HCJ 9264/04

State of Israel

v

1. **Jerusalem Magistrates Court (formal respondent)**
2. **Jerusalem District Court (formal respondent)**
3. **Guy Sarim**
4. **A**

The Supreme Court sitting as the High Court of Justice

[6 June 2005]

Before President A. Barak, Vice-President M. Cheshin and Justice D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The third respondent ('the respondent') was indicted in the Jerusalem Magistrates Court for an offence of committing an indecent act. The victim of the alleged offence ('the complainant') kept a personal diary and the parts that were relevant to the period during which the complainant and the respondent were acquainted with one another were photocopied and sent to counsel for the respondent.

Counsel for the respondent applied to inspect the whole diary under s. 74 of the Criminal Procedure Law. The Magistrate Court ordered the prosecution to produce the whole diary for inspection by the court, after an *ex parte* hearing where it heard only the arguments of the respondent. The decision was upheld by the District Court on appeal. The state filed a petition in the High Court of Justice to set aside the decision to produce the whole diary, on the grounds that the court had no jurisdiction under s. 74 of the Criminal Procedure Law to order the state to produce the whole diary, since it was not in the possession of the state, and that a proceeding under s. 74 of the Criminal Procedure Law disproportionately violated the right of the

complainant to privacy. According to the state, counsel for the respondent should have filed an application under s. 108 of the Criminal Procedure Law to order the complainant to produce the whole diary, since this would violate the complainant's privacy to a lesser degree.

Held: The power of the court to inspect material under s. 74(d) of the Criminal Procedure Law should be interpreted broadly. The fact that material is not in the possession of the prosecution and the fact that there is an alternative proceeding under s. 108 of the Criminal Procedure Law do not deprive the court of the power under s. 74(d), even if they may limit its use. The main consideration when the court exercises its power under s. 74(d) of the Criminal Procedure Law is the relevance of the material to the indictment and the likelihood that it will be of benefit to the defence.

When the inspection of material involves a violation of the basic rights of witnesses or complainants, the court should find the proper balance between these rights and the rights of the accused to a fair trial.

With regard to personal diaries, the tendency will be to regard those parts that relate to the subject of the indictment or the accused as 'investigation material' that the accused has a right to inspect. By contrast, those parts of the diary that do not relate to the indictment will tend not be regarded as 'investigation material.' The defence will have the burden of showing that there is a real possibility that the material will be of benefit to the defence, and that this is not merely a speculative and remote hope.

As a rule, the High Court of Justice does not intervene in the interim decisions of the criminal courts. But the decision of the Magistrates Court was made *ex parte*, and the petitioner had no opportunity of making arguments supporting the complainant's right to privacy. This was a serious procedural defect that justified the intervention of the High Court of Justice.

Petition granted in part.

Legislation cited:

Criminal Procedure Law [Consolidated Version], 5742-1982, ss. 74, 74(a), 74(b), 74(b)-(e), 74(d), 108.

Israeli Supreme Court cases cited:

HCJ 620/02 *Chief Military Prosecutor v. Appeals Court Martial* [2003] IsrSC 57(4) 625. [1]

HCJ 8808/04 *Afek v. Tel-Aviv District Attorney's Office* (unreported). [2]

HCJ 6876/01 *Barlai v. Justice of Tel-Aviv Magistrates Court* (unreported). [3]

HCJ 583/87 *Halperin v. Vice-President of Jerusalem District Court* [1987] IsrSC 41(4) 683. [4]

HCJ 398/83 *Avitan v. Panel of Three Justices* [1983] IsrSC 37(3) 467. [5]

HCJ 4591/04 *Matok v. Tel-Aviv-Jaffa Magistrates Court* (unreported). [6]

HCJ 188/96 *Tzirinsky v. Vice-President of Hadera Magistrates Court* [1998] IsrSC 52(3) 721. [7]

CrimApp 1355/98 *Ben-Ari v. State of Israel* [1999] IsrSC 53(2) 1. [8]

CrimA 1152/91 *Siksik v. State of Israel* [1992] IsrSC 46(5) 8. [9]

CrimApp 5400/01 *A v. State of Israel* (unreported). [10]

CrimApp 5425/01 *El Haq v. State of Israel* [2001] IsrSC 55(5) 426. [11]

CrimApp 3831/02 *Matzri v. State of Israel* [2002] IsrSC 56(5) 337. [12]

CrimApp 8294/03 *Maximov v. State of Israel* [2004] IsrSC 58(1) 49. [13]

CrimApp 9322/99 *Masarwa v. State of Israel* [2000] IsrSC 54(1) 376. [14]

CrimApp 10160/04 *Gold v. State of Israel* [2005] IsrSC 59(3) 373. [15]

CrimApp 1372/96 *Deri v. State of Israel* [1996] IsrSC 50(1) 177. [16]

CrimApp 2632/00 *A v. State of Israel* (unreported). [17]

HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [2001] IsrSC 55(4) 267. [18]

HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**. [19]
CA 506/88 *Shefer v. State of Israel* [1994] IsrSC 48(1) 87; **[1992-4] IsrLR 170**. [20]
HCJ 1391/03 *Comtec Systems v. Justice Y. Adiel* (unreported). [21]
CrimApp 8467/99 *A v. State of Israel* [2000] IsrSC 54(2) 454. [22]
HCJ 5578/02 *Manor v. Minister of Finance* [2005] IsrSC 59(1) 729. [23]
CrimApp 4157/00 *Nimrodi v. State of Israel* [2000] IsrSC 54(3) 625. [24]
CrimApp 11042/04 *A v. State of Israel* [2005] IsrSC 59(4) 203. [25]
CrimApp 1781/00 *Schwartz v. State of Israel* [2001] IsrSC 55(4) 293. [26]
LCrimA 11364/03 A v. Israel Police [2004] IsrSC 58(5) 583. [27]
HCJ 233/85 *El Huzeil v. Israel Police* [1985] IsrSC 39(4) 124. [28]
HCJ 1689/02 *Nimrodi v. Attorney-General* [2003] IsrSC 57(6) 49. [29]
CrimApp 3642/04 *Serpo v. State of Israel* (unreported). [30]
CrimApp 6022/96 *State of Israel v. Mazor* [1996] IsrSC 50(3) 686. [31]
CrimFH 3750/94 *A v. State of Israel* [1994] IsrSC 48(4) 621. [32]
[LCrimA 5877/99 *Yanos v. State of Israel* 2005] IsrSC 59(2) 97. [33]
CrimApp 3927/05 *A v. State of Israel* (unreported). [34]
CrimA 639/79 *Aflalo v. State of Israel* [1980] IsrSC 34(3) 561. [35]
CrimA 63/79 *Ozer v. State of Israel* [1979] IsrSC 33(3) 606. [36]

For the petitioner — A. Helman, U. Carmel.
For the third respondent — Y. Gaulan, N. Shohat.
For the fourth respondent — F. Cohen.

JUDGMENT

Justice D. Beinisch

In this petition the petitioner, the State of Israel, is requesting that we set aside the decisions of the Jerusalem Magistrates Court and the Jerusalem District Court, which ordered it to produce, for the inspection of the Magistrates Court, the personal diaries of the fourth respondent, who is a complainant (hereafter: the complainant) in a criminal proceeding that is being conducted against the third respondent (hereafter: the respondent). As we shall see below, the fundamental question that arises in the petition before us concerns the scope of the power and discretion of the court within the framework of a proceeding under s. 74 of the Criminal Procedure Law [Consolidated Version], 5742-1982 (hereafter: the Criminal Procedure Law) to order the prosecution to produce, for the inspection of the court, material which, according to counsel for the accused, constitutes 'interrogation material,' when this material is not in the possession of the prosecution, and when according to the prosecution it is material that is irrelevant to the indictment and producing it will violate the privacy of a witness or a complainant.

Factual background and sequence of proceedings

1. On 13 February 2002, an indictment was filed against the respondent in the Jerusalem Magistrates Court, in which he was charged with an offence of committing an indecent act with the use of force. In the indictment it was alleged, in brief, that on 3 June 2001, the respondent and the complainant met, following several previous meetings that took place between them with a view to starting a romantic relationship. According to what is alleged in the

indictment, at that meeting after they talked about the complainant's desire to stop meeting with the respondent, the respondent committed indecent acts against her without her willing consent and with the use of force. As can be seen from the arguments of counsel for the respondent before us, the scope of the dispute between the parties in this case concerns the question whether the sexual contact that took place at that meeting occurred with the complainant's consent.

Two days before the complainant was supposed to testify in the respondent's trial, it became known to counsel for the prosecution, during an interview with the complainant, that the complainant had for many years kept a personal diary which was made up of several notebooks, and the relevant notebook for the period relevant to the indictment is the ninth of these notebooks. Counsel for the prosecution therefore applied to postpone the testimony of the complainant and at the same time she asked the complainant to give her all the pages of the diary that were relevant to the indictment or to the respondent, but she made it clear that the state did not intend to ask the complainant to produce the whole diary during the court hearing. In response to the directions of counsel for the prosecution, the complainant gave her a copy of all the pages of the diary that were recorded from the date on which the name of the respondent was first mentioned until the date on which the complaint was filed with the police, and also all the pages that were recorded after the complaint was filed with the police that had any connection to the subject of the case. All the pages that the complainant gave to counsel for the prosecution were photocopied from the ninth notebook in the series of notebooks that made up the complainant's diary, and they were all recorded between 12 May 2001 and 12 July 2001 (hereafter: 'the photocopied pages of the diary'). Two entries in the diary that were written between 12 May 2001 and 12 July 2001 were not photocopied and were not given to the prosecution, because the complainant claimed that they were of no relevance to the subject of the indictment (hereafter: 'the entries that were not photocopied'). A copy of all the photocopies that the complainant gave to the prosecution as aforesaid were sent to counsel for the respondent.

As counsel for the prosecution made clear in her letter to counsel for the respondent (petitioner's exhibit 4), the photocopying of the diary was done in

the following manner: the complainant went to the office of counsel for the respondent with pages that she photocopied in advance from the diary and with the diary itself. Thereafter, the complainant, in the presence of counsel for the prosecution, examined the pages of the diary that she did not photocopy, because they appeared to her to be irrelevant, in order to examine in detail whether those pages contained anything that related to the relationship with the respondent, the complaint that was filed against him, or the complainant's conversations with others with regard to the filing of the complaint. The complainant read to counsel for the prosecution several sections with regard to which she had doubts, and counsel for the prosecution decided that they too were relevant to the case and therefore those pages were also photocopied. In the next stage, the complainant, in the presence of counsel for the prosecution, examined the photocopies and the diary, and where there were pages that she had not photocopied (because they were irrelevant to the case), counsel for the prosecution inserted a blank page on which she wrote 'several irrelevant pages are missing.' Counsel for the prosecution emphasized that selective photocopies of parts of pages were not made and that she told the complainant that on any day that there appeared something relevant to the trial, she should photocopy everything that was written on that page without omissions. Counsel for the prosecution also pointed out that she asked the complainant whether there was recorded in the diary anything concerning other similar events that happened to her in the past with other men and the complainant's answer was that nothing similar had happened to her in the past and consequently there was nothing recorded in the diary on such a subject. Later, at the request of counsel for the respondent and with the consent of the complainant, counsel for the prosecution herself examined the sections that were not photocopied from the ninth notebook of the diary and she reached the conclusion that there was nothing relevant to the indictment in those sections (petitioner's exhibit 6).

2. On 17 November 2003, the testimony of the complainant was heard and copies of the pages of the diary that were photocopied were submitted in evidence. On the morning of that day, before the testimony of the complainant was heard, counsel for the respondent filed an application under s. 74(b) of the Criminal Procedure Law, in which he applied to inspect the

complainant's diary in full. Counsel for the respondent argued that the complainant's diary in its entirety, since she began to record it, constituted 'investigation material' as defined in s. 74 of the Criminal Procedure Law, and therefore he applied to have all the notebooks of the diary produced for his inspection. He also applied to inspect the diary itself rather than a photocopy of it. In response, counsel for the prosecution argued that the notebooks that the complainant kept in the period prior to her acquaintance with the respondent (hereafter: the early notebooks) did not constitute 'investigation material' that should be produced for inspection by the accused, and that revealing the content of the diary, to the extent that this was irrelevant to the indictment, constituted a serious violation of the complainant's privacy. She also argued that even the sections that were not photocopied from the complainant's ninth notebook did not constitute 'investigation material.' Notwithstanding, counsel for the prosecution submitted the ninth notebook for the inspection of the Magistrates Court justice that heard the application (Justice A. Farkash), so that the court could see for itself that the photocopy was a true copy of the original and that no changes had been made to the photocopied pages as compared with the original.

In his decision of 14 December 2003, Justice Farkash held that everything that was recorded in the complainant's diary, starting on the date when the name of the accused was first mentioned until the date of filing the indictment, including the sections that were not photocopied, was 'investigation material' that the defence was entitled to inspect. With regard to the early notebooks, however, Justice Farkash held that these did not constitute 'investigation material' and the right of the complainant to privacy took precedence over the right of the accused to inspect them. Justice Farkash denied the application of counsel for the respondent to present his arguments concerning these notebooks *ex parte* and added that counsel for the respondent had the right to call the complainant for further testimony and to act pursuant to s. 108 of the Criminal Procedure Law, if he thought that the early notebooks might help the defence. In addition, Justice Farkash held that if there was an additional notebook that was written in the period after the

ninth notebook, the parties ought to reach an agreement with regard to the right to inspect this.

3. Both the state and the respondent filed appeals in the Jerusalem District Court (Justice M. Ravid), which allowed the appeals and decided to return the case to the Magistrates Court. In his decision of 29 December 2003, Justice Ravid held that with regard to the sections that were written in the diary after 12 July 2001, the Magistrates Court should have inspected them under s. 74(d) of the Criminal Procedure Law and only then should it have decided whether to allow the respondent to inspect them. He also held that this material ought to be seized by the police in order to allow the court to act as aforesaid. With regard to the sections of the ninth notebook that were not photocopied, Justice Ravid held that in its sweeping finding that the diary constituted 'investigation material,' the Magistrates Court did not examine the material in accordance with the test laid down in HCJ 620/02 *Chief Military Prosecutor v. Appeals Court Martial* [1], with regard to the extent of the connection between the sections and the questions that might be in dispute in the trial and the degree of harm to the complainant if the material would be revealed, and the court should consider whether in accordance with the aforesaid tests all of the material should not be shown to the accused. Finally, with regard to the early notebooks, Justice Ravid held that the Magistrates Court should have allowed counsel for the respondent to present his arguments *in camera* and then it should have decided in accordance with this argument whether there were grounds to disclose all or some of the diaries after it inspected them. Therefore the District Court as aforesaid returned the case to the Magistrates Court in order to complete its decision in accordance with the District Court's decision.

4. Following this decision, a further hearing took place on 20 January 2004 before Justice Farkash in the Magistrates Court, and during this the arguments of counsel for the respondent were heard *ex parte* on the subject of the early notebooks. At the end of the hearing, Justice Farkash decided that the early notebooks should be produced for his inspection and that after he inspected them he would give a decision on the question whether they constituted 'investigation material.' He also held that a decision with regard to all the other issues that were raised by the parties would be given later.

The state filed another appeal on this decision of the Magistrates Court, in which it argued, *inter alia*, that the hearing of the respondent's application to receive into his possession the complainant's diaries was conducted, from the very beginning, without jurisdiction. The state argued that a condition for holding a hearing under s. 74 of the Criminal Procedure Law is that the application refers to material that is in the possession of the prosecution authorities, whereas in the present case the diaries are not in the possession of the prosecution. Therefore the state argued that the respondent should have based his application on s. 108 of the Criminal Procedure Law, rather than on the aforesaid s. 74, and since it did not do so, the court did not acquire jurisdiction to hear the application.

The District Court (Justice M. Ravid) dismissed the appeal *in limine* on 8 February 2004, since the Magistrates Court acted in accordance with the guidelines of the District Court in its previous decision, and the court does not sit in appeal on its own decisions. Notwithstanding, Justice Ravid held that there appeared to be grounds for the Magistrates Court to reconsider its decision, after it would hear the arguments of the complainants *in camera*, and after it addressed the fact that counsel for the defence had in his possession a separate document that supported his arguments, without any connection to the complainant's diaries.

5. Following this decision, a further hearing took place before the Magistrates Court (Justice Farkash), during which the arguments of counsel for the complainant were heard and also the complainant herself was heard *ex parte*. In addition, counsel for the respondent was heard *ex parte* once again, in order to present to the court the defence document mentioned in the decision of Justice Ravid on 8 February 2004. In its decision of 25 March 2004, the Magistrates Court considered the various factors that were in issue and ultimately it held that there was a basis for allowing the court to inspect both the notebooks of the diary that related to the period after the event and also all of the early notebooks. Therefore it held that the complainant should deliver the early notebooks that were in her possession for the inspection of the court. The court also pointed out that it had received two notebooks relating to the period after the event described in the indictment, but it had

refrained from inspecting them at this stage until all the diaries were produced.

The state once again filed an appeal against this last decision to the Jerusalem District Court, and the complainant joined in this appeal with an appeal of her own. The District Court (Justice M. Ravid) denied the two appeals on 16 June 2004. In its decision, the court held that in so far as material relating to the privacy of the individual, such as the personal diaries of the complainant, was concerned, weight should be given to the value of the protection of privacy, but he reached the conclusion that this did not override the right of the accused to a fair trial in the present case. The court held that when there is no indication to support the claim that the material that is entitled to the protection of privacy contains anything that may be relevant to the defence of the accused and the claim is made solely for the purpose of 'fishing,' the court should deny the application to inspect the personal diaries of a complainant; but if the defence is able to point to any slight indications that might be able to show that an inspection of the personal diaries would be of benefit to the accused, even if this material only concerns matters peripheral to the indictment, the court will tend to allow inspection of the diaries. In the present case, the District Court did not see any reason to intervene in the decision of the Magistrates Court, which acted in accordance with the guidelines of the District Court in its decision of 8 February 2004.

This is what led to the state filing this petition, in which it asks us to cancel the decisions that order it to produce, for the inspection of the Magistrates Court, the early notebooks from the complainant's diary. In consequence of this petition, a temporary order was made on 14 October 2004, which stayed the production of the early notebooks of the diary for the inspection of the Magistrates Court, and on 2 May 2005 an order *nisi* was made in the petition. To complete the picture, it should be noted that the early notebooks are not currently in the possession of the complainant but are in the possession of counsel for the prosecution. Notwithstanding, the prosecution emphasized that these notebooks are in the possession of the prosecution solely for the purpose of ensuring that if the petition is denied, it will be possible to comply with the decisions of the courts and that the

notebooks are sealed in an envelope and no one on behalf of the prosecution has inspected them.

The claims of the parties

6. The main argument of the state is that the decisions of the Magistrates Court and the District Court should be set aside because the whole proceeding took place without the court having jurisdiction to hear the issue. According to the state, s. 74 of the Criminal Procedure Law does not give the court jurisdiction to order the state to seize documents that are not in its possession, if it thinks, in good faith, that they are not relevant to the investigation and the indictment. It also argues that the decisions of the Magistrates Court and the District Court disproportionately violate the constitutional rights of the complainant to privacy and dignity, mainly in view of the fact that counsel for the respondent could have availed himself of an alternative proceeding under s. 108 of the Criminal Procedure Law, which injures the complainant to a lesser degree. In addition, the state argues that the decisions that are the subject of the petition were made in a defective proceeding, since in its opinion these decisions could not be based on arguments that counsel for the respondent made *ex parte* without the state being given an opportunity to reply to these arguments.

In reply, counsel for the third respondent argue that the petition should be dismissed *in limine*. Counsel for the respondent argue that the petition is an attempt to appeal against an absolute judicial decision and that this case does not fall within the scope of the rare exceptions when the High Court of Justice will intervene in judicial decisions. In addition, counsel for the respondent utterly reject the argument of lack of jurisdiction that was raised by the state and they argue that the jurisdiction of the court under s. 74 of the Criminal Procedure Law applies also to material that is not physically in the possession of the investigation and prosecution authorities. Counsel for the respondent further argue that the petition should also be denied on the merits. They argue that in the decisions that are the subject of the petition the courts exercised their jurisdiction according to the law and that they properly applied to the circumstances of the present case the principles that were laid down in the case law of this court, including the question of the balance

between the right of the accused to a fair trial and the right of the complainant to privacy.

Deliberations

7. On 2 May 2005 we decided to make an order *nisi* without deciding the preliminary arguments raised by the third respondent. Let us therefore first discuss in brief the preliminary arguments of counsel for the respondent. It is well known that, as a rule, the High Court of Justice does not intervene in the interim decisions of the Magistrates and District Courts, except in rare cases (see, for example, HCJ 8808/04 *Afek v. Tel-Aviv District Attorney's Office* [2]; HCJ 6876/01 *Barlai v. Justice of Tel-Aviv Magistrates Court* [3]; HCJ 583/87 *Halperin v. Vice-President of Jerusalem District Court* [4], at p. 702; HCJ 398/83 *Avitan v. Panel of Three Justices* [5], at p. 471). This rule naturally applies also to the decisions of the courts with regard to applications to inspect investigation material within the framework of a criminal proceeding (see, for example, HCJ 4591/04 *Matok v. Tel-Aviv-Jaffa Magistrates Court* [6]). But it appears that the present case is one of those rare cases in which there are grounds to depart from the rule of non-intervention that this court imposed on itself. This is because the petition raises an argument of lack of jurisdiction and also a claim of defects in the proceeding, which is *prima facie* accompanied by a concern of a serious and irreversible violation of the constitutional rights of the complainant, which cannot be remedied within the framework of an appeal against the judgment. Moreover, the petition before us gives rise to fundamental questions that have wide-ranging ramifications and that arise on many occasions, and it would appear that it is important for this court to clarify the law on this issue (see *Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 631; also see and cf. the minority opinion of Justice Strasberg-Cohen in HCJ 188/96 *Tzirinsky v. Vice-President of Hadera Magistrates Court* [7]). In this context it is also possible to point out that counsel for the respondent also said in their arguments that 'there is considerable fundamental importance' to the court examining (and, in their opinion, also rejecting) the position of the state in this petition with regard to ss. 74 and 108 of the Criminal Procedure Law (p. 15 of the reply of the third respondent).

Jurisdiction of the court under s. 74(d) of the Criminal Procedure Law

8. Section 74 of the Criminal Procedure Law says the following:

'Inspection of the investigation material'

> 74. (a) If an indictment is filed with regard to a felony or a serious misdemeanour, the accused and his defence counsel, as well as a person whom the defence counsel has authorized for this purpose, or, with the consent of the prosecutor, a person whom the accused has authorized for this purpose, are entitled to inspect the investigation material at any reasonable time, and also a list of all the material that was assembled or recorded by the investigating authority and that concerns the indictment, which is in the possession of the prosecutor, and to copy it.
>
> (b) An accused may apply to the court in which the indictment was filed to order the prosecutor to allow him to inspect material that, according to him, is investigation material that was not produced for his inspection.
>
> (c) An application under subsection (b) shall be heard by one judge, and in so far as possible it should be brought before a judge who is not trying the indictment.
>
> (d) During the hearing of the application, the prosecution shall produce the material in dispute for the inspection of the court only.
>
> (e) A decision of a court under this section may be appealed before the appeals court, which will hear the appeal with one judge.
>
> (f) Nothing in this section shall prejudice the

> provisions of chapter 3 of the Evidence Ordinance [New Version], 5731-1971.'

Section 74(a) of the Criminal Procedure Law therefore enshrines the right of the accused to inspect the 'investigation material,' whereas ss. 74(b)-74(e) of the Criminal Procedure Law provide a mechanism for judicial scrutiny of the prosecution's decision not to produce material that the accused claims is 'investigation material.' This mechanism was provided in order to protect the basic right of the accused to a fair trial, while taking into account that even when the prosecution discharges its duties with skill and fairness, 'the defence should not be compelled to rely absolutely on the ability of the prosecution to assess the potential inherent in the material from the viewpoint of the defence' (CrimApp 1355/98 *Ben-Ari v. State of Israel* [8], at pp. 4-5). Within the framework of this mechanism, s. 74(d) provides that in order to decide the question whether we are concerned with 'investigation material' that the accused has a right to inspect, the court is competent to order the prosecution to produce the *material in dispute* for the inspection of the court. It should be emphasized that, contrary to the impression that might be received from the language of subsection (d), we are not speaking of an automatic procedure whereby in every application to inspect 'investigation material' the material is produced for the inspection of the court. The court is not obliged to make use of its power to inspect the material in dispute; this is a discretionary power. As the court made clear in *Ben-Ari v. State of Israel* [8], at p. 5:

> 'Section 74 of the Criminal Procedure Law provided a new and orderly procedure for identifying and disclosing investigation material, and it provided a mechanism for the judicial scrutiny of a decision of the prosecution not to produce material that counsel for the defence claims is investigation material. According to this section, counsel for the accused is entitled to apply to the court to order the prosecutor to allow him to inspect material that is, according to him, investigation material.
>
> According to the arrangement provided in s. 74(d) of the law, for the purposes of the hearing of the application to inspect

> investigation material, "the prosecution shall produce the material in dispute for the inspection of the court only." The legislature did not provide that the court is obliged to inspect the requested material, but as a rule, in order to decide the application, the court will inspect the material, even if only in order to ascertain the type and nature of the material.
>
> Only in exceptional cases will the court refuse to inspect the material. It will do so, for example, when the material clearly does not relate at all to the subject-matter of the indictment, and counsel for the defence also does not point to the slightest indication that is capable of showing why the requested material is a part of the investigation material in that case. In such a case, especially when the quantity of material under discussion is very great, and the impression is formed that the application is merely intended to make the proceedings unnecessarily cumbersome, without it having any practical purpose for the defence of the accused, the court may exercise its discretion and refuse to inspect the material.'

It was therefore held in that case (*ibid*. [8], at p. 7) that:

> 'When there is a possibility, even if it is a remote one… that certain material may be…. relevant to the indictment that is currently pending before the court, and it may be of use to the defence, the court would do well… to inspect the material before it decides the application.'

The main question that arises in the case before us is whether the jurisdiction or discretion of the court under the aforesaid s. 74(d) is affected by the fact that the material is not in the possession of the prosecution and the possibility that producing it for the inspection of the court may harm the rights of a witness or a complainant. In addition to this question, two other questions present themselves: does the existence of the power under s. 108 of the Criminal Procedure Law to order a witness to produce documents affect the power of the court under s. 74(d), and may the court hear the arguments of counsel for the accused *ex parte* within the framework of a proceeding

under s. 74? We will first consider the significance of the fact that the material is not in the possession of the prosecution and the relationship between ss. 74 and 108 of the Criminal Procedure Law, and thereafter the proper balance between the rights of the accused and the rights of witnesses and complainants within the framework of the decision under s. 74(d). Finally we will consider the state's contentions concerning the hearing of the arguments of counsel for the respondent *ex parte*.

Material that is not in the possession of the prosecution authorities

9. The state's main argument is that the court is not competent, under s. 74(d) of the Criminal Procedure Law, to order the state to produce for its inspection any material that is not in its possession, if it thinks, in good faith, that it is irrelevant to the investigation and the indictment. This argument is far-reaching. Admittedly, before the court orders the state to produce material for its inspection, especially when it is material that is not in the possession of the state, the state should determine that it is indeed material that is, *prima facie*, 'investigation material' under s. 74(a) of the Criminal Procedure Law. Notwithstanding, this court has already held on more than one occasion that 'investigation material' for the purpose of s. 74 of the Criminal Procedure Law does not merely include material that is physically in the possession of the investigation and prosecution authorities, but it may also include material that is within the control of these authorities in the broad sense, or material that *ought*, because of its nature, to be in their possession (see, for example, CrimA 1152/91 *Siksik v. State of Israel* [9], at p. 19; CrimApp 5400/01 *A v. State of Israel* [10]; CrimApp 5425/01 *El Haq v. State of Israel* [11], at p. 430; CrimApp 3831/02 *Matzri v. State of Israel* [12], at p. 339; CrimApp 8294/03 *Maximov v. State of Israel* [13], at p. 53). The state also recognizes that s. 74 of the Criminal Procedure Law is not absolutely limited to material that is in the possession of the investigation and prosecution authorities. But it argues that the power of the court to order the state to seize material under s. 74 of the Criminal Procedure Law and produce it for the inspection of the court under s. 74(d), even though it is not in its possession, is limited to extreme cases where there is a concern that the state refrained from seizing the material intentionally and in bad faith.

But the state is correct in its argument that the fact that the material in dispute is not in the possession of the prosecution and investigation authorities does constitute an indication that it is not 'investigation material.' As the court held, for example, in CrimApp 9322/99 *Masarwa v. State of Israel* [14], at pp. 381-382:

> 'The fact that material is not at all in the possession of the investigation and prosecution authorities usually indicates that it is not investigation material. In the normal course of events, when investigation activities are carried out in an objective manner and in good faith, the material is not in the possession of the investigation authorities simply because it was not found by them to be relevant to the investigation; *prima facie*, this means that the material is not a part of the basis for the indictment against which the accused is required to defend himself. In such circumstances, it should also not be regarded objectively as "investigation material," within the meaning of that term in s. 74 of the law.'

This assumption relies on the premise in our legal system that the prosecution discharges its duty skilfully and fairly, and therefore it is usually possible to rely on the fact that material that was not collected or that was not found to be relevant for the investigation is not 'investigation material' (CrimApp 10160/04 *Gold v. State of Israel* [15], at para. 3; *Masarwa v. State of Israel* [14], at p. 382; see also CrimApp 1372/96 *Deri v. State of Israel* [16], at p. 183; *Matzri v. State of Israel* [12], at pp. 339-340; CrimApp 5400/01 *A v. State of Israel* [10], at para. 2; CrimApp 2632/00 *A v. State of Israel* [17], at para. 4).

However, this premise is opposed by the premise that:

> 'The prosecution should not exercise its discretion as to what counsel for the defence should or should not use for his defence, and it should allow him the possibility of resorting to any relevant material that may be used for the defence according to his professional discretion' (*Masarwa v. State of Israel* [14], at p. 382).

As I have said, in order that counsel for the defence should not be required to rely on the ability of the prosecution to assess the potential and benefit in the material for the defence of the accused, a mechanism of judicial scrutiny was provided in s. 74 of the Criminal Procedure Law (*ibid*. [14]; *Ben-Ari v. State of Israel* [8], at pp. 4-5). Clearly the effectiveness of this mechanism of judicial scrutiny is likely to be harmed if the power of the court to inspect material that is in dispute is restricted.

Moreover, there are possible cases where material that should be in the possession of the prosecution and investigation authorities because it is clearly 'investigation material' is not in their possession even when these authorities acted in good faith and in all fairness; for this reason also we should not restrict the power of the court to determine that material is *prima facie* 'investigation material' and to order that it is brought before the court for its inspection under s. 74(d) of the Criminal Procedure Law merely to the extreme case where there is a concern that the state intentionally and in bad faith refrained from seizing the material. Thus, for example, it was held in CrimApp 5400/01 *A v. State of Israel* [10], at para. 2:

> 'It has also been held that investigation material is not merely the material that is physically in the possession of the investigation and prosecution authorities, but it also includes material that is in the control of these authorities in the broad sense… in order to ensure that all the material that falls within the scope of investigation material is produced, the legislature introduced the mechanism that is provided in s. 74 of the law, which allows judicial scrutiny of a decision of the prosecution not to produce material that counsel for the defence claims constitutes "investigation material."
>
> The premise is that, as a rule, when the investigation and prosecution authorities act within the framework of their duties, in an objective manner and in good faith, the fact that the material is not in their possession can indicate *prima facie* that it is not investigation material. But this is not always the case, and sometimes material which should be in the possession of the

> prosecution and investigation authorities and which is clearly investigation material is not in their possession. For this reason, the physical and practical test of whether the material is in the possession of the prosecution is insufficient in order to determine what is "investigation material".'

Indeed, the premise that material that is not in the possession of the prosecution and investigation authorities does not constitute 'investigation material' does not create an absolute presumption. There may be cases where the court will find that certain material does *prima facie* constitute 'investigation material' within the meaning of that term in s. 74 of the Criminal Procedure Law, even though it is not in the possession of the prosecution, and even without there being any question as to the integrity and good faith of the prosecution, provided that there is a basis for finding that according to the nature of the material, its connection to the investigation justifies its seizure by the prosecution or by the investigation authorities. To this we should add that it is also possible that the court will find that certain material does not constitute 'investigation material' within the meaning of that term in s. 74 of the Criminal Procedure Law, notwithstanding the fact that it was assembled within the framework of the investigation and is in the investigation file. The fact that the material is or is not in the possession of the prosecution constitutes a significant indication of whether it should be classified as 'investigation material,' but it is only an indication; ultimately the question of whether it is 'investigation material' will be decided by the court, in accordance with all the appropriate considerations, of which the foremost is the relevance of the material to the indictment and the accused, and in accordance with the likelihood that it will be of benefit to the accused's defence. In this regard, remarks that were made in a slightly different context in *Chief Military Prosecutor v. Appeals Court Martial* [1], at pp. 634-635, are pertinent:

> 'If it were possible to base the definition on the fact that it is sufficient that the material was assembled during the investigation, the process of the characterization and identification of the material as "investigation material" would be simpler, and a significant part of the deliberations on this

> issue would become redundant. But the test is far more complex…
>
> The conclusion is that no firm rules should be made with regard to the definition of "investigation material," and no sweeping conclusion should be drawn with regard to the nature of the material merely because of the fact that it was assembled [or was not assembled] during the investigation. When a dispute arises between the prosecution and the defence with regard to the character of material that the prosecution refuses to produce to the defence, it is necessary to make a precise examination that relates to the specific material, its characteristics and nature. For this purpose, the legislature introduced the proceedings set out in ss. 74(b)-74(e) of the Criminal Procedure Law. Within the framework of the examination that takes place in those proceedings, all of the considerations relating to the material under discussion will be taken into account. The connection of the material to the indictment and the accused will be examined, and consideration will also be given to whether there is a reasonable possibility that the material will be of benefit to the accused's defence. Any evidence that may be relevant to a matter that is being decided in the trial will be included within the scope of the "investigation material" that ought to be produced for inspection by the defence.'

(See also CrimApp 5400/01 *A v. State of Israel* [10], at para. 3).

The conclusion is, therefore, that the mere fact that the material is not physically in the possession of the prosecution and investigation authorities does not deny the *power* of the court under s. 74(d) of the Criminal Procedure Law to order the prosecution to seize the material and produce it for its inspection (even when there is no question as to the good faith of the prosecution), but it constitutes a *consideration* that the court will take into account within the framework of its discretion as to whether to exercise this power (see, for example, *Gold v. State of Israel* [15], at para. 5). Below we

shall discuss the weight of this consideration within the framework of all of the considerations that the court should take into account.

The relationship between sections 74 and 108 of the Criminal Procedure Law

10. Section 108 of the Criminal Procedure Law provides:

> 'Order to submit documents and exhibits
>
> 108. The court may, upon an application of a litigant or upon the initiative of the court, order a witness who has been summoned or any other person to submit to the court on the date provided in the summons or the order, those documents that are in his possession and that are specified in the summons or the order.'

Section 108 of the Criminal Procedure Law therefore gives the defence a means of obtaining documents that are not in the possession of the prosecution, but are in the possession of a witness or of any other person. This therefore gives rise to the following question: how does the possibility of making such an application affect the discretion of the court as to whether to grant an application under s. 74 of the Criminal Procedure Law, when the material in dispute is not in the possession of the prosecution authorities?

As we said above, the fact that the material is not in the possession of the prosecution does not necessarily preclude the possibility of making an application under s. 74 of the Criminal Procedure Law, and even the state does not argue that this fact in itself requires making an application only under s. 108 of the Criminal Procedure Law. The possibility of counsel for the defence making a different application, such as an application under s. 108 of the Criminal Procedure Law, and the fact that the material is not in the possession of the prosecution, do not affect the essence of the court's jurisdiction, but they only concern the manner in which it exercises its discretion. Within the framework of this discretion, the court should consider which of the powers that it has is more suitable for considering the application of counsel for the defence to produce the requested material. It would appear that the main distinction between the different powers to order the production of the requested material revolves around the question

whether there is a basis for imposing the duty to produce the material for the inspection of the court on the prosecution. Within the framework of the aforesaid s. 74, the prosecution is the party that has the duty to produce the material, and this is when we are concerned *prima facie* with 'investigation material' that the accused has a *prima facie* right to inspect, even if he does not wish to present it in evidence in the trial. By contrast, producing the material pursuant to an order under s. 108 of the Criminal Procedure Law is a matter within the discretion that the court exercises at the stage of presenting the evidence, with regard to the manner of holding the trial and the relevance of the evidence that the parties wish to present. Therefore when we are speaking of material that is not in the possession of the prosecution, within the framework of the considerations that the court will take into account, it should distinguish between material that by its very nature is in the control of the prosecution in the broad sense, in that it is in the possession of authorities that have a direct connection to the investigation, or material that should have been in the possession of the prosecution because of its connection to the investigation, on the one hand, and material that the prosecution should not be required to obtain even if the accused or his defence counsel are interested in it for their defence, on the other (see *Masarwa v. State of Israel* [14], at pp. 383-384; CrimApp 5400/01 *A v. State of Israel* [10], at paras. 3-4; *Matzri v. State of Israel* [12], at p. 340; CrimApp 2632/00 *A v. State of Israel* [17], at para. 5). Within the framework of this consideration, the court should also take into account that by imposing on the prosecution an obligation to seize the material that is not in its possession, it is imposing on it a duty to exercise its powers under the law to seize the material from the person who has it in his possession, even against his will.

The argument of the state before us is that when we are speaking of material that concerns the privacy of an individual who is not a defendant, such as a witness or a complainant, there is a constitutional duty to make an application under s. 108 of the Criminal Procedure Law, and the court has no jurisdiction to apply s. 74 of the Criminal Procedure Law. According to the argument, the proceeding under the aforesaid s. 108 is more proportionate in its violation of the constitutional right of the witness or the complainant to privacy, as compared with the proceeding under s. 74 of the Criminal

Procedure Law, and therefore there is a duty arising from the principle of proportionality to make use of the proceeding under s. 108. This argument should be rejected for three reasons.

First, the state's arguments gives rise to a difficulty because when we are speaking of an application to inspect material that concerns the privacy of a witness or complainant, the right of the witness or complainant to privacy is opposed by the right of the accused to a fair trial. We are therefore speaking of a conflict between two human rights and therefore one cannot argue that the more proportionate solution from the viewpoint of the right to privacy should be preferred or the more proportionate solution from the viewpoint of the right to a fair trial should be preferred without first considering the proper balance between these basic rights (and to this we may add that there is an approach according to which the principle of proportionality is totally unsuited to balancing between two human rights, as opposed to a balance between a human right and a public interest; see the opinion of Justice Dorner in HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [18], at pp. 285-286; see also HCJ 2481/93 *Dayan v. Wilk* [19], at p. 476 {[redacted]}; A. Barak, *Legal Interpretation* (vol. 3, *Constitutional Interpretation*, 1994), at pp. 377-386, and especially at pp. 383-384; cf. also CA 506/88 *Shefer v. State of Israel* [20], at pp. 103-104 {[redacted]}).

Second, even if we ignore the aforesaid difficulty, we have also not been persuaded on the merits that there is any foundation to the state's argument that a proceeding under s. 108 of the Criminal Procedure Law is *a priori* a measure that violates the right of a witness or a complainant to privacy to a lesser degree. Indeed, there are certain differences between the two proceedings. Thus, for example, unlike in s. 108 of the Criminal Procedure Law, the proceeding under s. 74 of the Criminal Procedure Law does not take place before the judge who is trying the indictment; and unlike in s. 108 of the Criminal Procedure Law, there is a right to appeal a decision within the framework of s. 74 of the Criminal Procedure Law (see, for example, *Barlai v. Justice of Tel-Aviv Magistrates Court* [3]; HCJ 1391/03 *Comtec Systems v. Justice Y. Adiel* [21]). But we do not think that the differences between these proceedings can decide the question of the proper balance between the right of the witness to privacy and the right of the accused to a fair trial. Both

within the framework of the proceeding under s. 108 of the Criminal Procedure Law and within the framework of the proceeding under s. 74 of the Criminal Procedure Law, the court should strike a proper balance between the right of the accused to a fair trial and the right of the witness to privacy, and it would appear that the considerations for deciding this matter will be similar within the framework of both proceedings, although not necessarily identical (see *Masarwa v. State of Israel* [14], at p. 383). Moreover, as our case shows, there are circumstances in which it is possible within the framework of both these proceedings to give a witness or a complainant to whom the material relates a right to present his case, and we accept that when there is a potential violation of the right of the witness or the complainant to privacy, he should be allowed to have a right to present his case (see also: CrimApp 8467/99 *A v. State of Israel* [22], at p. 457).

Third, even were we to accept the premise that the proceeding under s. 108 of the Criminal Procedure Law is a slightly more proportionate measure vis-à-vis the witness or the complainant, this still cannot impose on the court a duty to prefer only the proceeding under the aforesaid s. 108. The reason for this is that the principle of proportionality does not impose a duty to choose the measure that is the least harmful in an absolute sense, but it recognizes a 'margin of proportionality,' and any choice from among the various possibilities that fall within this margin will satisfy the requirement of proportionality (see, for example, HCJ 5578/02 *Manor v. Minister of Finance* [23] at paras. 14-15). Both the proceeding under s. 108 of the Criminal Procedure Law and the proceeding under s. 74 of the Criminal Procedure Law lie within the 'margin of proportionality,' provided that these proceedings allow the court to strike a proper balance between the right of the accused to a fair trial and the right of the witness to privacy.

The balance between the rights of the accused and the rights of witnesses and complainants within the framework of s. 74(d)

11. The purpose of the accused's right to inspect the investigation material under s. 74 of the Criminal Procedure Law is to allow him to realize his right to a fair trial and to give him a proper opportunity of defending himself against the charges levelled against him (*Chief Military Prosecutor v. Appeals*

Court Martial [1], at p. 633; *Masarwa v. State of Israel* [14], at p. 381; CrimApp 4157/00 *Nimrodi v. State of Israel* [24], at pp. 632-633); some authorities are of the opinion that the right to inspect the investigation material is also intended to balance, to some degree, the inherent disparity of forces between the state as prosecutor and the accused (*per* Justice Grunis in CrimApp 11042/04 *A v. State of Israel* [25], at para. 4). Indeed, this court has on several occasions discussed the exalted status of the right to inspect the investigation material and the great importance that it plays in realizing the right to a fair trial; and it has even been held that its exalted status leads to its being included among 'the fundamental rights of the accused in Israel' (*per* Justice Cheshin in *Siksik v. State of Israel* [9], at p. 22 and in CrimApp 1781/00 *Schwartz v. State of Israel* [26], at p. 303; see also LCrimA 11364/03 *A v. Israel Police* [27], at para. 5 and the references cited there). In view of this purpose, and in view of the great importance of the basic right of the accused to a fair trial, this court has adopted a broad approach to the definition of the 'investigation material' that the prosecution is liable to produce to the accused. Thus it has been held, *inter alia*, that the right to inspect the investigation material is likely to apply even in cases where the material in dispute is not directly related to the indictment or the accused, and its relevance to the indictment is marginal (*Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 633; see also *Nimrodi v. State of Israel* [24], at pp. 632-633; HCJ 233/85 *El Huzeil v. Israel Police* [28], at p. 129; HCJ 1689/02 *Nimrodi v. Attorney-General* [29], at pp. 62-63). It has also been held that, in general, in the absence of any impediment resulting from a violation of the rights of another person or a violation of another protected interest, any doubt concerning the classification of material as 'investigation material' should work in favour of the accused (*Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 633).

Within the framework of this broad approach the court also has the power to inspect the material in dispute, pursuant to s. 74(d) of the Criminal Procedure Law, since this power is, as aforesaid, a part of the mechanism of judicial scrutiny whose purpose is to protect the basic right of the accused to a fair trial and to prevent a situation in which his right to inspect the investigation material is subject to the absolute discretion of the prosecution.

Therefore, as a rule — i.e., in the absence of special considerations, such as a concern that the rights of another person or another protected interest may be violated, and when the material is in the control of the prosecution — it is sufficient that counsel for the defence should point to a slight indication that is capable of showing that the material under discussion is 'investigation material,' or to some possibility, albeit remote, that the material may be relevant to the indictment and may be of use in the defence of the accused, for the court to order the prosecution to produce the material for its inspection under s. 74(d) of the Criminal Procedure Law (*Ben-Ari v. State of Israel* [8], at pp. 5, 7).

But notwithstanding the broad approach, it has been made clear in our case law that:

> 'The broad approach is not without limits. Too broad an approach may, in certain circumstances, go too far, and not only will it not contribute to the accused's defence but it may also disproportionately and unjustifiably violate the protected rights of others' (*Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 633, and the references cited there).

These remarks, which were made with regard to the scope of the material that should be produced for the accused's inspection, are also pertinent to the scope of the use that the court may make of its power to inspect material that is in dispute under s. 74(d) of the Criminal Procedure Law, since too extensive a use of this power is likely to result in a disproportionate and unjustifiable violation of the protected rights of others.

12. Indeed, the test for the definition of 'investigation material' is a broad one and the power of the court to inspect material in dispute under s. 74(d) of the Criminal Procedure Law should also be interpreted broadly. But where we are concerned with material that, whether inspected by the accused and counsel for the defence or only by the court, involves a violation of the basic rights of witnesses of complainants — and especially the constitutional rights of privacy and dignity — the proper balance should be found between them and the rights of the accused to a fair trial (see and cf. CrimApp 3642/04 *Serpo v. State of Israel* [30], at para 6; *Chief Military Prosecutor v. Appeals*

Court Martial [1], at pp. 635-636; CrimApp 5400/01 *A v. State of Israel* [10], at para. 3; *Masarwa v. State of Israel* [14], at pp. 383-384; CrimApp 6022/96 *State of Israel v. Mazor* [31]).

Our case law has already stated that 'the right of the accused to a fair trial that will allow him to defend himself against the charges made against him is not an absolute right that allows an unlimited violation of the rights of a witness in his trial' (*Masarwa v. State of Israel* [14], at p. 384); and as President Shamgar emphasized in CrimFH 3750/94 *A v. State of Israel* [32], at p. 630:

> 'Human dignity is not only the dignity of the accused but also the dignity of the complainant, the witness, the victim; fairness in a trial, to which we aspire, is not merely fairness to the accused, but also to anyone who seeks the help of society to draw conclusions from his degradation and humiliation as a human being.'

The court is required to protect human dignity, including the dignity of the complainant, the witness and the victim of the crime (*Tzirinsky v. Vice-President of Hadera Magistrates Court* [7], at p. 745); this is particularly the case with regard to victims of sex offences and offences of a sexual character, since their very disclosure and the need to testify with regard to them imposes on the victims of the offence the traumatic experience of a violation of the personal affairs and their right to privacy and dignity (*Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 640; see also LCrimA 5877/99 *Yanos v. State of Israel* [3], at para. 25). In addition to the consideration of protecting the rights of witnesses and complainants, there is also the public interest of conducting trials, enforcing the law and solving crimes (*Chief Military Prosecutor v. Appeals Court Martial* [1], at pp. 640-641). This was well expressed by Justice Cheshin in *Yanos v. State of Israel* [3], at para. 24:

> 'The legal system wishes to protect the complainant and to prevent, in so far as possible, any injury to her reputation, privacy, modesty and dignity. This is on the individual level. At the same time the legal system wishes — on a community level — to encourage victims of sex offences to turn to the law

> enforcement authorities and to make a complaint, in order to protect the public against sex offenders. The considerations on the individual level and on the community level are interrelated and interconnected, since in order to realize the community interest — to encourage complaints with regard to sex offences — the legal system is obliged to establish a mechanism that will protect the complainant on the individual level, since if it does not do so victims will be deterred from making complaints against their attackers.'

13. What, then, is the proper balance between the rights of the accused to a fair trial and the rights of witnesses and complainants to dignity and privacy? In *Chief Military Prosecutor v. Appeals Court Martial* [1] the balancing formula with regard to the duty to produce 'investigation material' for the inspection of the accused was held to be the following:

> 'In a direct conflict, when the right of the accused to a fair trial is weighed against the protection of the privacy of the witnesses, the right of the accused to a fair trial will tip the scales, and conflicting considerations must give way. But when the right of the accused to defend himself is not harmed, or when the possibility that it will be harmed is remote and insignificant, proper weight should be given to the rights of witnesses and victims of the crime and the public interest of conducting trials, enforcing the law and solving crimes.
>
> Indeed, the violation of the privacy of the witnesses is sometimes unavoidable in the course of a trial, but it should be proportionate, and care should be taken to ensure that it is does not exceed what is necessary for allowing the accused to defend himself properly. Beyond this, the witnesses and complainants should be protected so that their basic rights of privacy and dignity are not violated.'

(*Chief Military Prosecutor v. Appeals Court Martial* [1], at pp. 635-636; see also CrimApp 11042/04 *A v. State of Israel* [25], at para. 4; CrimApp

3927/05 *A v. State of Israel* [34], at para. 4). This was also the ruling in *Serpo v. State of Israel* [30]:

> 'The test for defining "investigation material" is a broad one, and it extends also to material that relates to the "periphery of the indictment." But where we are speaking of material that concerns the privacy of the individual, weight will be given to the value of protecting privacy, provided that it does not override the right of the accused to a fair trial' (*ibid*. [30], at para. 6).

It was also made clear in *Chief Military Prosecutor v. Appeals Court Martial* [1] that the main consideration when applying the balancing formula between the right of the accused to a fair trial and the rights of witnesses and complainant to dignity and privacy is the importance of the material to the defence of the accused. In other words, in each case the court should examine the relationship between the material and the indictment and the accused, and it should consider the *reasonable possibility* that it will be of benefit to the accused's defence. In a direct conflict between the right of the accused to a fair trial and the rights of witnesses and complainants, i.e., when we are speaking of what is manifestly 'investigation material' or when it is clear that there is a *reasonable possibility* that the material will be of benefit to the defence of the accused — the court should order the disclosure of the material to the accused, even if this will involve a violation of the rights of a witness or a complainant. But the more remote the relevance between the material under discussion and the questions that are likely to be in dispute in the trial, and the weaker the connection between the material and the potential defence of the accused, the greater the weight that should be given to the rights of the witnesses and complainants (*Chief Military Prosecutor v. Appeals Court Martial* [1], at pp. 635-636, 640; CrimA 11042/04 *A v. State of Israel* [25], at para. 4).

14. The remarks made in *Chief Military Prosecutor v. Appeals Court Martial* [1] and in the other decisions cited above related, as aforesaid, to the duty to produce 'investigation material' for the inspection of the *accused*. But the principle determined in those cases is valid also for the question whether

the *court* should inspect material that is in dispute pursuant to its power under s. 74(d) of the Criminal Procedure Law, from the perspective that in this situation also the main consideration is the relevance of the material and its importance for the defence of the accused. Notwithstanding, it should be emphasized that there is a significant difference between the decision whether to order the production of material for the inspection of the court and the decision whether to order its production for the inspection of the accused. When the question is whether the court will inspect the material in dispute pursuant to its power under s. 74(d) of the Criminal Procedure Law, the balance is tipped even further in favour of the right of the accused to a fair trial, and the burden placed on counsel for the defence to point to the relevance of the material and its importance for the defence of the accused is less than with regard to the question whether to order the production of the material for the inspection of the accused. This conclusion is based on three main reasons.

First, it is clear that the violation of the privacy and dignity of the witness or complainant is smaller when only the court inspects the material. Admittedly, we accept the state's argument that even when the court inspects material concerning the privacy of a witness or a complainant, this constitutes a violation of privacy. But it would appear that no one disputes that such a violation is less than the violation arising from producing the material for the inspection of the accused and his counsel. *Second*, the inspection by the court of material that is in dispute constitutes, as aforesaid, a part of the mechanism of judicial scrutiny whose purpose is to protect the right of the accused to a fair trial and to prevent a situation in which the accused's right to inspect the investigation material is subject to the absolute discretion of the prosecution. Excessive reluctance on the part of the court to inspect the material in dispute is likely to make this mechanism of judicial scrutiny less effective and also indirectly harm the purpose that this mechanism is intended to achieve. *Third*, inspection of the material in dispute by the court constitutes an interim proceeding that is intended to assist it in deciding whether it is 'investigation material.' It is therefore clear that at the stage of the decision whether to make use of the power given to the court to inspect the material in dispute, the

ability of the court to assess the relevance of the material to the indictment and its importance for the accused's defence is reduced.

Therefore, when counsel for the defence shows that *prima facie* there is a possibility that the material contains something that may assist the accused's defence, and that this is not merely a speculative and remote hope, and when the material is such that it is appropriate to impose the duty of producing it specifically on the prosecution, the court should inspect the material in dispute, even if this inspection involves a certain violation of the rights of a witness or a complainant to whom the material relates. By contrast, the court should refrain from inspecting material when even *prima facie* — before it inspects the material — it would appear that there is no connection between the material under consideration and the questions that may be in dispute in the trial, and between the material and the ability of the accused to defend himself, or that the connection is remote and marginal. In such cases, when even *prima facie* and before the inspection of the material it can be held that it is not 'investigation material,' there is no justification for ordering the production of the material in dispute for inspection by the court. Producing such material for the inspection of the court does not contribute anything to the right of the accused to a fair trial, and it constitutes an unnecessary and unjustified violation of the right of the witness or the complainant to privacy.

In this context we should emphasize that the fact that the court sees fit to inspect the material is no indication of its decision on the application of the accused to inspect the material. As we have explained above, there is a real difference between the decision to produce the material for the inspection of the court and the decision to produce it for the inspection of the accused and his defence counsel. Therefore, there may certainly be cases where the court will reach the conclusion that notwithstanding a certain violation of the rights of a witness or complainant, the proper *prima facie* balance between these rights and the rights of the accused leads to the conclusion that the court should inspect the material in dispute; but after it inspects the material the court may come to the conclusion that it should not be produced for the inspection of the accused. Thus, for example, in *Serpo v. State of Israel* [30], which also concerned an application made by counsel for the defence to inspect the whole diary of a complainant, the state itself proposed 'in view of

the complainant's request that the diary should not be revealed in its entirety, and in order to protect her privacy,' that the court should inspect the diary and decide whether the diary, or parts of the diary, should be produced for inspection by the accused (*ibid*. [30], at para. 30). But after inspecting the diary, both the District Court and the Supreme Court reached the conclusion that the material in dispute did not contain anything that might be relevant to the indictment or that the defence needed to inspect for the purpose of conducting a fair trial, and it was therefore held that the complainant's right of privacy in that case prevailed (*ibid.* [30], at paras. 4 and 7).

The proper balance with regard to personal diaries of witnesses and complainants

15. The material in dispute in the present case — the personal diaries of the complainant — clearly involve the privacy of the individual. We accept the argument of counsel for the state that entries that a person makes in his personal diary are some of his most intimate and personal property, and that the inspection of these, even if only by the court, involves a violation of the privacy and intimacy of the owner of the diary. Notwithstanding, we accept the argument of counsel for the respondent that even though personal diaries of witnesses and complainants are not manifestly 'investigation material,' there may be cases whey they (or parts of them) contain material that is relevant to the indictment or to the accused, or material that will be of benefit in his defence.

It is possible to determine that as a rule the proper practice with regard to the personal diaries of witnesses or complainants, the inspection of which naturally involves a violation of the privacy of the individual, is to create a preliminary distinction between the parts of the diary that relate to the subject of the indictment or the accused, and those parts that relate to the personal and private experiences of the owner of the diary, which are unrelated to the events that are the subject of the indictment (see *Serpo v. State of Israel* [30], at para. 7; cf. also *Chief Military Prosecutor v. Appeals Court Martial* [1], at p. 644). With regard to the parts of the diary that relate to the subject of the indictment or the accused, it is possible to regard them as 'investigation material' that the accused has a right to inspect. By contrast, it is clear that

the personal and private experiences of the owner of the diary, which are totally unrelated to the questions that may be in dispute in the trial and the accused's ability to defend himself, are not 'investigation material' even according to the broad interpretation of this concept. With regard to these there is no justification for producing them for the inspection of the accused and his defence counsel or even for the inspection of the court only.

The difficulty arises with regard to parts of a diary which, even though they do not relate to the facts concerning the indictment, may, according to the argument of counsel for the defence, be of benefit to the accused's defence. With regard to material of this kind, it was held in *Serpo v. State of Israel* [30], at para. 6, that:

> 'Background material that concerns one of the persons involved in the case but does not relate to the facts that concern the indictment does not necessarily fall within the definition of "investigation material" and in any case it does not need to be produced for the inspection of counsel for the defence, especially when producing it for inspection may violate the privacy of the individual. It can, as a rule, be assumed that material that is not relevant to the indictment will also not be used by the prosecution for the purpose of establishing a basis in evidence for convicting the accused.'

It follows that background material that concerns a witness does not necessarily fall within the definition of 'investigation material and it would appear that when this material does not relate to the facts concerning the indictment and is not in the possession of the prosecution, the tendency will be that it should not be classified as investigation material. Notwithstanding, nothing in the aforesaid will necessarily exempt the court from examining, according to the special circumstances of each case, and after giving the parties an opportunity to present arguments in this regard, whether the aforesaid material may be of benefit for the defence of the accused. This is the case because the case law of this court has recognized that even material of this kind, such as material that concerns attacking a witness's credibility, may in certain circumstances be considered 'investigation material' (see, for

example, *El Haq v. State of Israel* [11], at p. 430). In this regard, the remarks made in CrimApp 5400/01 *A v. State of Israel* [10], at para. 3, are pertinent:

> 'The question whether medical or psychiatric material or any other material concerning the emotional state, personality or past of a witness is material that is relevant to the proceedings, and for this reason also to the accused's defence, is a question that depends on the nature and context of the material, the relationship between it and the incident under consideration and the special circumstances of each case. It cannot be taken for granted that all medical or psychiatric material concerning a witness or complainant in a trial is indeed relevant to the matter being considered by the court. As a rule, if we are speaking of material that is *prima facie* relevant to the matter under consideration, or that is significant because it may affect a determination concerning the credibility of a witness or a decision concerning the capacity of the witness to testify, in general it will constitute "investigation material" and it will be in the prosecution's possession, or it should be in its possession.'

Therefore when we are speaking of parts of a diary that do not relate to the facts concerning the indictment, and especially when they relate to a period that is not close to the period that is relevant to the indictment, it is possible to say that these parts of the diary belong *prima facie* to the type of material that the court will not regard in principle as 'investigation material.' In such cases the court will tend to refrain from inspecting the material, and the burden is on counsel for the defence, who is requesting the court to inspect the material, to show that *prima facie* there is indeed a possibility that the material will be of benefit to the accused's defence, and that this is not merely a speculative and remote hope.

16. In the case before us, counsel for the prosecution made a preliminary distinction between the parts of the diary that relate to the question of the indictment or the accused, and the parts that relate to the personal and private experiences of the complainant, which are unrelated to the events that are the subject of the indictment. With regard to the parts of the diary that relate to

the subject of the indictment or the accused, there is no dispute in the present case that the respondent has the right to inspect these, and according to the claim of counsel for the state, all of these parts of the diary have indeed been photocopied and produced for his inspection. The material in dispute in the present case concerns the parts of the diary that do not relate to the facts of the indictment and that are not in the possession of the prosecution (or at least would not be in its possession had it not been for the decisions of the courts that are the subject of this petition). The fact that counsel for the prosecution saw fit to take possession only of the pages that were photocopied out of the ninth notebook, because it regarded only these as relevant, serves as an indication that the other parts of the diary are not 'investigation material.' This decision also appears to be reasonable and proper on the face of it, in view of the fact that the other notebooks relate to years that preceded the incident that is the subject of the indictment, in which the complainant was not yet acquainted with the respondent. We are speaking, as we said above, of many notebooks of a diary, which concern events that began six years before the complainant became acquainted with the respondent, and end two years before the incident. This is therefore a very long period of time, and *prima facie* the further we distance ourselves chronologically from the incident that is the subject of the indictment, the harder it is to see how this material is relevant to the proceedings that are taking place and to the accused's defence. This is particularly the case with regard to the notebooks that relate to events that precede the acquaintance between the complainant and the respondent. Moreover, the nature of this material is such that it does not manifestly constitute 'investigation material,' and, as we said above, the tendency will generally be not to classify it as 'investigation material.' In such circumstances, counsel for the defence has the burden of persuading the court as to the relevance of the early notebooks in the diary for the respondent's defence, and what are the *prima facie* reasons for his argument that the prosecution should have seized the material within the framework of the investigation and produced it for his inspection.

In the present case, the Magistrates Court reached the conclusion that counsel for the respondent succeeded in showing that *prima facie* there was a possibility that the material might be of benefit to the accused's defence, and

that this was not merely a speculative and remote hope. The court reached this conclusion after it heard the arguments of counsel for the respondent with regard to the benefit that he might derive from the diary for the defence of the respondent, which were heard *ex parte*. Within the framework of our judicial scrutiny in the proceeding before us, and in view of the character of the scrutiny of the High Court of Justice, we do not seek to replace the discretion of the Magistrates Court with our own discretion, and since we have come to the conclusion that the Magistrates Court acted within its jurisdiction, we have refrained for considering the discretion that the Magistrates Court exercised within this jurisdiction when it decided to inspect the diaries. Moreover, because of the nature of the proceeding in the High Court of Justice, the arguments that were heard *ex parte* — those arguments that persuaded the trial court to inspect the diaries — were not brought before us. Therefore, we are not able to determine whether there was a defect in the *merits* of the decision of the Magistrates Court that justifies our intervention. Notwithstanding, as shall be made clear below, we are persuaded that there was a defect in the proceeding in which the Magistrates Court reached its conclusion, and this defect goes to the heart of the matter. Consequently, the decision of the Magistrates Court should be set aside.

Hearing the arguments of counsel for the accused ex parte *within the framework of a proceeding under s. 74 of the Criminal Procedure Law*

17. The state argues that it was not permissible to order it, within the framework of a proceeding under s. 74 of the Criminal Procedure Law, to seize the early notebooks of the complainant's diary and to produce them for the inspection of the court on the basis of arguments that counsel for the respondent made *ex parte*. It argues that a proper proceeding under s. 74 of the Criminal Procedure Law requires the state to be given an opportunity to hear the reasons for the accused's application and his explanations as to why the material is, in his opinion, relevant to his defence, so that it can respond to his arguments in an objective manner. It argues that especially when we are speaking of material that concerns the privacy of the individual and that the state thinks in good faith is irrelevant there is no basis for ordering the state to violate the constitutional rights of a person without it knowing the

reason that was given to justify this violation, and without it being able to respond to it objectively. We agree with this argument.

The proceeding that took place in this matter, *ex parte*, does not allow the prosecution to respond to the arguments of counsel for the accused and to try and persuade the court that the prosecution should not be required to seize the diaries from the complainant who opposes this and to produce them for the inspection of the court. In this regard, there is merit in the state's argument that if the witness was requested, within the framework of her cross-examination by counsel for the defendant, to produce her diaries in the court, the court would be entitled to consider, in the presence of both parties — even if not in the presence of the witness herself — the relevance of the diaries, and to decide the question whether they are essential to the proceeding. If the court chose to exercise the power of inspection that is provided in s. 74(d) of the Criminal Procedure Law and to impose a duty on the prosecution to seize the diaries, it should first have informed it of the reason for this and allowed it to respond to the argument.

It should be emphasized that this court will not be quick to intervene in interim proceedings in criminal trials in general, and in particular because of defects in the proceeding, and we would not have done so in this case either. But in this case we are not speaking of a minor procedural defect or a defect in a proceeding that affects the state alone, but of a defect that has significant ramifications on the constitutional right of the complainant to her privacy. As we have seen above, the main consideration within the framework of the balance between the right of the respondent to a fair trial and the right of the complainant to privacy concerns the question whether *prima facie* there is really a possibility that the material will be of benefit to the accused's defence, and whether this is not merely a speculative and remote hope. The problem is that the proceeding that took place in the Magistrates Court does not allow the state to know what is the reasoning of counsel for the respondent with regard to the relevance of the early notebooks of the diary to the accused's defence, on what *prima facie* reasons his argument is based, and what is the basis for the decision of the court that the prosecution should have seized the material within the framework of the investigation and produced it for its inspection. In such circumstances, the state, as the party

charged with the public interest and protecting the rights of the complainant, is unable to discharge its duty.

We are aware that counsel for the defence is not obliged to reveal to the prosecution the details of the defence that he intends to present in the trial, and that he is entitled, in certain circumstances, to make arguments *ex parte*, but the criminal proceeding is not a game of sport, in which each of the parties tries to obtain a tactical advantage over his opponent. In this respect, the remarks made by Justice Barak in CrimA 639/79 *Aflalo v. State of Israel* [35], at p. 575, are pertinent:

> 'The criminal proceeding is a coordinated and balanced set of norms that is intended to give effect to the substantive criminal law. The purpose of the proceeding is to bring about the acquittal of the innocent and the conviction of the guilty. The criminal proceeding is not a sporting competition or a competition of any other kind. The trial is not a game… the purpose of the criminal proceeding is to discover the truth. Both the prosecutor and the accused should make their contribution to discovering the truth. In the "Magna Carta" of defendants' rights it is not stated that the criminal proceeding should give him tactical advantages over the prosecution. The purpose of the proceeding is not to give tactical advantages, either to the prosecutor or to the accused.'

(See also CrimA 63/79 *Ozer v. State of Israel* [36], at p. 616).

It has also been said in our case law that:

> 'The right not to disclose the defence claims of the accused does indeed constitute an important procedural right. But this right should be balanced against other interests involved in the criminal proceeding, including the public interest (which is represented by the prosecution) and the rights of the witnesses' (*Barlai v. Justice of Tel-Aviv Magistrates Court* [3]).

Indeed, the prosecution should not be required to exercise its powers in order to seize material from witnesses or potential witnesses contrary to their wishes and in violation of their constitutional rights, without the prosecution

being informed of the reason why it should make use of its aforesaid power and without giving it a real opportunity to protect the constitutional rights of those witnesses. This is especially the case with regard to material that *prima facie* does not constitute 'investigation material.' In such circumstances, the court should have allowed the prosecution to respond to the argument that the material was relevant to the defence, which was made by counsel for the defence *ex parte*, before the court decided that the case before it was a suitable one for exercising its power under s. 74(d) of the Criminal Procedure Law.

We are therefore of the opinion that in the situation that has arisen the trial court ought to hold a further hearing in the presence of counsel for the defence and the prosecution, in order to examine at the same time the arguments of both parties with regard to the relevance of the diaries and the need to classify them as 'investigation material.' After hearing the arguments as aforesaid, the court should make a new decision on the question of whether to inspect the material under s. 74(d) of the Criminal Procedure Law, in accordance with the proper balance between the right of the respondent to a fair trial and the right of the complainant to privacy as set out in the guidelines provided in our decision.

Summary

18. As a rule, in view of the important purpose of protecting the right to a fair trial, the power of the court under s. 74(d) of the Criminal Procedure Law to inspect material that is in dispute should be interpreted broadly. Thus, *inter alia*, the fact that the material is not in the possession of the prosecution and investigation authorities, and the fact that counsel for the defence may be able to avail himself of additional proceedings, such as a proceeding under s. 108 of the Criminal Procedure Law, do not deprive the court of this power, even if they are capable of limiting the use of it. The main consideration that the court should take into account within the framework of its decision whether to make use of its power under s. 74(d) of the Criminal Procedure Law and to inspect the material in dispute is the *prima facie* relevance of the material to the indictment and the accused, an assessment of the *prima facie* likelihood that it will be of benefit to the accused's defence and the degree of

justification there is for imposing a duty on the prosecution to produce the material as a part of the investigation activities carried out under the law.

In the normal course of events, when the material is in the possession of the prosecution authorities and there is no concern that the rights of a third party or any other protected interest will be violated, *any possibility, albeit remote, that the material is relevant to the indictment and may be of use for the accused's defence is sufficient* for the court to exercise its power under s. 74(d) of the Criminal Procedure Law. In such cases, the burden imposed on counsel for the defence is a small one and it is sufficient for him to show a slight indication that the material concerned may be 'investigation material.' By contrast, when the material is not in the possession of the prosecution and investigation authorities, this fact constitutes an indication that *prima facie* we are not speaking of 'investigation material.' Therefore, although this fact does not deprive the court of its power to act pursuant to s. 74(d) of the Criminal Procedure Law, it is a significant reason for it to refrain from making use of that power. In such cases, the burden with which counsel for the defence is charged is greater, but in the absence of a concern that there may be a violation of the rights of another person or of another protected interest, the burden of showing a *prima facie* possibility that the material is relevant to the indictment and may be used for the defence of the accused remains relatively light.

Where we are speaking of the inspection of material that involves a violation of the basic rights of witnesses or complainants, the court should find the proper balance between these rights and the rights of the accused to a fair trial. The dominant consideration remains the *prima facie* relevance of the material to the indictment and the accused, and an assessment of the *prima facie* likelihood that it will be of benefit for the accused's defence. The court should inspect the material in dispute, notwithstanding a certain degree of violation of the rights of a witness or complainant, when counsel for the defence shows the relevance of the material to the proceeding being conducted against his client, and when the court is persuaded, after giving the prosecution an opportunity to respond to the arguments of counsel for the defence, that *prima facie* there is a *possibility that goes beyond a speculative and remote hope that the material will be of benefit for the accused's defence*.

By contrast, the court should refrain from inspecting material when even *prima facie* — before it inspects the material — it appears that there is no connection between the material under discussion and the questions that are likely to be in dispute in the trial, and between the material and the accused's ability to defend himself, or when the connection is remote and marginal. It should be emphasized that this test concerns the question whether the court should inspect the material in dispute, as distinct from the question whether to produce the material for the inspection of the accused and his defence counsel, for which a *reasonable possibility that the material will be of benefit for the accused's defence* is required.

When the material in dispute is personal diaries of witnesses or complainants, and an inspection of these naturally involves a violation of the privacy of the individual, the parts of the diary that relate to the subject of the indictment or to the accused should be distinguished from the parts that relate to the personal and private experiences of the owner of the diary, which are not related to the incidents that are the subject of the indictment. With regard to the parts of the diary that concern the subject of the indictment or the accused, these may be regarded as 'investigation material' that the accused has a right to inspect. By contrast, with regard to the parts of the diary that do not relate to the facts relevant to the indictment, especially when these relate to a period that is not close to the period that is relevant to the indictment, it can be said that these parts of the diary *prima facie* are included in the types of material that the court will not regard as 'investigation material.' The court will tend to refrain from inspecting these parts of the material, and counsel for the defence, who is requesting that the court inspects the material, will have the burden of showing that *prima facie* there is indeed a possibility that the material will be of benefit to the accused's defence, and that this is not merely a speculative and remote hope.

Epilogue

The case before us, in so far as it relates to the application of counsel for the defence to inspect the complainant's diaries, has undergone various transitions and upheavals and we regret the consequent delay in the respondent's trial. Notwithstanding, in view of the defect that occurred in the

proceeding and in view of the importance of the rights that are involved in the matter, we see no alternative but to return the decision to the Magistrates Court so that it may reconsider the question of the need to order the prosecution to seize the diaries and produce them for its inspection, which it should do after holding a hearing in the presence of both parties, at which the prosecution may address the arguments of counsel for the defence.

For these reasons, the petition is granted in part as stated above.

In view of the circumstances of the case, we are not making an order for costs.

President A. Barak

I agree.

Vice-President M. Cheshin

I agree.

Petition granted in part.

28 Iyyar 5765.

6 June 2005.