights of the convicted person and the public interest in immediate enforcement of the judgment, the court, as a rule is to grant applications to stay execution of prison terms until the disposition of the appeal, with the exception of exceptional cases in which there is a reasonable risk of flight of the convicted person from the law, or that the convicted person poses a risk to public safety, or that particularly severe damage to public confidence in the enforcement system is expected.

The State seeks to rebut the arguments of the appellant and the Public Defender. The starting point of the argument the State brought before us is that it is the directive of the legislature that a prison term is to be executed immediately upon sentencing. The State learns this from the provision of section 43 of the Penal Law, according to which one who is sentenced to prison will have his prison term calculated from the date of sentencing, unless the court orders otherwise. Alongside the rule of immediate execution, the legislature granted the court discretion to stay the execution of the sentence to another date, as per section 87(a) of the Penal Law. The State argues that the law followed by this court in the matter of stays of execution is stable and clear, and properly balances the various interests involved in the matter, and it is not proper to deviate from it. According to the State's approach, the Basic Law: Human Dignity and Liberty has no impact on the matter before us; it is a matter of existing legislation, which is not subject to constitutional review but merely interpretive influence. Even as to this last issue, there is nothing in the Basic Law which changes the accepted law followed by this court, according to which execution of the prison sentence will be stayed only in exceptional circumstances; the sum of the argument is that after the conviction of a person criminally, and his sentencing to prison, he no longer benefits from the presumption of innocence and he no longer enjoys the right to freedom from imprisonment. His liberty has been denied by the judgment of an authorized court which sentenced him, and the question of stay of execution of a prison sentence no longer involves violation of personal liberty which is protected by the Basic Law. To base this claim the State refers us to the approach of the American and Canadian Law in this matter. Alternatively, the State claims, that even if the convicted person has the right to liberty which may be violated pursuant to consideration of the stay of the execution of his sentence, then the law that has come forth from this court, as to stay of execution of a prison sentence during the pendency of the appeal, fulfills the constitutional balancing required by the Basic Law.

The Normative Framework

5. The practice of the law in the matter of the stay of execution of a prison sentence during the pendency of the appeal has developed in the case law of this court from its earliest days. Tracing the developments in the case law reveals that from the beginning the law developed against the background of what was customary in British common law and this was applied in our system even before the relevant statutes in this matter were legislated, some of them directly, others indirectly. Eventually, the case law based the law in practice on the construction of the legislated provisions. Thus it was established that the rule is that a prison term is to be executed immediately and execution of a prison term is not stayed except "in extraordinary circumstances" or if there exist special circumstances which justify the stay. This rule is anchored in the basic principle of our system, according to which the law is determined at the trial level, in which oral evidence is heard, and in which the facts are determined based on impressions of witnesses. The level of proof required in a criminal proceeding is high – proof beyond a reasonable doubt – and with the conclusion of the proceeding, once it has been determined that guilt has been proven beyond a reasonable doubt, the convicted person is denied the presumption of innocence. So too, in our system – unlike the continental system which views the consideration at the trial level and the appeals level as one unit – the appeal is not part of the criminal proceeding; the appeal is an additional proceeding, limited in its scope from the first proceeding since as a rule evidence is not heard during it, and it is a review proceeding. As background, it must be remembered, that in common law countries, from where we have drawn the fundamentals of our system, determining guilt based on the facts is left to a jury which makes the determination in the trial court. It appears that this legal structure, according to which one must separate the trial level from the appeals level, has influenced the development of the rule according to which upon the conclusion of the proceeding at the trial level expression is to be given to the punitive result dictated by the conviction.

Relevant Statutory Provisions

6. A number of statutory provisions relate to the matter before us. Since we are dealing with the execution of a sentence that was imposed on a person after their criminal conviction, we will turn first to Chapter 6 of the Penal Law entitled "Modes of Punishment." In Title B of Chapter 6 above, entitled – "Imprisonment," there are two provisions relevant to our discussion – section 43 and section 44. We will bring these provisions verbatim:

"Calculation of the Prison Term	43.	One who is sentenced to prison his prison term will be calculated from the day of the sentence, unless the court has ordered otherwise: if the convicted person was free on bail after the sentence, the days he was free will not be counted as part of the period of the sentence.
Postponed Imprisonment	44.	If the court imposes a prison sentence, it may order that the sentence commence from the date it shall determine."

An additional provision which applies in our matter is found in section 8 of chapter 6 above, in section 87 of the statute:

"Postponement of Dates.	87	(a) If a date is established for the execution of a sentence, in one of the sections of this chapter or by the court according to it, the court is permitted to stay the execution to another date. (b) If the execution of the sentence was stayed according to subsection (a), the court may stay it an additional time for special reasons which will be recorded. (c) The court staying the execution of a sentence according to this section may condition the stay on bail or other conditions as it sees fit; the provisions of sections 38 to 40 and 44 of the Criminal Procedure Law, 5725-1967 will apply to bail according to this section with the necessary changes. (d) The court's decision in accordance with this section is subject to appeal."

As detailed above, each of the parties before us relied in their arguments on a different one of the three said provisions and regarded it as the relevant legislated framework for determining the date of execution of the prison term. The state's construction of section 43 of the Penal Law, according to which, as a rule, and lacking any other determination by the court, the commencement of the prison term begins with the sentencing, is consistent with the construction of said section in the case law. Thus for example,

Justice Shamgar has said regarding the construction of section 43 to the Penal Law, during discussion of a matter different than the one before us (in that matter the elements of the offense of escape from lawful custody were under consideration):

> "The origin of the status of "in custody" is a result of the integration of two significances attached to the sentence that is read to the convicted person: one, and this is the legal one, stems from the provisions of section 43 of the Penal Law, according to which: 'one who is sentenced to prison his prison term will be calculated from the day of the sentence, unless the court has ordered otherwise…'
>
> **Meaning, the prison sentence begins to run from the date of the sentence, unless the court has ordered otherwise. . . According to the simple words and the clear intent of the legislature, the broad rule is that, the prison term begins with the notice of the decision of the judicial authority**."
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> (CrimA 608/81 *Benyamin Ben Maier Suissa v. State of Israel* [2], at pp. 492-493. Emphasis added – D.B.).

Similar things were stated by Justice Shamgar in FH 16/85 *Harrari v. State of Israel* [3] during consideration of the question of when the period of probation begins to be counted when extended by the court.

> "**The guiding rule which arises from the penal law is that, the commencement and the application of the sentence are from the date of the sentence, and that is, if the court has not ordered otherwise**. This is the provision of section 43 of the Penal Law that one who is sentenced to prison, his prison term will be calculated from the date of the sentence, unless the court has ordered otherwise. The court may order a postponed sentence (section 44 or section 87 of the law above)."
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> (**Ibid**. at p. 454 emphasis added – D.B.)

7. From the above, therefore, one may glean that, as a rule, the date of execution of a prison sentence imposed by the court is immediately upon the imposition of the sentence, unless the court has ordered otherwise.

Alongside this rule, the legislature determined that the court may stay the date of commencement of the prison sentence until a date other then the date of the imposition of the sentence. To this end, all three statutory provisions that were quoted above are relevant. The discretion given to the court to stay the date of execution of the sentence is learned from the language of section 43 itself ("unless the

court has otherwise ordered"). A separate determination as to this matter is found in section 44 of the Penal Law which is entitled "postponed imprisonment." It appears that according to the accepted construction of section 43 of the law, there is a certain overlap between the ending of section 43 and section 44. (And indeed this was the approach of Justice Shamgar in CrimA 757/85 *State of Israel v. Harnoi* [4]:

> "To a certain extent section 44 is no more than a more explicit statement of what was already implied from the determination in section 43. . .") As to section 87 of the Penal Law, its application is different from that of sections 43 and 44 at least in two primary areas. First, section 87 deals with stay of the date of execution of a 'sentence,' not necessarily a prison sentence. Second, section 87 enables the court to order the stay of execution of a sentence it handed down, even at a date after the date of sentencing. (For the background to the legislation of this section see: CrimA 1100/91 *State of Israel v. Jeffrey* [5]).

To the statutory provisions mentioned above one must add an additional statutory provision which is also relevant to the matter of stay of execution of a prison term during the pendency of the appeal, and that is the directive established in section 44 of the Criminal Procedure (Enforcement Powers – Arrests) Law 5756-1996 (Hereinafter: "the Arrests Law"). Section 44 above establishes the following:

> "Release on Bail by the Court
>
> 44 (a) A suspect who has not yet had an indictment filed against him, an accused or convicted person whose appeal is pending on his judgment and is under arrest or in prison, the court may, upon his application, order his release on bail or without bail.
>
> (b) The court may order the accused or convicted person, whose appeal is pending on his judgment, to post bail, even if it is not authorized to order his detention according to section 21 in order to ensure his appearance in court, and when it has done so, the accused or convicted person will be seen as one who was freed on bail."

On the basis of the language of the section, it does not deal directly with the question of the date of commencement of the prison sentence. But in fact it is directed at the same practical outcome that is likely to stem from stay of execution of the prison sentence

according to sections 43, 44 and 87 of the Penal Law, which is that the convicted person remains free for the duration of the period of the appeal subject to the conditions that were determined for his release (compare this with section 87 (C) of the Penal Law). Therefore it has been decided, that the considerations that the court will weigh in an application for release of a convicted person on bail during the pendency of his appeal, will be identical to the considerations taken into account in an application to stay execution of a prison sentence until the disposition of the appeal (see MAppCrim 2161/92 *Fadida v. State of Israel* [6], stated by Justice Bach; and compare: MApp 123/76 *Ikviah v. State of Israel* [7].

With the exception of section 44 of the Arrests Law, there is nothing in the abovementioned sections of the law, in their language, which relates to the situation of stay of execution of a prison term specifically during the period of appeal, rather they are phrased in a broad manner without details as to the grounds for the stay. As a result of the multitude of sections in the law which relate to the matter, applications to stay the execution of prison terms for the pendency of the appeal are considered by the appeals court in the framework of a number of procedural "tracks" whether as an application to stay execution according to section 87 of the Penal Law and its sections or whether as an application to be released on bail. As stated above, the considerations that will be weighed by the Court in each of the above cases will generally be identical, although the issue of the relationship between the various "tracks" is not entirely clear. It is interesting to note that in foreign legal systems, which we will discuss later, the issue which is the subject of our discussion is dealt with in sections of the law which deal with the release on bail during the pendency of the appeal of a person who was convicted and sentenced to prison, and in foreign literature and case law it is generally discussed under the title of "release on bail pending appeal." It is also to be noted that most of the initial decisions of the Supreme Court in which the accepted rules for stay of execution of the prison sentence were formulated were decided in applications to be freed on bail during the pendency of the appeal in accordance with the Bail Ordinance 1944 (which was cancelled in 1965 with legislation of the Criminal Procedure Law). What is important for our purposes is that in not a single one of the law's provisions which enable the court to stay or postpone the date of commencement of the prison sentence, did the legislature detail the considerations which will guide the court in its decision, including where an appeal on the conviction filed by the convicted person is at the foundation of the request to stay execution. These considerations have been determined by the courts working within the framework of the authority given to them by the legislature, and we will turn to this now.

The Court Rulings in this Matter

8. The construction that was given in the case law of this court to legal provisions which give the court authority, with discretion, to stay the execution of the prison sentence or to release the convicted person on bail, during the pendency of appeal, was narrow. The rule that was established was that a person who was convicted of a criminal offense, and who was sentenced to prison, would begin by serving his sentence immediately after the imposition of the sentence. The rule that was established was that the cases in which execution of the prison term would be stayed due to the filing of an appeal, would be "extraordinary" cases where "special circumstances" exist which justified it. Among the many references for this approach (hereinafter for convenience we will call it – "the accepted approach") we can bring the words of the Justice S.Z. Heshin in MA 24/55 *Shlomo Porat (Perlberg) v. Attorney General of Israel* [8].

> "When the court comes to discuss the question whether it is appropriate to release on bail a person that has already been convicted but his appeal has not yet been heard, it is not entitled to ignore the determining fact that there is already a judgment against the applicant which sentenced him to prison, and only in extraordinary cases will the court or the judge hearing the application grant the request."
>
> (**Ibid**.).
>
> (see also MApp 2/52 *Locksner v. Israel Attorney General* [9]; Mot 118/79 *Richtman v. State of Israel* [10] at p. 47, 169; Mot 156/79 *Kobo v. State of Israel* [11] at p. 64; Mot 132/81 *Pitusi v. State of Israel* [12] at p. 819; 430/82 MApp *Michalshwilli v. State of Israel* [13] at p. 107; This approach is similar to the English law in this matter see R. Pattenden, *English Criminal Appeals* 1844-1994 (Oxford, 1996) [66]112).

The primary reason mentioned in the case law for not staying the execution of a prison sentence during the pendency of the appeal is that with the conviction of the convicted person with the offense with which he is accused, the presumption of innocence from which he benefited until that time dissipates. In the words of Justice Agranat:

> ". . . the rule is, that prior to the conviction the person is presumed to be innocent, whereas after the conviction, the necessary presumption must be -- until it has been decided otherwise on appeal -- that he is guilty of the offenses of which he was convicted, and therefore a person will not be freed on bail at this stage, except under extraordinary circumstances."

(MApp 10/62 *Cohen v. Attorney General* [14] at p. 535).

In other decisions emphasis was placed on the existence of an authorized judicial decision which denies the convicted person's freedom, and which is valid and presumed to be legitimate as long as it has not been changed by the appeals court:

> "It appears to me that in principle **the determining element in this distinction** (between the arrest of a person who has been convicted but not yet sentenced, and the stay of execution of a prison sentence that was imposed-- D. B.) **is not a suspect's innocence or conviction, but rather the phase at which he was convicted and sentenced, meaning the existence of a judicial decision as to denial of his liberty for the period of time detailed in the sentence.** The conviction in and of itself -- without a sentence of imprisonment -- does not constitute a "red line" between the two situations, and does not constitute but one consideration, although a weighty and serious one, in the totality of regular and accepted considerations in the consideration of the arrest of a person who has not yet been convicted." (MApp 183/80 *Sharabi v. State of Israel* [15] at p. 519 emphases added -- D. B.).

The case law mentions an additional reason for immediate execution of the sentence, except in extraordinary cases, and that is the threat of injury to public safety if the convicted person is freed during the period of appeal. Justice Zemora discusses this in the first case in which the matter came up before this Court:

> "The rule is: as to a person who was convicted and punished lawfully, public safety is to be preferred over the possibility that perhaps the convicted person will be acquitted in the appeal and it will turn out that an innocent person sat in prison." (Mot 52/50 *Maatari v. Attorney General of Israel* [16], at p. 416).

Alongside the concern for public safety the case law has recognized an additional public interest which is at the basis of the rule of immediate execution of a prison sentence, and that is the interest that is grounded in effective enforcement of the criminal law and deterrence of potential offenders. (See MAppCrim 166/87 *State of Israel v. Azran and Others* [17]).

9. As stated above, alongside the rule -- immediate execution of a prison sentence -- the case law has recognized exceptions which exist under those "special" or "extraordinary" circumstances in which it would be justified to stay the execution of the prison term despite the considerations that were detailed in previous case law. These

circumstances, in summary, are: when the conviction is for an offense that is not serious or where the circumstances of its commission are not serious; when the period of arrest which was imposed on the convicted person is short, relative to the time frame in which the appeal is expected to be heard, and there is a concern that until the determination of the appeal the convicted person will serve his entire punishment or a significant part of it; when there is a blatant possibility that the appellant will be successful in his appeal because of a manifest distortion on the face of the decision. Justice Zamir summarized the accepted approach as to the stay of execution of a prison term as follows:

> "the rule as to stay of the execution of a prison sentence was formulated some time ago, it was summarized clearly in Mot 156/79 *Kobo v. State of Israel* [11] and we still follow it. The main points of the law, very briefly, are as follows:
>
> A) The determining rule is that a person who has been sentenced to prison must begin serving his sentence immediately. One does not stay execution of the prison sentence except "under extraordinary circumstances" or if there are "special circumstances" which justify a stay.
>
> B) The special circumstances that are sufficient to justify a stay of execution are generally these: an offense that is not serious; a short prison term; a chance the appeal will be granted. As to the chance that the appeal will be granted, it is necessary that in the convicting decision there is a clear distortion, or that there is a pronounced likelihood of success in the appeal. To this end, it is not necessary to examine in a detailed and concise manner the facts and reasoning on which the judgment is based. It is necessary that the issue is apparent on the face of the decision.
>
> Generally, the fact that the applicant was free on bail until his sentence was imposed, the fact that he does not constitute a serious risk to public safety, and that his family situation or business situation are difficult, are not sufficient to justify a stay of execution (MAppCrim 2599/94 *Danino v. the State of Israel* [18]).

This in fact has been the accepted law for many years, and justices in this Court follow it today as well (see for example, from among the many decisions, the following decisions: CrimA 8549/99 *Ben Harosh v. State of Israel* [19]; CrimA 3695/99 *Abu Keif v. State of Israel* [20]; CrimA 4263/98 *Luabna v. State of Israel*[21]; CrimA 3594/98 *Ploni (John Doe) v. State of Israel* [22]; CrimA 1050/98

Siamo v. State of Israel [23]; MAppCrim 6877/93 *Ploni (John Doe) v. State of Israel* [24]).

10. Alongside the accepted approach as to stay of execution of a prison term during the pendency of appeal, another approach has developed over the years, which tends to be more flexible with the conditions for stay of execution until the disposition of the appeal of the convicted person. The development of the broader approach has brought with it various grounds to justify the stay of the execution of the prison term and the freeing of the convicted person on bail until the conclusion of the hearing of the appeal, and the breaking out of the narrow framework of postponement of execution as only an exception. This approach has been expressed in the words of Justice Bach in MApp 28/88 *Sussan v. the State of Israel* [25]:

> "Personally, I believe that if the convicted person's chances of winning the appeal seem good on the surface, and if in taking into account all the rest of the circumstances, such as the convicted person's criminal history and the danger that he poses to the public, there is no special reason for his immediate imprisonment, then the court is entitled to favorably weigh his release on bail until the appeal. . . I also cannot entirely ignore the fact that it is a matter of a person with an entirely clean history, that there is no apparent danger to be expected from him if execution of the sentence is stayed. On the other hand, there is a risk, that if he is immediately arrested, and if he later wins his appeal, a result which as I stated, does not appear unreasonable, then he will serve a significant portion of a sentence which will later turn out to have been imposed unjustifiably. In my opinion there is also a difference regarding a decision such as this between a defendant who was free on bail for the entire time before the judgment was handed down by the trial court, and a defendant that was detained pending the completion of the proceedings and seeks now, after he has been convicted, to be freed from prison until his appeal is heard."

See also the decision of Justice Bach in MAppCr 4331/96 *ElMakais v. State of Israel* [26]; the decision of Justice Bach in MAppCr 5719/93 *Forman v. State of Israel* [27]; see also the decision of Justice Tal in MAppCr 6689/94 *Attias and others v. State of Israel* [28] which mentions the decision in Sussan in agreement above).

A different approach to the stay of execution of a prison sentence during the pendency of appeal in comparison to the accepted

approach, has been expressed in the decisions of Justice Strasberg-Cohen in MAppCr 8574/96 *Mercado v. State of Israel* [29]; MAppCr 8621/96 *Kuzinski v. State of Israel* [30]; and MAppCr 4590/98 *Sharabi v. State of Israel* [31]. In these decisions Justice Strasberg-Cohen reiterated that the rule is that the convicted person must serve the prison sentence immediately when it is imposed. However, the Justice emphasized the need, in each and every case, to balance, in accordance with the circumstances and characteristics, the considerations and various interests involved in the matter of the stay of execution, while avoiding establishing rigid and limited categories of cases in which the imprisonment will be stayed until disposition of the appeal. This is how this approach was presented by Justice Strasberg-Cohen in her decision in the *Mercado* case above:

> "Indeed, it has been an accepted rule for us from long ago that a defendant who has been convicted, must serve his sentence as soon as it is imposed. The reasons for this rule are well and good, both in the individual realm and in the public realm. A person who is convicted and a prison sentence was imposed upon him is no longer presumed to be innocent and the very fact of his filing of an appeal does not reverse things and does not does put in the hands of the appellant a given right to stay his sentence. As long as it has not been established otherwise on appeal, the convicted person is considered guilty by law and he must pay the price for his actions. However, a conviction does not constitute the end of the matter. The law has put in the hands of a person lawfully convicted, the right of appeal, which if he takes advantage of, will put his conviction and the punishment that was imposed on him, under the scrutiny of a higher court and only after the appeal is heard will the court have its final say. We are faced with a clash between various interests worthy of protection. On the one hand, the convicted defendant must pay the price for the deeds for which he was convicted and serve his punishment without delay, and the legal system must take care that the sentence is implemented immediately. On the other hand, society must take care that a person does not serve a punishment of imprisonment for nothing, and that his liberty is not taken away from him when at the completion of the proceeding, he may be acquitted. In my opinion, it is preferable to stay the prison term of ten defendants whose appeal was denied, rather than have one defendant serve his prison term, that it later turns out he did not have to serve. However, it is not sufficient to merely file an appeal to bring about the stay

> of execution of a prison sentence, for if you would say so, then every prison sentence should be stayed, and I do not believe that it is correct to do so. In order to find the right balance, we have at our disposal tools that we can use to measure and weigh all the relevant considerations and conduct a proper balancing between them."

A more sweeping approach which calls for a change in the accepted rules in the matter of stay of execution of prison terms during the period of appeal, is to be found in the decision of Justice Ilan in CrimApp 7068/98 *Hachami v. State of Israel* [32].

> "I believe that the time has come to review the rule that a person should serve their sentence, even in if they have filed an appeal. The reason for this is, that after the defendant has been convicted and is no longer presumed to be innocent it is proper that he serve his sentence as close as possible to the commission of the offense and the more the date is postponed -- the less efficient the punishment. Despite this, everyone agrees that in the case where a relatively short prison term has been imposed, the execution of the punishment is to be deferred until the disposition of the appeal, lest the appellant serve his entire sentence by the time the appeal is heard. This is also the position of the prosecution. In my humble opinion the concern here is not just that perhaps a person will serve their entire sentence and then be acquitted. Even a person who has been sentenced to six years in prison and serves two years by the time he is acquitted on his appeal has suffered an injustice despite the fact that four years that he will not serve remain.
>
> . . .
>
> **In my opinion, the rule must be that a person should not serve their sentence until the judgment is final, unless there is a serious concern that it is not possible to guarantee that he will appear to serve his sentence or that he poses a danger to the public**."
>
> (Emphasis added -- D. B.)

In addition to the decisions mentioned, which express each in its own way a deviation from the accepted approach, it is possible to point to decisions of the court which do not explicitly deviate from the position above, but in fact broaden the circumstances in which execution of a prison term is stayed. From various decisions of justices of this Court there appears to be a tendency at times to take into consideration the fact that the applicant was free on bail during the course of his trial, his clean history and other personal

circumstances. Moreover, many of the decisions that were handed down do not give weight to the appeal's chances of success and do not apply the test of "the chances of success of the appeal are apparent on the face of the judgment." These decisions to a certain degree changed the normative picture of the situation in this matter as it appears in fact. The Public Defender tried to persuade us with its arguments and the data presented, that in fact the courts have abandoned the guiding rule as to the immediate execution of a prison sentence, even if they avoided declaring a new policy. It is difficult to reach this conclusion from the data that the Public Defender presented before us; this data relates primarily to decisions on appeal in the district courts that deal with relatively short prison terms that were imposed in the trial courts, and do not necessarily lead to the conclusions which the Public Defender reached. However, it can be said that in the judgments of this Court there exists in point of fact a process of greater flexibility in the accepted approach and a broadening of the range of cases in which prison terms are stayed until the conclusion of the hearing of an appeal filed by the convicted person.

Stay of Execution of a Sentence of Imprisonment During the Period of the Appeal-Discussion

11. The first question we must ask is, is there a justification for re-examining the rules that apply in the matter of stay of execution of a prison sentence during the pendency of the appeal? It appears that a re-examination is justified as described in the decision of Justice Zamir in the matter before us; from the details of the decisions mentioned above it appears that indeed there have been breaks in the accepted approach in the matter of stay of execution of a prison sentence during the pendency of the appeal and a certain lack of clarity has developed in light of the various approaches apparent in the case law of this court. Moreover, the law in the case, that was first developed about 50 years ago, grew against the backdrop of British law and developed in a normative environment in which significant changes have occurred over the years. Among other thing significant changes have occurred in the areas of criminal law and process, the Basic Law: Human Dignity and Freedom was passed and there has been development in the status of the right of appeal. These changes in the substantive law have practical ramifications, which indirectly impact the matter before us. Thus, for example, the change that occurred in the law of arrests with the passing of the Arrests Law influenced not only the fundamental realm, but also increased the number of accused who are released on bail during their trial; a fact which has increased the number of accused who at the stage of decision on an application to stay execution are being denied their freedom for the first time. This re-examination is necessitated therefore, in light of the changes that have occurred in our law over

the years, which justify examining the validity of the law against the backdrop of the normative reality of our own time. We will turn to this now.

12. As a starting point for our discussion we are guided by the statutes which apply to the matter of stay of execution of a prison sentence during the pendency of the appeal. As has been said above, section 43 of the Penal Law, as it has been constructed in case law, establishes that a prison sentence is to be executed immediately upon sentencing, unless the court has ordered otherwise. Decisions of this court in which it has been determined that the rule is that imprisonment during the period of appeal is not to be stayed except in special and extraordinary circumstances, apparently is consistent with the general guideline that arises from the language of section 43 as to the immediate execution of imprisonment. However, it must be emphasized that the case law that determined the law in this case, was not generally anchored in statutory language. It can even be said that such law is not necessarily to be concluded from the language of the statute. From the version of the section and its legislative placement it can be concluded that it establishes a general guideline as to the date of the execution of the sentence and the manner of calculation of the prison term, and is not exclusive to the circumstances of filing an appeal on the judgment. In other words, the section applies to the sentencing phase and by the nature of things does not distinguish in the matter of the date of execution of the sentence between a situation where an appeal has been filed and other situations. As to sections 44 and 87 of the Penal Law, they too do not explicitly relate to the question of stay of execution of the sentence during the pendency of appeal; section 44 was originally intended to give the court authority to establish in the sentence, a later date for execution of the prison term, while the aim of section 87 of the Penal Law is to grant the court the authority to stay yet again the date of execution of the prison sentence (see Amendment to Penal Law (Methods of Punishment) Draft Proposal *Hatzaot Hok* no. 522 at p. 246, an amendment that was legislated as a result of CrimA 9/55 *Yegulnitzer v. State of Israel* [33], in which it was established that the court does not have the authority to stay the execution of a prison sentence from the moment that a date has been set for the commencement of its execution). It may, therefore, be said that section 43 and sections 44 and 87 of the Penal Law do not delineate a framework that limits the courts to stay of the execution of the sentence during the pendency of the appeal exclusively to "special" or "extraordinary" cases.

As can be seen from the above, the provisions of the Penal Law do not relate explicitly to the stay of execution of a prison sentence upon the filing of an appeal on a conviction. However, when we come to examine the effect of filing an appeal on the date of

execution of the sentence, we must take into account the accepted essence of the appeal process in our legal system. According to our system, as opposed to what is customary in other Western European countries, the appeal in its essence is a separate process of review of proceedings that took place in the lower court. In the European system, it is the principle of "double instances" according to which the two proceedings are handled as one unit, and the party is entitled to have both instances consider his case both from the legal and factual perspectives, that is accepted. Because the process is not based to begin with on hearing oral evidence, the appeals court is not limited in receiving additional evidence, and as a rule the lower court does not have an advantage over the appeals court. Apparently, for this reason, filing an appeal normally stays the execution of the decision of the lower court until the conclusion of the appeal proceedings. We have already stated that unlike the European system, according to our system, when the proceeding in the lower court is completed the accused's matter is decided by an authorized court, after having heard evidence and after having examined it by the stricter standard that is required in a criminal proceeding, and with this the conviction phase is complete. Accordingly, the fact of realization of the right of appeal to an appeals court – which is the court of judicial review -- does not necessitate stay of execution of the sentence, but rather at that phase it is necessary to express the consequences necessitated by the conviction, including execution of the sentence. (for the difference between the two systems see S. Levin *The Law of Civil Procedure – Introduction and Basic Principles* (5759-1999) [63] at pp. 30-33, 185-186; and see M. Damaska 'Structures of Authority and Comparative Criminal Procedure' [70]at 489-90).

Stay of the execution of the sentence is not therefore necessitated by the very filing of the appeal, and is a matter given over to the discretion of the court. When the application is made at the sentencing hearing it is decided by the court imposing the punishment: when the stay is requested after the appeal is filed, the decision is in the hands of the appeals court. The court which imposes a prison sentence and decides to stay the execution of the sentence takes into account circumstances related to the defendant and the offense and among other considerations may take into account the need to enable the defendant to file an appeal. After filing an appeal on a decision in which a prison sentence was imposed, the appeals court has another consideration which can influence the range of considerations which relate to the date of execution of the prison sentence. The decision as to the stay of the execution of the prison sentence during the pendency of the appeal will take into account, apart from the broad rule as to immediate execution of the prison sentence also special considerations which

relate to the existence of a pending appeal on the decision. Therefore, even if from the statutory clauses we learn a broad rule of immediate execution of the sentence, still the fact of filing an appeal can influence the manner of exercise of the discretion of the court as to the stay of execution of the sentence in accordance with the authority given to it by law, and it may change the balance between the various considerations entailed in the question of the date of commencement of execution of the prison sentence.

13. As a rule, exercising discretion as to deciding the question of stay of execution of a prison sentence entails a balance between considerations which relate on the one hand to the public interest, and on the other, to the interests of the individual involved. Filing an appeal brings in further considerations which are also related to both public and private interests. The proper balance of the totality of considerations related to the issue will determine in which cases the convicted person-appellant will begin to serve his sentence immediately, and in which cases execution of the sentence will be deferred until the disposition of the appeal.

There is no doubt that the broad rule regarding immediate execution of a prison term rests on the public interest of effective enforcement of the law. This interest has several aspects: first, release of a person who has been convicted of a criminal offense may endanger public safety and security; this is particularly so when it is a matter of someone who was convicted of an offense that by its nature and the circumstances of its commission indicates a risk. Second, release of a person sentenced to prison, may undermine execution of the sentence due to the flight of the convicted person from the law, and in certain circumstances of a pending appeal there may also be the fear of obstruction of justice. It would appear that these aspects of the public's interest in immediate enforcement are not in question. They are learned a fortiori from the law of detention pending completion of the proceedings which enable denying the liberty of a person who enjoys the assumption of innocence where there is a reasonable basis for their existence. When it is a matter of a person who has been convicted and sentenced, the weight of such considerations intensifies; it is a matter of a person who no longer enjoys the presumption of innocence, but is in the realm of a criminal who has been convicted and against whom a prison sentence has been imposed. This fact can have an impact both on assessing the danger of a person, as we are no longer basing this on prima facie evidence but rather on a reliable judicial determination that has been made on the basis of a foundation of the more stringent rules of evidence of criminal law, and on the fear of flight from the law, due to the concrete and real threat of imprisonment.

The public interest in immediate enforcement of imprisonment has an additional aspect, which relates to the need to enact effective action of the law enforcement mechanisms while maintaining public confidence in them. The stay of the execution of a prison sentence may cause a large time delay between the date of the sentencing and the date the sentence is served, during which time a convicted person will be free to walk about. This has the potential to damage the effectiveness of criminal punishment, as "the more time that passes between the commission of a crime or the discovery of a certain crime and the time the criminal is convicted, the lesser the deterring influence of the punishment imposed on others which may be offenders like him." CrimA 125/74 *Merom, Corporation of International Commerce, Ltd. and others v. State of Israel* [34] at p. 75). When a person who has been convicted of a crime and sentenced to prison walks about freely just as before, the deterrence of potential offenders may be hindered. Justice Winograd discussed this in MAppCr 166/87 *State of Israel v. Azran* and others [17]).

> "An incident such as this has an echo, and the release of the respondents, after they have been convicted, has or may have, a damaging effect, on potential offenders, who will mistakenly believe, that even though John Doe was convicted of rape, he is walking around free as though nothing happened." (**Ibid**. at p. 810).

Justice Dov Levin has also discussed the deterrence consideration:

> "The starting point is that there is a presumption that he who has been convicted by the court of first instance is no longer presumed to be innocent and must be held accountable for his actions. **An unnecessary delay which is not necessitated by special reasons damages the deterrence aspect of the punishment**." MAppCr 3360/91 *Abu Ras and others v. State of Israel* [35] (emphasis added D.B.)

See also the words of Justice Türkel in CrimA 7282/98 *Uda v. State of Israel* [36]:

> "It is a matter of serious offenses and there is significance to the fact that it will be said that he who was convicted of their commission will be held accountable for them immediately after sentencing or closely thereafter." Moreover, public confidence in law enforcement authorities and the effectiveness of their actions, may be damaged as a result of the release of offenders who have been convicted and sentenced. Before legislation of the Arrests Law, there was debate in this court whether considerations of deterrence and

> public confidence were relevant consideration in decisions as to detention pending completion of the proceedings in serious offenses. But it is commonly accepted opinion that at the phase following overturn of the presumption of innocence, when a person's guilt has been determined and his sentence passed, considerations related to deterrence and maintenance of the effectiveness of criminal punishment are relevant and proper. These considerations are also relevant in the framework of exercise of discretion as to stay of execution of a prison sentence during the pendency of the appeal. Similar considerations, related to deterrence, effective enforcement and fear of harm to public confidence in law enforcement systems as a result of the release of offenders after conviction and while their appeals are heard, we also find in the case law of other countries whose systems are similar to ours. Thus, for example, in U.S. federal law emphasis has been placed on the element of deterrence in the framework of considerations related to the possibility of release on bail after conviction and until the disposition of the appeal. This consideration was one of the considerations which was at the basis of the legislation of the Bail Reform Act of 1984 which made the conditions for release of convicted persons on bail during the period of appeal significantly harsher than prior law. (See *U.S. v. Miller* [51]; D. L. Leibowitz Release Pending Appeal: A Narrow Definition of 'Substantial Question' under the Bail Reform Act of 1984 [71] 1081, 1094).

In Canada, as in the United States, the issue of stay of execution is legislated in the framework of statutes regarding the release of a convicted person during the period of appeal. Section 679(3) of the Canadian Criminal Code establishes the conditions for release during the period of the appeal. Subsection (c) conditions the release of a convicted person during the appeal, inter alia, with the fact that "His detention is not necessary in the public interest." The appeals courts in several Canadian provinces interpreted the above condition as including, inter alia, the consideration of the impact of the release of the convicted person on public confidence in the law enforcement systems.

> "I think it can be said that the release of a prisoner convicted of a serious crime involving violence to the person pending the determination his appeal is a matter of real concern to the public. I think it can be said, as well, that the public does not take the same view to the release of an accused while awaiting trial. This is

> understandable, as in the latter instance the accused is presumed to be innocent, while in the former he is a convicted criminal. The automatic release from custody of a person convicted of a serious crime such as murder upon being satisfied that the appeal is not frivolous and that the convicted person will surrender himself into custody in accordance with the order that may be made, may undermine the public confidence and respect for the Court and for the administration and enforcement of the criminal law." (*R v. Demyen* [54])

For additional judgments in which a similar approach was adopted see *R v. Pabani* [55]; *Mcauley v. R* [56]; *Baltovich v. R* [57].

It should be noted that in Canadian case law there are also other opinions which emphasize, in the framework of the "public interest" test, the fear of "pointless imprisonment." Lacking case law of the Canadian Supreme Court on the matter, it appears that the more accepted approach is the one presented in the *Demyen* case above: "At this point, it is seen to be an intelligible standard under which to maintain confidence in the administration of justice" (D. Stuart Charter, *Justice In Canadian Criminal Law* (2nd ed., 1996) [67] 357). It should be commented that the approach which emphasizes the importance of the public interest in immediate enforcement of the prison term was expressed in the *Demyen* case above and in other cases in relation to serious offenses of violence.

14. As said, the public interest with its various aspects, including considerations of deterrence, effectiveness and protection of public confidence in the law enforcement system, still hold when we are discussing the matter of stay of execution of a prison sentence during the pendency of the appeal. However, where there is an appeal of a decision in which imprisonment has been imposed, the fear of damage to the public interest and the weight it is to be given is of a more complex nature. Against the considerations we have listed above, there stands the need to avoid irreparable and significant damage to the convicted party due to his immediate imprisonment, if it turns out after the fact – after his appeal was heard – that his imprisonment was not justified. The severity of such injury is not to be underestimated. ". . .denying his personal liberty is a particularly harsh injury. Indeed, denying personal liberty by way of imprisonment is the most difficult punishment that a civilized nation imposes on criminals." (In the words of Justice Zamir in HCJ 6055/95 *Sagi Zemach and others v. the Minister of Defense and Others* [38] in paragraph 17) Such an injury is not just the business of the individual but touches on the interests of the general public; the clear public interest is that people who will eventually be declared innocent in a final judgment not serve time in prison.

Moreover, the public confidence in legal systems and enforcement may be severely injured if it turns out after the fact that the prison time served was not justified. Justice Strasberg-Cohen pointed this out in MAppCr 4590/96 (*Mercado*) [31] above:

> "Indeed as a rule, the accused who is convicted is to serve his sentence without delay and is not presumed to be innocent, non-immediate execution is likely to damage public confidence in the system, however, the acquittal of a convicted person on appeal after he has served a prison sentence that was imposed on him, may damage public confidence in the system, no less so."

A similar approach was expressed in Canadian case law:

> "Whatever the residual concerns which might cause individuals to question their confidence in a justice system which releases any person convicted of murder pending appeal, they would, in my view, pale in comparison to the loss of confidence which would result from an ultimate reversal of the verdict after Mr. Parsons had spent a protracted period in prison." (*R v. Parson* [58]).

15. Realization of the right of appeal which is given to the convicted person by law is also a consideration which the court must take into account when determining the question of stay of execution of a prison term. In order to determine the matter before us I do not find it necessary to make a determination as to the weighty question of the legal status of the right of appeal. I will note only that the claim of the applicant's counsel in this matter that from the very anchoring of the right of appeal in section 17 of the Basic Law: the Judiciary, the conclusion is to be drawn that it is a matter of a constitutional basic right that cannot be limited except in those cases where there are grounds for detention, is far reaching and not to be accepted. The question of the normative status of the right of appeal in our system is not a simple question and it has already been determined more than once in the case law that the right of appeal is established by law and is not included among the basic rights in our law, as determined by Justice Shamgar in HCJ 87/85 *Argov and others v. the Commander of the IDF Forces for Judea and Samaria* [38].

> "The right of appeal is not counted among the basic rights that are recognized in our legal system which draw their life and existence from the accepted legal foundational concepts, which are an integral part of the law that applies here, as in the examples of freedom of expression or the freedom of occupation." (**Ibid**. at pp. 361-362).

This court in fact did not recognize the right of appeal as a basic right, but the case law has emphasized the great importance of the institution of appeal "as an integral component of fair judging." (See the High Court of Justice case, *Argov* above). In light of the importance of the right of appeal it has been decided that an interpretation which grants the right of appeal is to be preferred over an interpretation which denies it. (See HCJ 1520/94 *Shalem v. The Labour Court and others,* [39] at p. 233; MAppCr 2708/95 *Spiegel and others v. State of Israel* [40] at p. 232). The Basic Law: Human Dignity and Freedom does not explicitly recognize the right of appeal. The question whether it is possible to recognize a constitutional right of appeal among the protected rights in the Basic Law: Human Dignity and Freedom has not yet been considered in the case law. Various possibilities can be conceived for anchoring the right in the Basic Law, whether as derivative of rights explicitly detailed in the Basic Law (in our matter – the right to liberty and perhaps dignity), and whether as stemming from the principle of proportionality in the limitation clause (meaning: defining the violation of liberty, property and more without first having an appeals process, is a violation "that exceeds that which is necessary." Compare to the words of Justice Or – as to the right to a fair trial – in LCA 5587/97 *Israel Attorney General v. Ploni (John Doe)* [41] at p. 861). On the other hand, a view has been expressed which objects to the recognition of the right of appeal as a right that is derived from the Basic Law, although in discussion of the civil aspect, primarily for pragmatic reasons and taking into consideration the characteristics of our legal system (see S. Levin 'Basic Law: Human Dignity and Freedom and Civil Legal Processes,' [64] at pp. 462-463, and the discussion in his book supra at pp. 30-33). It is interesting to note that in legal systems close to ours the right of appeal is not recognized as a constitutional right; it is not explicitly mentioned in the United States Constitution or the Canadian Charter of Rights and Freedoms, and to date has not been recognized as part of the constitutional right to due process. (See; *McKane v. Durston* [52]; *Jones v. Barnes* [53]; W. R LaFave *Criminal Procedure* (2nd. ed., 1992) [68] 1136-1137). Although voices calling for a re-examination of the law in this matter have been heard (See: in the United States – the minority opinion of Justice Brennan in the *Jones* case above; M. M. Arkin 'Rethinking The Constitutional Right To a Criminal Appeal' [72]; A.S Ellerson 'The Right to Appeal and Appellate Procedural Reform' [73]; in Canada see D. Gibson '*The Crumbling Pyramid: Constitutional Appeal Rights in Canada*' [74]; *R v. Farinacci* [59].

As noted above, whether the right of appeal is recognized in our legal system as a basic right or not, there is no arguing its significant weight in our system. For the purpose of the matter which we are

discussing – determining the discretion for stay of execution of a prison sentence in the framework of existing legislation – it is enough that we give thought to the rule of construction anchored in case law according to which an interpretation which gives the right of appeal is to be preferred over one that denies it.

16. These are therefore the considerations and interests which are involved in exercising the court's discretion in the stay of execution of a prison sentence, considerations which relate to both private individuals and the general public interest. The court must exercise its discretion while conducting a proper balance among these considerations. In the framework of conducting this balance special weight is to be given to the fear of unjustified violation of liberty. The right to liberty has been recognized by this court as a basic right of the highest degree, that is to be respected and violation of it to be avoided to the fullest extent possible. (See MApp 15/86 *State of Israel v. Tzur* [42] at p. 713 Justice Elon; The Judgment of Justice Heshin in MAppCr 537/95 *Ganimat v. State of Israel* [43] at 400-401). Today the right to liberty is anchored in section 5 of the Basic Law: Human Dignity and Liberty. The statutory provisions which we discussed above, which delineate the matter of stay of execution of a prison term, were in fact legislated before the legislation of the basic law and thus the provisions of the Basic Law cannot impinge on their validity (section 10 of the Basic Law: Human Dignity and Liberty). However, the normative determination in the Basic Law, which defines the right to personal liberty as a constitutional right and which draws the balancing point between it and the various interests which society seeks to advance, influences the legal system overall; the significance of this influence, among other things is that the court's interpretive work, as well as any exercise of discretion given to the court in the framework of existing legislation, will take place while taking into consideration the norm anchored in the Basic Law. President Barak discussed this in the Genimat case above:

> "What are the interpretive ramifications of the Basic Law: Human Dignity and Liberty for interpretation of old law? It appears to me that one can point –without exhausting the scope of the influence – to two important ramifications of the Basic Law: first, in determining the statutory purpose at the core of an (old) statute, new and intensified weight is to be given to the basic rights established in the Basic Law. Second, in exercising governmental discretion, which is anchored in old law, new and intensified weight is to be given to the constitutional character of the human rights anchored in the Basic Law. These two ramifications are tied and interlaced with one another. They are two sides of the following idea: with the legislation of the basic laws as

> to human rights new reciprocity was drawn between an individual and other individuals, and between the individual and the public. A new balance has been created between the individual and the authorities." (**Ibid**. at p. 412)

17. As said above, the State claims that the defendant who has been convicted and sentenced to prison does not have a basic right to personal liberty. Therefore, the State claims that the Basic Law: Human Dignity and Liberty has no relevance to the matter before us. In any event the State claims that even if the right exists the law regarding stay of execution of a prison sentence meets the conditions of the limitation clause. The general question whether the person who has been convicted and sentenced to prison has a 'constitutional right' to freedom, violation of which is subject to the tests of the limitation clause in the Basic Law, is a broad question. Various approaches may be taken as to this question: thus for example it is possible to argue the absence of such a protected basic right, or to its being a right of lesser weight than other right which are anchored in the Basic Law (see A. Bendor, 'Criminal Procedure and Law of Evidence: Development of Individual Human Rights in Procedural Criminal Law,' [65] at p. 500; the words of Justice Dorner in HCJ 1715/97 *Office of Investment Managers in Israel and others v. Ministry of Finance and others*, [44] at p. 418 and on). It is interesting to note that the Canadian case law that deals with the rights of prisoners, has recognized in certain cases the violation of the right to liberty of a convicted person serving a prison sentence, such as when there is a substantive change in the conditions of imprisonment or in the rules which apply to release on bail (see P.W. Hogg, *Constitutional Law of Canada* (4th. ed., 1997) [69] 1069; *Cunningham v. Canada* [60]; *Miller v. The Queen* [61] 112 – 118).

In our case there is no need to attempt and examine this question to its full extent and in the full range of situations in which it might arise. This is because the question before us arises in a special situation and it is possible to limit the discussion to it alone. In the matter before us, it appears to me that the State's claim according to which determination of the question of the stay of execution of a prison sentence does not involve any violation of the right to liberty is not to be accepted. The State is correct in its claim that when a person's guilt has been determined by a court beyond a reasonable doubt, the assumption is that "there is a justification, which meets the standards of the limitation clause for executing the sentence imposed upon him." It is also true that the violation of the liberty of the convicted person is derivative of the judgment which has overturned the presumption of innocence, and from the sentence. However, the complete distinction which the State wishes to establish in our case between denying liberty based on an authorized judgment and the

determination of the date of commencement of the execution of the sentence, ignores the fact that the denial of liberty itself which is expressed in the immediate imprisonment, takes place at a stage in which the question of the accused's innocence has not been finally determined. A judicial judgment by which a person' liberty is denied is also valid at the appeals phase as long as it has not been changed. And yet, as long as a final decision has not been made there exists the potential to change the decision at the appeals phase and to reinstate the presumption of innocence. In this situation, a decision whose significance is immediate imprisonment of a person, in accordance with the judgment which is the subject of the appeal, carries with it, beyond the immediate-physical violation of personal liberty, the possibility of serious violation of the liberty of an innocent person. The severity of such violation may only be fully realized at a later stage, if, and to the extent that, the appeal of the convicted person is upheld and it is found that he served his sentence needlessly; but the existence of this possibility is the result of a decision as to the immediate execution of the prison sentence. Against this background it can be said, that if we hold to the view that a person who has been convicted and sentenced to prison has no right to liberty then such a determination is fitting for an absolute conviction. At the phase in which there is not yet a determination on the appeal of the convicted person, the right to liberty exists as a right but its intensity is weakened in light of the judicial determination which stands as long as it has not been overturned.

Indecision which relates to the question of violation of a constitutional right to liberty as a result of the immediate execution of a prison sentence prior to the determination of the appeal, has also been dealt with in the Canadian courts. It is interesting to note that there, conflicting decisions have been handed down. Thus, in the matter of *R v. Farinacci* [60] the prosecution's claim – that was argued as part of a discussion as to the constitutionality of the statutory provision which deals with release on bail during the period of appeal –that the statutory provisions which deal with the release of a convicted person during the period of appeal do not violate the convicted person's liberty, but rather the opposite is true – they advance it, and therefore are not subject to constitutional limitations, was dismissed. In dismissing the claim the judge of the appeals court of Ontario established that:

> "I cannot accept the respondent's contention that there can be no resort to s. 7 of the Charter in this case because s. 679(3) of the Criminal Code is not a provision which 'authorizes' imprisonment but rather a provision which enhances liberty. There is, in my view, a sufficient residual liberty interest at stake in the post-conviction appellate process to engage s. 7 in some

> form. ... The respondent's submission that s. 7 does not apply to bail pending appeal because, after conviction and sentence to a term of imprisonment, bail operates to enhance rather than to restrict liberty, proceeds from the same formalistic and narrow interpretation of constitutionally protected rights. In so far as the state purports to act to enhance life, liberty or security of the person, it incurs the responsibility to act in a non-arbitrary, non-discriminatory fashion and cannot deprive some persons of the benefits of the enhancement without complying with the principles of fundamental justice." (*Supra*, at 40 - 41).

On the other hand, in another decision in Canada the claim was dismissed according to which the statutory section which relates to release during the period of the appeal is not constitutional, while the claim of the prosecution there was upheld that the said statutory provision does not violate the right to liberty at all, as that was denied in the sentence, while the said statutory provision enables the freeing of the appellant:

> "While the appellant's imprisonment clearly deprives him of his liberty, the authorization for this imprisonment does not derive from s. 679(3)(c). Rather, the appellant's liberty is deprived by the sentence imposed by the trial judge. Nothing in s. 679(3)(c) adds to this deprivation. To the contrary, the provision affords a means of arranging the appellant's release. The appellant's liberty interests can only be enhanced by s. 679(3)(c), under which the operation of the sentence imposed by the trial judge may be temporarily suspended. There is thus no deprivation of any right in s. 679(3) (c). For this reason, I conclude that s. 7 does not apply to bail pending appeal."
>
> (*R v. Branco*) [62]).

In light of what has been said above it may be summarized and stated that when we come to establish the limits of appropriate judicial discretion for stay of execution of a prison term during the pendency of the appeal, we must do so while paying heed to the importance and the status of personal liberty, and the limits of permitted violation of it in accordance with the principles that were delineated in the Basic Law: Human Dignity and Liberty. Justice Zamir discussed this in MAppCr 3590/95 *Katrieli v. State of Israel* [46], when he examined the guiding considerations in the matter of stay of execution of a prison sentence during the period of the appeal.

> "*Inter alia*, weight is also to be given in this context to the Basic Law: Human Dignity and Liberty. This basic

> right protects a person's liberty (section 5) and although it is not sufficient to impinge on the validity of the Criminal Procedure Law, it is sufficient to influence via interpretation, the provisions of this statute as to release from detention or imprisonment. **In this vein, it is to be said that even when the law and the circumstances require denial of the liberty of a person in detention or prison, liberty is not to be denied to an extent that exceeds that which is necessary**." (Emphasis added D.B.)

18. In light of the various considerations and interests involved in the matter of stay of execution detailed above, how will the court exercise its discretion when coming to examine an application to stay execution of a prison sentence that has been imposed, until disposition of the appeal? We will note first that the response of the applicant's counsel to this question which rests primarily on the decision of Justice Ilan in the Hahami case above, is not acceptable to us. This approach according to which the very filing of the appeal justifies stay of execution of the sentence, with the exception of cases where there is a fear that the convicted person will endanger public safety or will not appear to serve his term, is far reaching. It does not properly distinguish between the phase of detention – when the presumption of innocence still holds, and the phase after conviction; it misses the target of the objective of giving effective deterrent expression to penal law punishment and may damage public confidence in the law enforcement system due to the release, as a matter of course, of those who have been convicted of criminal offenses. It may also encourage filing meaningless appeals for the purpose of stay of the prison sentence. In this matter we also cannot learn from the customary law on this issue in the continental systems, where the criminal procedural process, the definition of the tasks of the court of appeals and the degree of its involvement in the determinations of the court of first instance is different from our system. (See S. Levin's book, **ibid**. [63] Damaska article [70] **ibid**.).

With that, the "accepted approach" for stay of execution of the prison sentence during the pendency of the appeal, in its traditional and limited meaning, no longer stands. The appropriate approach to this issue must take into consideration and give weight to the totality of relevant considerations and interests which we have discussed which may apply to the various interests involved in the matter and the their degree of intensity under the circumstances and give them the appropriate relative weight. According to this approach strict rules are not to be established for the exercise of discretion but rather guiding frameworks are to be delineated for its exercise. The starting point must be that the court must utilize its discretion in a manner that takes into account the public interest in immediate enforcement

of imprisonment, still prior to the hearing of the appeal, but must take care, however, that the realization of this interest does not harm the convicted person and their rights in a manner that goes beyond that which is necessary. As detailed above, the directive of the legislature is that as a rule, a sentence of imprisonment is to be executed immediately after the sentence is handed down. As we have explained, filing an appeal on a judgment does not in and of itself stay execution of the judgment, but rather the matter is given to the discretion of the court. Nonetheless, when the court comes to decide on an application to stay the date of commencement of the prison term on the basis of the authority given to it by law, the filing of an appeal constitutes an additional consideration that may impact the totality of considerations which are before the court, and the balance among them. The burden is on the applicant for stay of execution of the prison sentence to convince the court that under the circumstances the public interest in immediate execution of the prison sentence is overridden by the additional interests implicated in the case which we have discussed above.

The relevant considerations and interests will be examined by the court that is considering the applications, without purporting to present a closed list, we will discuss below the circumstances and primary considerations that the court must weigh when considering an application by the convicted person to stay execution of the prison sentence during the pendency of the appeal on the judgment:

(A) *The Severity of the Crime and the Circumstances of its Commission*: the severity of the crime and the circumstances of its commission influence the intensity of the public interest in immediate enforcement of the prison sentence. As a rule, the more severe the crime and the circumstances of its commission, the greater the public interest in immediate enforcement of the imprisonment, in its various aspects. So too, as to the fear of the danger that the convicted person poses to the public, the severity of the crime of which he was convicted can in and of itself be an indication of his dangerousness. As to the essence of the offenses which constitute on their own an indication of dangerousness, one can also learn from the laws of detention, according to which being accused of certain offenses creates a presumption as to the dangerousness of the accused (see: Arrests Law s. 21 (a)(1)(c)). It is to be noted that in American law it has been established by law that a person who was convicted of committing certain serious offenses, such as violent offenses or offenses punishable by death or imprisonment beyond a certain time period, are not to be released on bail or the conditions for release are harsher than usual (see Bail Reform Act of 1984, s. 3143(b)(2); 8A Am. Jur. 2nd. [76] 283) the severity of the crime and the circumstances of its commission also have ramifications on the intensity of the interest of protecting the effectiveness of criminal

punishment and the actions of law enforcement authorities; the greater the severity of the offense and the circumstances of its commission, the greater the public interest in achieving effective deterrence from commission of similar crimes by others and the greater the fear of damage to the effectiveness of punishment and public confidence in enforcement systems if the convicted person is set free. And note: as to this last matter I do not believe that the severity of the offense needs to be determined only according to the measure of the violence involved in its commission. According to my approach, even the release of somebody convicted of committing offenses that do not involve severe violence and are not of the type of offenses listed in section 21 (a) (1) (c) of the Arrests Law, but which damage protected social interests of importance, including offenses of far-reaching fraud or corruption offenses that were committed through the abuse of public office, may under certain circumstances damage public confidence in law enforcement authorities and the effectiveness of criminal enforcement. Such damage is a consideration among the considerations of the court in making a determination as to stay of imprisonment, within the examination of the background of the other facts of the case.

(B). *The Length of the Prison Term Imposed on the Convicted Person*: The length of the prison term may affect the court's discretion in a number of ways. First, when the prison term is brief, relative to the date in which the appeal is expected to be heard, there exists a fear that the convicted person will serve his sentence before his appeal is heard. In such a case, it is appropriate to stay execution of the sentence in order to enable the convicted person to effectively realize the right of appeal which he has by law. This approach is also acceptable within the traditional approach for staying execution of a sentence. And it appears that it is necessitated by the accepted rules of construction as developed in the case law, according to which legislation is to be constructed in a manner that validates the right of appeal and enables its realization. Second, the length of the prison term imposed on the convicted person may influence the assessment of the fear of flight of the convicted person from the law or attempts by him to obstruct justice; the concrete knowledge of the convicted person that if he fails in his appeal he is to expect a prolonged prison term, may increase the fear that he may flee from the law, this is so even if in the course of his trial in the trial court he appeared for his trial as required. Third, the severity of the punishment that was imposed on the convicted person teaches us of the severity of the crime of which he was convicted, as generally punishment reflects the severity of the criminal act.

(C). *The Quality of the Appeal and the Chances of its Success*: A central question to which we must give thought is what is the weight that is to be given to the fact of filing an appeal and to the chances of

the appeal. For the reasons we have already detailed, we have seen fit to reject the approach according to which the very filing of an appeal justifies stay of the execution of the sentence. However, it appears that a perspective according to which it is appropriate to make a change from the present law, relates to the weight that is to be given to the quality of the claims raised in the appeal and the chances of its success in the framework of examining an application to stay execution of a sentence until the disposition of the appeal. The accepted approach in the case of stay of execution of a sentence leaves a particularly narrow opening for consideration of the appeal of the convicted, when it is not a matter of a short prison term and light offenses. According to this approach, only conspicuous chances to win the appeal or salient distortion in the conviction justify stay of execution of the sentence during the pendency of the appeal. This test establishes a high threshold which only in a few cases will the convicted person seeking to stay his imprisonment meet. Such a test can injure in a disproportionate manner the freedom of the convicted person and the effective realization of the right of appeal; it creates an overly large gap between the level of examination at the preliminary phase of the decision on the application to stay execution of the sentence, and examination of the appeal itself, and increases the chances that serving the sentence will turn out retroactively to be unjust. Under these circumstances, the means of immediate execution of a sentence may cause damage which is more than the utility contained within it. It is not superfluous to note, that the test as to the chances of the appeal as it had been phrased in the case law, has in point of fact "been abandoned" in many decisions of this court, and even the State in its arguments before us does not phrase the appropriate rule according to its approach with such narrow language.

The consideration which relates to the chances of appeal is a relevant consideration to the question of stay of execution of the sentence during the period of appeal. The more that the convicted person is able to show that his appeal is based on solid arguments the greater the justification to avoid immediate enforcement of the judgment before the appeal is heard on the merits. However, it is not to be ignored that the consideration as to the chances of the appeal is a complex consideration, and assessing the chances of the appeal and its quality places before the judge difficulties which are not negligible. From the character of the procedure which takes place during the application to stay execution of the sentence it can be derived that the judge does not have sufficient tools to assess in an informed manner the arguments raised in the appeal; the procedure takes place on the basis of a theoretical examination of these arguments and does not generally include studying the transcript and the totality of the evidence that was brought in the case. Moreover, it

is not desirable that a judge dealing with an application to stay the execution of a sentence, will make determinations that may have an influence on the discussion in the appeal itself. Despite said difficulties, we are not dealing with an extraordinary assignment that judges are unaccustomed to. Theoretical assessments are not new to the court, and it is accustomed to implementing considerations of this type at the phase of discussion of detention pending completion of the proceedings as well, when the presumption of innocence still stands. A similar process of assessing the theoretical chances of an appeal, is also familiar to the court when dealing with applications to stay execution of a sentence in civil appeals. We will note further that in other legal systems which are similar to ours, weight is given to the chances of appeal and its quality in the framework of a determination as to stay of imprisonment until disposition of the appeal: thus, it is determined by federal law in the United States that the release of a convicted person on bail during the course of the pendency of his appeal is conditioned on his proving that his appeal "raises a substantial question of law or fact likely to result in reversal..." (Bail Reform Act of 1984, S. 3143 (b) (B)). Courts are split as to the interpretation of this section, but it appears that the common approach is that the convicted person must show that the appeal raises a question that is at least "balanced" in its chances ("close question"). (See T.W. Cushing "Raising a 'Substantial Question': The Key to Unlocking the Door Under the Bail Reform Act" [75] 198). Indeed, the Canadian Law makes do with the requirement that the appeal is not baseless or 'frivolous,' but in a number of decisions a statutory condition as to the lack of public interest in the imprisonment of the convicted person has been interpreted as including, inter alia, the assessment of the quality and strength of the appeal arguments. (See: *R. v. Mcauley* (1997) *Ont. C.A Lexis* 3[56]; *R. v. Farinacci* [59]; *R v. Pabani* [55]).

The theoretical assessment of the chances of appeal, in the framework of examining an application to stay execution, is not done by a "mechanical" probability test relative to the possible results of the appeal: such an examination is not possible in fact and it is not desirable for it to be undertaken by a single judge at such an early phase of the discussion. The judge dealing with an application to stay execution of a sentence is to examine the quality of the arguments on appeal and their type, and assess their inherent potential to influence the outcome of the appeal. The theoretical strength of the arguments will be examined against the background of the accepted rules in our system relative to the exercise of review by the appeals court. Thus, for example, claims by the applicants to change factual findings of the lower court which are based on its impression of witnesses, or reliable determinations of that court, will not generally be sufficient to base good theoretical chances for the

appeal. When the appeal is focused on legal questions, for which it can be determined on a theoretical level that they raise real difficulty, this will be sufficient, generally, to point to an appeal which justifies stay of execution of the sentence until these are clarified. It is not unnecessary to note that it is not the outer legal dress which is given to the appeal argument which is determinative, but the substance of the argument and the degree of its relation and relevance to the concrete circumstances of said case, in a manner that is sufficient to influence the results of the appeal if the claim is upheld. Thus, it can be summarized that when it is a matter of serious arguments, that by their nature and character – if they are accepted – are sufficient to influence the results of the appeal this will contain a significant consideration for justifying stay of execution of the imprisonment until disposition of the appeal, all this taking into account the totality of circumstances of the matter.

(D.) *The Criminal History of the Convicted Person and his Behavior During the Course of the Trial*: as has already been noted above, these circumstances may point to the degree of dangerousness that is posed to the public from release of the convicted person and the existence of a fear of flight from the law. This being the case, they may be relevant to applying the court's discretion when it examines whether to stay execution of a prison sentence until disposition of the appeal. And note: this is not a matter of a consideration that stands on its own, and therefore it is not in every case that the convicted person without a criminal history or for whom it has been proven that he appeared properly during the course of his trial, will be sufficient to determine the matter of stay of execution of a prison sentence. It may even be said that generally, at the phase after conviction, a clean record and careful adherence to the conditions of bail during the time of the trial proceedings, are not of themselves sufficient to tilt the scale to stay execution of the sentence, taking into account the impact of the conviction and sentence on the assessment of the dangerousness and on the fear of flight by the convicted person, and considerations of deterrence and effectiveness which we discussed above (see paragraph 13 supra). But in the framework of the totality of the relevant considerations against the examination of the severity of the offense, the degree of punishment that was imposed and the nature of the appeal, it is possible to also take into account data as to a clean criminal history of the convicted person and his good behavior during the course of the trial.

(E) *The Personal Circumstances of the Convicted Person*: in the framework of examining the application to stay execution of a prison sentence, it is possible to also examine, in appropriate cases, the personal circumstances of the convicted person. A judicial decision, whose immediate significance is imprisonment of a person, whether

it is a matter of the sentencing phase or whether it is the appeal phase, does not need to entirely ignore any claim as to personal circumstances of the person and as to the consequences he may expect as a result of his imprisonment. Accordingly, personal circumstances constitute a consideration in the stay of execution of the prison sentence not only under the circumstances of the filing of an appeal. Moreover, the existence of special personal circumstances, may also influence the weight of the public interest in immediate execution of the prison sentence. The words of Justice Barak in MAppCr 37171/91 *State of Israel v. Golden* [46] which were said on the separate topic of detention pending completion of the proceedings on the grounds of severity of the offense (prior to legislation of the Arrests Law), are appropriate here:

> "The injury to the effectiveness of the criminal law and its enforcement, which is caused where someone who committed a severe offense, is "out and about" is tied, by its nature, to the theoretical circumstances of commission of the crime. **The efficiency of law enforcement will not be harmed, if someone who theoretically committed a serious offense is not detained because they are dying. Everybody understands that the special circumstances of the case justify that even someone who theoretically committed a severe offense, will not be arrested under these circumstances. Quite the opposite: arrest of the accused under these circumstances may create the impression that the state is taking revenge on the suspect and seeks him ill**." (**Ibid**. at p. 814. Emphasis added -- D. B.)

It appears to me that the logic behind these words is appropriate, with the appropriate changes, also when we are talking of the difficult personal circumstances of the convicted person whose appeal is pending. Indeed, taking into consideration the fact that we are now at the phase after conviction, it is possible that personal circumstances -- on their own -- will not generally have much weight in the decision of the court as to the stay of execution of a prison sentence, as the premise is that the court that imposed the sentence, also considered among the punitive considerations the existence of these circumstances. However, there may be cases in which it appears on the face of it that this premise does not exist; thus for example, when the personal circumstances which are argued developed or changed significantly after the sentence was handed down. So too, in other cases due to the special personal circumstances of the convicted person, such as his young age, his difficult mental condition or additional considerations for which the consequences of execution of the prison sentence may be particularly

difficult. In such cases, the personal circumstances will add additional weight to the decision to stay execution of the prison sentence until disposition of the appeal. We will note that from examination of the decisions of this Court in applications to stay execution it appears that special personal circumstances indeed occasionally serve as a consideration among the considerations of the court when coming to determine applications to stay execution of prison sentences during the pendency of the appeal (see for example MAppCr 4092/94 *Tioto v. State of Israel* [47]; CrimA 6579/98 *Friedan v. State of Israel* [48]).

(F) *Appeal as to Severity of the Punishment*: An additional consideration that is to be weighed in applications to stay execution of prison during the period of appeal, is whether the appeal is directed against the judgment and challenges the conviction itself, or whether it is a matter of an appeal that deals with the severity of the punishment that was imposed only? As a rule, in appeals of the latter type, the tendency will be not to stay execution of the prison sentence. When the appeal is on the severity of the punishment, the balance of the considerations and interests which is before the eyes of the court may change. In such a case, the conviction itself -- which refutes the presumption of innocence -- is absolute, and the same potential does not exist for it to be restored on appeal, which we discussed above. Examining the quality of the appeal and its chances will be done while noting the rules as to the degree of intervention of the appeals court in punishment that was imposed by the trial court, and the question of the relationship between the time expected for hearing the appeal and the period of imprisonment that was imposed on the convicted person. When on the face of it is not a matter of a punishment which deviates from the accepted punitive policy, and when the degree of punishment that is accepted in similar cases is greater than the amount of time expected for hearing the appeal, execution of the prison sentence will not be stayed except in exceptional circumstances and the burden for showing this is so will be on the applicant. (Compare: CrimA 3602/99 *Ploni (John Doe) v. State of Israel* [49], Justice Ilan; 3976/99 *Ephraimov v. State of Israel* [50], Justice Strasberg-Cohen).

19. As said, the list of circumstances detailed above does not purport to be exhaustive. It exemplifies the type of circumstances and considerations that have in them to influence the application of discretion by the court when it comes to determine an application to stay execution of a prison sentence during the pendency of the appeal; these considerations relate to the public interest in immediate enforcement of the judgment on the one hand, and preservation of the rights of the convicted person on the other hand. The court must determine each and every case according to its facts, while balancing between the different interests which we have discussed above

relating to the topic. It is important to emphasize that the considerations which we discussed are not static and do not stand on their own, but influence each other. The work of balancing between them will be done after assessing the strength of the various interests and the weight that is to be given to each of them under the circumstances of the case. Thus, for example, the more the convicted person can show that his theoretical chances of success on appeal are good and well founded, the lesser the weight of the public interest in immediate enforcement of imprisonment, and thus, depending on the matter, will be narrowed to those considerations of danger to the public or flight from the law, which also apply in the law of detention pending completion of the proceedings. So too, the more it is a matter of conviction of a more severe criminal offense, the circumstances of whose commission are more severe, so too will the burden increase on the convicted person that seeks to stay execution of his prison term to show that there exist circumstances which justify stay of execution of the prison term despite the public interest in its immediate enforcement.

Conclusion

20. In conclusion, the summary of our position as to stay of execution of a prison sentence during the pendency of appeal, is this:

A. The filing of an appeal is not sufficient on its own to stay execution of a prison sentence. Stay of execution of a prison sentence during the pendency of the appeal is a matter for the discretion of the court.

B. The approach which was accepted in the case law of this Court, according to which stay of execution of a prison sentence during the period of appeal is a matter of an exception which applies only in extraordinary cases and under the existence of special circumstances, no longer holds.

C. In applying its discretion as to stay of execution of a prison sentence during the period of appeal, the court will consider the public interest in immediate enforcement of the judgment, and considerations which relate to the convicted individual and his rights in light of the existence of a pending appeal proceeding; the court will make sure that protection of the public interest will not harm the convicted person and his rights in a manner that is not proportional. The type of relevant circumstances and considerations which the court will take into account when applying said discretion, were detailed in our decision.

D. The burden on the applicant for stay of execution of the prison sentence is to convince the court that under the circumstances of the case, the public interest in immediate execution of the prison sentence retreats in the face of the additional interests involved in the matter.

The approach we propose is not new to the case law of this Court; and it is integrated with a broadening trend taking shape in previous decisions of the court, such as for example in the judgments of Justice Strasberg-Cohen in the Mercado, Kochanski, and Sharabi cases above. This approach operates to make the accepted approach for stay of execution of a prison term during the pendency of the appeal more flexible in a manner that will reflect the totality of considerations and interests involved in the matter, while giving appropriate weight to the concern for violation of the rights of the convicted person.

From the General to the Specific

21. Having drawn the basic framework, we turn to the application of the guidelines in exercising our discretion in the circumstances of the applicant's case. It should first be said that the case before us is not of the easier cases for determination, both because of the type of offense, and because of the reasons for the appeal and because of the "borderline nature" of the period of imprisonment. Moreover, the date of determination of the appeal arrived after the applicant received, in fact, a significant stay of execution during the time that was required to formulate our approach to the fundamental issue. However, the correct question is – if the matter of the applicant had come to us a priori -- whether based on the guidelines that we have delineated we would have upheld the application to stay execution of the prison sentence until the disposition of the appeal. I have come to the conclusion that were I to consider the application and make a decision as to it a priori, according to the criteria we proposed, while balancing among the relevant considerations, I would have tended in the direction of immediate execution of the prison sentence.

The offenses with which the appellant was convicted -- rape and sodomy -- are severe offenses, and seemingly by their nature are the type of offense which point to the dangerousness of the person convicted of committing them. Generally we will rarely stay execution of the sentence for convictions of offenses of this type, for reasons of public interest, including the enforcement interest. Moreover, the period of imprisonment that was imposed on the applicant -- 3 years of imprisonment in fact-- is not considered among the short time frames for which it is appropriate to give a stay of execution only to enable hearing of the appeal; at most, it would have been justified to move the hearing of the appeal forward, in consideration of the length of the prison term. When we come to weigh the chances of the appeal we must give thought to the fact that the notice of appeal is directed primarily against findings of fact and findings of credibility, and does not raise serious legal questions. Generally such an appeal, on its face and lacking reasons that would show otherwise, does not have a large theoretical chance, even if of

course we cannot rule out the possibility that the claims or some of them will eventually be accepted. To all this is to be added, that apparently it arises from the sentence that the court took into account the personal circumstances of the applicant, and the normative background, and gave them expression in the sentence that was handed down. There are not in the personal circumstances of the applicant extraordinary considerations of the type that justify stay of execution of the prison sentence in order to prevent special harm that is expected from the fact of imprisonment. Therefore, if the grounds for the application had been before us under regular circumstances they would not be sufficient to convince us to stay execution of the sentence.

However, when we come to determine the matter of the applicant today, we must also consider among our considerations the fact that the applicant has been free on bail for a long period of time since the sentence was handed down and his appeal may be heard soon. For this reason, and in consideration of the date that has been set for hearing the appeal, it is not appropriate, at the present phase in the proceedings, to order the immediate imprisonment of the applicant.

President A. Barak
I agree.

Vice-President S. Levin
I agree

Justice T. Or
I agree.

Justice E. Mazza
I agree.

Justice M. Cheshin
I agree.

Justice T. Strasberg-Cohen
I agree.

Justice D. Dorner
I agree.

Justice Y. Kedmi

1. *Stay of Execution of a Prison Sentence*

My colleague, Justice Beinisch is worthy of accolades for the effort invested in preparing her thorough and comprehensive opinion. Strength to him.

I join the result that my colleague has reached: and the framework of considerations proposed by her as a basis for consideration of an application to stay execution of the prison term against the background of filing an appeal is acceptable to me. However, in light of the language of the summary presented in paragraph 20.b. to the judgment which states: "stay of execution of a prison term during the period of appeal," is no longer "an exception which applies only in extraordinary cases and under the existence of special circumstances" – I find it necessary to add a qualifying comment.

The summarizing language in said paragraph may leave the impression, that stay of execution of a prison term under said circumstances *is no longer an 'exception'* to the rule which requires immediate execution of such a judgment. In my approach, from the substantive-fundamental approach, this is not the stance which is necessitated by the clarification undertaken by my colleague in this matter in her judgment; and does not sit well with imposing the burden of persuasion – as to existence of circumstances which justify stay of execution on the applicant, as necessitated by the language of paragraph 20.d. of the summary.

Reading the judgment teaches *me* at least, that from the fundamental perspective the law and the case law in the following two areas have stayed as they are. One – and this is the primary one – that based on the written law, the rule is that a prison term is to be executed *immediately* upon imposition, *unless* there exist grounds which justify staying its execution; when the individual seeking the stay, bears the burden of persuasion of the court as to the existence of the grounds. And the second – whose practical significance does not fall below that of its predecessor – that the *central* consideration for justifying deviation from the said rule, is contained in the chances of the appeal's success. I have also learned from the judgment: that the specific secondary considerations which are grounded in the special circumstances of a said case – that were developed in this context in the case law, have also been left as is; and there is no basis for the argument heard lately in courts according to which: the provisions of the Basic Law: Human Dignity and Liberty, undermine the basis from the existing law in the matter of stay of execution and necessitate establishing an innovative approach, at the basis of which stands the constitutional right to personal liberty.

The change presented in the judgment, is, *in my view*, a change in the policy of the application of the existing rule; as opposed to a conceptual change which establishes a new rule. To *this* character of

the change – with which, as said above I agree – I found explicit expression in the words of my colleague according to which: the change "relates to the *weight* that is to be given to the quality of the arguments raised in the appeal and the chances of its success"; in a manner that "The more that *the convicted person is able* to show that his appeal is based on solid arguments the greater *the justification to avoid immediate enforcement of the judgment*." Therefore: we do not have a fundamental revolution here, rather – clarification of the proper application of the rule already existing for us according to which: from now on the threshold of requirements for stay of execution, is no longer as high as was to be understood from decisions given in the past in this matter, but lower and more flexible.

In summary, in *my view* – and in this I differ from the conclusion – there are two guidelines necessitated by the judgment: first – there is no room for the approach which says that "only blatant chances for success on appeal or a manifest distortion on the face of the conviction, justify stay of execution of the prison sentence during the pendency of the appeal"; and second – the judge considering the application must examine "the quality of the arguments on appeal and their type to assess the potential entailed in them to influence the results of the appeal."

2. *Joining a Party to the Proceeding as a "Friend of the Court"*

Granting the Public Defender's application to join the discussion as a "friend of the court" in the case before us, is not in line with my view in the matter. Here are a number of comments which reflect, fundamentally, my view on the subject.

The inherent authority of the court to join a "friend" to the discussion is an exception to the character of the judicial proceeding which is customary here. It is proper therefore to take care to make use of this authority in the rarest of cases, when the circumstances justify not only deviation from the rule, but necessitate it. The fact that the "friend" has the power to offer the court "assistance" in the solution of the legal problem before us, does not constitute, on its own, a sufficient basis for inviting a "friend" to join the discussion. For it we say this, the "friend" will become the "legal helper "of the court; and in my view this is not the purpose of the existence of this institution. In our system, the court copes with "legal issues" with the help of the "natural" parties who appear before it; when at the top of their priorities – and this is particularly so of defense attorneys – stand the accused and not consideration of the analytical-fundamental legal issue, which relates to the totality of accused or others involved in the criminal act which is the subject of the discussion. The court does not need offers of professional legal help from the broad public; and particularly not from those who have an interest in promoting

one solution or another to a problem that is to be determined in the discussion taking place before it.

As a rule, therefore, it is appropriate, in my view, to limit the invitation of a "friend," to circumstances of "procedural necessity," meaning: to circumstances in which the involvement of the "friend" is necessary to ensure the existence of a proper and fair discussion in the matter of the accused standing trial; as opposed to circumstances in which "friends" seek to present their own positions in the matter under discussion. The friend is indeed the friend of the Court; however, from a practical standpoint, he is the friend of the accused who is in distress. In the case before us, the application of the Public Defender to be joined to the discussion as a "friend" of the court did not come against the background of coming to the aid of a defendant in distress in order to ensure a fair trial in *his* matter; but rather, against the background of its desire to advance its fundamental position in the legal issue that has been placed by the parties before the court. In fact, the Public Defender seeks to join itself to the discussion as the "friend of all accused," all of them; and this so that it will have the opportunity to convince the court of the justness of a judicial policy which appears to it to be consistent with "rights of the accused." This is not the end to which the Public Defender was established; and in any event, this is not the purpose of the existence of the institution of the Court.

In summary: in my view, the institution of the Public Defender was established to ensure legal representation for the accused, when circumstances exist as established in the law; and is not assigned with the advancement of the interests of all defendants as such. In any event, even if it was assigned the task of protecting the rights of accused in general, this is not sufficient to grant it the status of "friend of the court"; and to prefer it over any other organization that sets as its goal to advance the interests of others "involved" in the criminal proceeding, such as: the entities handling the protection of rights of the victims of the offenses. It is appropriate that advancement of the rights of all accused be done elsewhere and not in the framework of the consideration of the matter of a given accused person.

Therefore, the application to stay execution of the prison sentence is granted as per the judgment of the Hon. Justice Beinisch.

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June 7, 2000