CrimFH 1187/03

State of Israel

v

1. Ophir Peretz

2. Erez Ben-Baruch

3. Yoav Mizrahi

The Supreme Court sitting as the Court of Criminal Appeals

[28 July 2005]

Before President A. Barak, Vice-President Emeritus E. Mazza, Vice-President M. Cheshin, Justice Emeritus J. Türkel and Justices D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, A. Grunis

Further hearing of the judgment of the Supreme Court (Justices E. Mazza, D. Dorner, A. Procaccia) on 20 January 2003 in CrimA 7132/02 and CrimA 7418/02, in which the Supreme Court allowed the appeal of the first and second respondents against the sentence of the Beer-Sheba District Court (Vice-President Y. Pilpel and Justices N. Hendel, R. Yaffa-Katz) on 17 July 2002 and the appeal of the third respondent against the sentence of the Jerusalem District Court (Justices Y. Hecht, M. Ravid, Y. Tzaban) on 16 July 2002.

Facts: In two unrelated cases, the prosecution and the defence made a plea bargain in the trial court that was subsequently rejected by the trial court, and the respondents were given stricter sentences than the ones recommended to the court in the plea bargain. The respondents appealed against the strictness of the sentences. In the appeals, which were heard jointly, the state defended the sentences that were handed down by the trial courts, rather than the plea bargains that were originally made by the state. The appeals were allowed, but the court expressed different views on the question whether the state should defend, in an appeal, a plea bargain that was rejected by the trial court, or whether it should defend the sentence handed down by the trial court. The state therefore petitioned the Supreme Court to hold a further hearing to clarify the issue of how the prosecution should act in such cases. The

petition to hold a further hearing was granted, and the matter was considered by an expanded panel of nine justices.

Held: As a rule, the prosecution should defend a plea bargain in the court of appeal, even when it was rejected by the trial court. In exceptional cases the prosecution should be allowed at the appeal stage to be released from its undertaking in the plea bargain, when considerations of the public interest override all the considerations that support the prosecution abiding by its undertaking in the plea bargain. In the opinion of Justice Grunis, in these exceptional cases the accused should be allowed to retract his guilty plea.

Petition denied.

Legislation cited:

Courts Law [Consolidated Version], 5744-1984, s. 30.

Criminal Procedure Law [Consolidated Version], 5742-1982, ss. 74, 83.

Public Defender's Office Law, 5756-1995.

Rights of Victims of Crime Law, 5761-2001, s. 17.

Standard Contracts Law, 5743-1982.

Israeli Supreme Court cases cited:

CrimA 7132/02 *Peretz v. State of Israel* [2004] IsrSC 58(3) 481. [1]

CrimA 1958/98 *A v. State of Israel* [2003] IsrSC 57(1) 577. [2]

CrimA 8164/02 *A v. State of Israel* [2004] IsrSC 58(3) 577. [3]

HCJ 218/85 *Arbiv v. Tel-Aviv District Attorney's Office* [1986] IsrSC 40(2) 393. [4]

CrimA 4722/92 *Markovitz v. State of Israel* [1993] IsrSC 47(2) 45. [5]

CrimA 6675/95 *Shiloah v. State of Israel* [1996] IsrSC 50(2) 672. [6]

CrimA 534/04 *A v. State of Israel* (not yet reported). [7]

CrimA 1289/93 *Levy v. State of Israel* [1994] IsrSC 48(5) 158. [8]

CrimA 532/71 *Bahmotzky v. State of Israel* [1972] IsrSC 26(2) 543. [9]
HCJ 844/86 *Dotan v. Attorney-General* [1987] IsrSC 41(3) 219. [10]
HCJ 311/60 *Y. Miller Engineering (Agency and Import) Ltd v. Minister of Transport* [1961] IsrSC 15(3) 1989; **IsrSJ 4 55**. [11]
HCJ 124/79 *Tzoba v. Minister of Defence* [1980] IsrSC 34(2) 752. [12]
HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [1997] IsrSC 51(5) 67; **[1997] IsrLR 499**. [13]
CrimA 3694/00 *Mordoff v. State of Israel* (unreported). [14]
CrimA 4886/02 *Glisko v. State of Israel* [2003] IsrSC 57(1) 875. [15]
HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485. [16]
CrimA 326/99 *Abud v. State of Israel* (unreported). [17]
CrimA 1242/97 *Greenberg v. State of Israel* (unreported). [18]
HCJ 840/79 *Israel Contractors and Builders Centre v. Government of Israel* [1980] IsrSC 34(3) 729. [19]
CA 6518/98 *Hod Aviv Ltd v. Israel Land Administration* [2001] IsrSC 55(4) 28. [20]
HCJ 164/97 *Conterm Ltd v. Minister of Finance* [1998] IsrSC 52(1) 289; **[1998-9] IsrLR 1**. [21]
CA 3541/98 *Di Veroli-Siani Engineering (1990) Ltd v. Israel Land Administration* [2002] IsrSC 56(4) 145. [22]
CA 6328/97 *Regev v. Ministry of Defence* [2000] IsrSC 54(5) 506. [23]

American cases cited:

U.S. v. Mooney, 654 F. 2d 482 (1981). [24]
Santobello v. New York, 404 U.S. 257 (1971). [25]
Brooks v. United States, 708 F. 2d 1280 (1983). [26]
United States v. Fentress, 792 F. 2d 461 (1986). [27]
United States v. Harvey, 791 F. 2d 294 (1986). [28]

United States v. Massey, 997 F. 2d 823 (1993). [29]
United States v. Rivera, 357 F. 3d 290 (2004). [30]

Canadian cases cited:
R. v. Paquette 41 W.C.B. (2d) 5 (1998) 22. [31]
R. v. Rubenstein, 41 C.C.C. (3d) 91 (1987). [32]
R. v. Simoneau, 40 C.C.C. (2d) 307 (1978). [33]
A.G. of Canada v. Roy, 18 C.R.N.S 89 (1972) [34]

For the appellant — E. Barzilai.
For the first and second respondents — M. Gilad.
For the third respondent — Z. Schlonsky.

JUDGMENT

Justice D. Beinisch

Is a plea bargain made by the prosecution in the trial court binding on the prosecution in the court of appeal even when the trial court rejects it? Is the prosecution entitled in its pleadings at the appeal stage to refrain from defending the plea bargain that it itself made in the trial court? If the prosecution is indeed entitled not to defend the plea bargain, in what circumstances may it do so? These are the fundamental questions that we must decide.

Factual background and sequence of the proceedings

1. The petition to hold the further hearing before us was filed following the judgment of this court in two criminal appeals that were heard jointly (CrimA 7132/02 and CrimA 7418/02). We shall describe below the facts underlying these criminal appeals and the judgment that was given in them.

In Criminal Appeal 7132/02 *Peretz v. State of Israel* [1], two persons, the first and second respondents before us, were indicted on charges of rape while taking advantage of a state of unconsciousness and in the presence of another. In the indictment filed against the first and second respondents it was alleged that they committed sexual acts on a girl of sixteen years of age, when she was drunk, and they even filmed these acts of theirs. After the trial of the respondents began, but before the testimony of the complainant was heard, the prosecution and defence reached a plea bargain. Within the framework of the plea bargain, the facts set out in the indictment were amended and the offence of which the respondents were accused was changed from an offence of rape to an offence of committing indecent acts. In addition, an agreement was reached with regard to the sentence. The arrangement concerning the sentence was an arrangement that allowed the parties to argue with regard to a range of sentence, according to which the prosecution would argue for a maximum sentence and the defence would argue for a more lenient sentence, which was the smallest sentence that the prosecution agreed it could request. After the plea bargain was presented to the District Court, the respondents pleaded guilty to the offences attributed to them and were convicted on the basis of their guilty pleas. As had

been agreed in the plea bargain, the prosecution asked the court to sentence each of the respondents to a sentence of eighteen months imprisonment, whereas counsel for the defence asked the court to give a sentence of only six months imprisonment, which would be served by means of community service. In support of the proposed arrangement, the District Court was presented with reports of the probation service which were, as the court defined them, positive in the main, and it was also presented with a statement from the prosecution that the arrangement was justified '*inter alia* in view of the attitude of the complainant who forgave the defendants and held no grudge against them and had no interest in a trial being held' (p. 21 of the court record in the District Court).

Notwithstanding the position of the parties, the Beer-Sheba District Court (Vice-President Y. Pilpel and Justices N. Hendel, R. Yaffa-Katz) rejected the plea bargain. The District Court thought that the sentence that was proposed by the prosecution was too lenient in the circumstances of the case and that there was a basis, in view of the seriousness of the case, for departing significantly from what was proposed by the prosecution. The District Court had reservations about the way in which the prosecution relied on the position of the complainant, and after it considered the various factors — the seriousness of the acts and the harm to the public interest, on the one hand, and the positive circumstances of the respondents, the guilty plea that they made and the proceedings that were made unnecessary as a result, on the other — it sentenced each of the respondents to five years imprisonment, of which three and a half years were actually to be served and the rest would be a suspended sentence. Each of the respondents was also ordered to pay the complainant compensation in a sum of NIS 10,000.

2. In Criminal Appeal 7418/02 *Mizrahi v. State of Israel* [1], the third respondent in the petition before us was charged with the rape of a girl who suffers from mild retardation and also with committing an act of sodomy on her. According to the indictment, on three separate occasions the third respondent had intercourse with the complainant and committed an act of sodomy on her, by telling her that he would marry her, when he knew that she was retarded and

took advantage of this fact in order to obtain her consent to the acts. When the trial began, the parties informed the court that they had reached a plea bargain according to which the respondent would plead guilty to the facts in the indictment (after a small change was made to the description of the acts set out therein), and he would be convicted and sentenced to six months imprisonment in community service and a suspended sentence. It was also stated in the plea bargain that the respondent would be liable to compensate the complainant in an amount of NIS 5,000. After the plea bargain was presented to the court, counsel for both parties urged the court to accept it, and counsel for the prosecution also discussed the many reservations of the prosecution in that case in view of the circumstances in which the offence was committed and the difficulties in the evidence that confronted it.

In this case too, notwithstanding the positions of the parties, the plea bargain was rejected. It should be noted that the Jerusalem District Court (Justices Y. Hecht, M. Ravid, Y. Tzaban) was not unanimous in its decision. Justice Tzaban thought that the plea bargain should be respected, whereas Justices Hecht and Ravid though that the sentence proposed in the plea bargain was inconsistent with the seriousness of the acts and they therefore sentenced the respondent to two years imprisonment, of which one year would actually be served and the remainder would be a suspended sentence. The respondent was also ordered to pay compensation to the complainant in a sum of NIS 5,000.

3. Appeals were filed in this court by the respondents against the two judgments of the District Courts in the cases described above and the appeals were heard together before Justices E. Mazza, D. Dorner and A. Procaccia. The two appeals were directed against the sentences and the main argument in them was that the District Courts in Beer-Sheba and Jerusalem had erred in rejecting the plea bargains and in imposing stricter sentences than the sentences that had been agreed in the plea bargains that had been made in each of the cases. Counsel for the respondents argued that according to the criteria laid down in case law, including CrimA 1958/98 *A v. State of Israel* [2], the plea bargains should have been accepted and the sentences should

have been handed down in accordance with what was agreed in those plea bargains.

In their response to the appeals, the prosecution defended the sentences that were handed down in the two cases. The prosecution explained that after reconsidering the cases, the State Attorney's Office had reached the conclusion that the sentences that had been agreed within the framework of the plea bargains, which were approved by the respective District Attorneys, were clearly inconsistent with the seriousness of the respondents' acts in the two cases described above. With regard to the first case the prosecution explained what its reasons were for making the plea bargain in the District Court, but it argued that notwithstanding the fact that there were grounds for supporting the plea bargain, the discretion that guided it in making the plea bargain was erroneous and unbalanced. The prosecution argued that, after the judgment was given in the District Court, the State Attorney's Office reconsidered the case and came to the conclusion that there had been no justification for reaching the aforesaid agreement with regard to the sentence. The prosecution's argument with regard to the second case was similar. With regard to this case also, the prosecution presented its reasons for agreeing to the plea bargain in the trial court, but it explained that after examining the evidence a second time it found that the agreement to the sentence that was proposed within the framework of the plea bargain was inappropriate. The re-examination of the two cases by the State Attorney's Office therefore led to a change in the state's position: instead of defending the plea bargain to which the District Attorney's Offices has agreed in the District Courts, the prosecution chose to defend the sentences that were handed down. It need not be said that counsel for the respondents attacked this change of position and according to them the change in the prosecution's position harmed the expectation and reliance interest of the respondents.

4. The prosecution's new position was unacceptable to the justices of this court, and in the judgment which is the subject of this further hearing, the appeals filed in both cases were allowed. The three justices on the panel agreed that in the circumstances of the

case there was no basis for departing from the sentences that had been agreed within the framework of the plea bargains and the respective District Courts ought to have adopted them. Therefore the sentences of the first and second respondents were reduced to eighteen months imprisonment, whereas the sentence of the third respondent was reduced to six months imprisonment that would be served in community service, all of which as agreed in the plea bargains.

But on the question that is the focus of this further hearing there was a dispute between the justices on the panel. Justice Dorner, who expressed the majority opinion, thought that the change in the position of the prosecution with regard to the plea bargain in the court of appeal was problematic and undesirable. As she said:

> 'This position of the state before us, which apparently reflects different approaches between the District Attorneys and the State Attorney's Office, is very problematic. This is because a defendant who agrees to a plea bargain and also adversely changes his position as a result by pleading guilty to the offences with which he is charged, is entitled to assume that the state, which agreed to the plea bargain, will defend it in every court. Therefore the state ought to determine rules for approving plea bargains that will prevent changes in its position as aforesaid' (para. 5 of the judgment [1]).

Consequently, Justice Dorner was of the opinion that no weight should be attached to the state's position in the appeal:

> 'On the merits, in view of the fact that the appellants agreed to the plea bargains on the assumption that the state would defend them, the position of the state before us cannot affect the question whether in the circumstances of the cases there was a justification, according to the criteria laid down in case law, for not respecting the plea bargains' (para. 6 of the judgment [1]).

Justice Mazza agreed with the opinion of Justice Dorner, but Justice Procaccia expressed reservations with regard to the aforesaid approach:

> 'In my opinion, the question of when and in what circumstances the prosecution may refuse in the appeal to defend the plea bargain to which it was a party in the trial court should be considered separately and proper criteria should be determined. I would refrain from a firm determination that a defendant is always entitled to assume that the state, which agreed to the plea bargain, will defend it in all circumstances and in all courts, and that there are no circumstances in which it may, or even should, change its position at the appeal stage.'

Since a decision on this question was unnecessary for deciding the appeals, as the justices agreed on the question of the merits of the appeal, Justice Procaccia said that the question should be left undecided.

5. As stated, on 4 February 2003 the state filed a petition to hold a further hearing with regard to the aforesaid judgment, under s. 30 of the Courts Law [Consolidated Version], 5744-1984. In its petition, the state gave details of the various opinions that were expressed in the judgment and argued that a further hearing should be held in order to clarify what is the extent of the state's commitment in the court of appeal to a plea bargain that was rejected in the trial court.

Before the decision was made in the petition to hold a further hearing, on 17 March 2003 this court gave its judgment in CrimA 8164/02 *A v. State of Israel* [3]. In that judgment, the basic question that is the subject of this further hearing arose once again, and President Barak, with the agreement of Justices England and Türkel, presented in his opinion a different approach from the one that was expressed in the opinion of Justice Dorner in the judgment that is the subject of this further hearing:

> 'In my opinion, in a plea bargain the prosecution undertakes to present its lenient position before the court that determines the sentence. As a rule, the prosecution

> should also honour plea bargains that it made in the court of appeal, but when the plea bargain that was brought before the trial court is examined by the court of appeal, the state prosecution may re-examine its position with regard thereto. At this stage it has a new factor to consider, namely the judgment of the trial court, which examined the plea bargain and passed the sentence. It should take into account this additional factor within the framework of the balance between all the considerations that it makes and that we have discussed (see para. 14 of this opinion). If the prosecution is of the opinion that the plea bargain was a proper one, and the court approved it, then it should defend the judgment of the court and the plea bargain in the court of appeal. If it thinks that the plea bargain was a proper one even though the court rejected it, it should defend the plea bargain in the court of appeal rather than defending the judgment of the court. However, if after a reconsideration it is of the opinion that the plea bargain was not a proper one, whereas the judgment of the court that rejected it is the proper view, it may defend the judgment of the court rather than the plea bargain. Against the background of the aforesaid analysis, the respondent was entitled, during the hearing before us, to choose to defend the judgment of the court, if it was of the opinion that the plea bargain that it made was defective to an extent that justifies a repudiation thereof notwithstanding the defendants' reliance on it. And this is what it has done *de facto*' (*ibid*. [3], at p. 587).

It would appear, therefore, that with regard to the same question this court has given two different opinions. The need to reconcile the approach expressed in the opinion of Justice Dorner with the approach of President Barak in CrimA 8164/02 *A v. State of Israel* [3] is the reason underlying the decision of Justice Cheshin on 8 May 2003 to hold a further hearing. In the words of Justice Cheshin:

> 'It is difficult to reconcile the remarks made by Justice Dorner (with the agreement of Justice Mazza and with the

> reservation of Justice Procaccia) in *Peretz v. State of Israel* [1] (in paras. 5 and 6 of her opinion on 20 January 2003) with the ruling made by the court (*per* President Barak, with the agreement of Justices Türkel and Englard) in CrimA 8164/02 *A v. State of Israel* [3] (in a judgment on 17 March 2003). Therefore I order — as requested — the holding of a further hearing in *Peretz v. State of Israel* [1] before a panel of nine justices. The subject of the further hearing is: to what extent is the state bound by in the court of appeal by a plea bargain that it made in the trial court?'

Thus we see that in this further hearing we are required to instruct the prosecution as to how it should act in the court of appeal after the plea bargain to which the state was a party was rejected by the trial court. It should be noted that the unique aspect of the issue under consideration in this further hearing is that it is not the criminal trial that took place in the court that is the focus of our deliberations but the considerations of the prosecution and the manner in which it operates in the course of the criminal trial. The sequence of proceedings as described above is what has brought this issue before us, and therefore we are required to decide the questions that it raises.

The arguments of the parties and the scope of the dispute

The state's position

6. The state agrees that, as a rule, the prosecution should also defend in the court of appeal the plea bargains that it made in the trial court. The state also agrees that the prosecution ought to defend plea bargains in which there was a mistake that is not serious. However, the state asks us to decide that the prosecution has discretion to examine each case on its merits, and in appropriate cases it has the possibility of choosing not to defend the plea bargain in the court of appeal. In principle, the state is asking us to adopt the position of President Barak, according to which a sentence that departs from a plea bargain is a new circumstance that the prosecution may take into

account within the framework of the factors that it considers when deciding its position in an appeal.

The logic of the rule that the prosecution should defend plea bargains lies, in the opinion of the state, in the importance and status of plea bargains and in the public interest that they will be upheld, as well as in the expectation and reliance interest that the accused has in the plea bargain. However, the state argues that this rule has exceptions. The exceptional cases are those where the court expresses criticism of the plea bargain and the arrangement is not accepted by it, or where there are new considerations that were not taken into account when the plea bargain was made. If in these exceptional circumstances the state reaches the conclusion, as a result of the criticism of the court or as a result of a reconsideration of the plea bargain, that a serious and significant mistake was made in its considerations, and that the plea bargain does not achieve the balance determined by this court in CrimA 1958/98 *A v. State of Israel* [2], it should admit this before the court of appeal and defend the sentence that departed from the plea bargain.

7. The most obvious difficulty that is presented by the position of the state is, of course, the harm that will be caused to the accused as a result of the state repudiating the plea bargain in the court of appeal. In its arguments, the state does not ignore this aspect of its position, and its obligation to the accused, but it is of the opinion that the weight given to this aspect in the approach of Justice Dorner is too great. In the state's opinion, the reliance interest is an importance consideration but it is not the only consideration, and it should be balanced against other important considerations. This balance may lead, in certain cases, to the conclusion that the prosecution ought not to support the plea bargain in the court of appeal. The state finds support for this position in the judgment given in HCJ 218/85 *Arbiv v. Tel-Aviv District Attorney's Office* [4]. That case considered the question of whether the state could repudiate a plea bargain before it was implemented, i.e., before the accused made his guilty plea in the court. In that case Justice Barak discussed the manner in which a balance should be struck between the interests of the accused (the expectation interest and the reliance interest) and the other

considerations that arise from the public interest, such as the credibility of the executive authority and the realization of the purposes of the criminal law. The state was of the opinion that the rule decided in *Arbiv v. Tel-Aviv District Attorney's Office* [4] supported its position that, in cases where the public interest so required, the prosecution would be entitled to act in a manner that harmed the reliance interest of the accused.

The state further argues that the manner in which the prosecution conducts itself is well known, both from the way in which it acts openly in the courts and from the guidelines of the State Attorney's Office that have been published. Therefore, even though in the state's opinion *it is theoretically possible* to harm the reliance interest of the accused when the public interest so requires, *in practice* when the prosecution repudiates a plea bargain in an appeal, the reliance interest of the accused is not harmed since *ab initio* the accused knows that he is not assured of the prosecution's support of the plea bargain at the appeal stage.

8. With regard to the specific cases of the respondents, the state argues that its repudiation of the plea bargains that were made with them was justified as a result of a reconsideration of the evidence in each of the cases, and a reassessment of the relevant considerations. Admittedly, the state concedes that in the discussions that it held with the respondents and with their counsel they did not address the question of what the prosecution's position would be in the court of appeal, but, as aforesaid, it argues that the prosecution's manner of conducting itself in this matter has been published and is well known.

The position of the Public Defender's Office

9. The Public Defender's Office represents the third respondent in the proceeding before us, and it presented a fundamental position on the question under discussion, unlike the specific position presented by defence counsel for the first and second respondents with regard to the sentences that they were given. From the detailed and reasoned response of the Public Defender's Office to the arguments of the prosecution we see that it agrees with the argument that it is not proper to make a sweeping rule that binds the

prosecution in the court of appeal to defend, in all circumstances, the plea bargain that it made in the trial court. From the response we see that the Public Defender's Office recognizes the discretion given to the prosecution, and in its opinion there are indeed exceptional cases in which the prosecution will not be obliged in the court of appeal to defend the plea bargain that was presented in the trial court. The question that the Public Defender's Office focused upon in its arguments is in what circumstances and under what conditions will the prosecution be entitled to repudiate a plea bargain that it made and to present a different position in the court of appeal.

In this matter, the Public Defender's Office presents two main arguments. First, the Public Defender's Office is of the opinion that giving notice to the accused with regard to its not being obliged to defend the plea bargain at the appeal stage is an essential precondition for the prosecution repudiating the arrangement. The prosecution argues that the notice to the defendant is required both by the existence of a general duty of fairness to the accused and also, specifically, by the State Attorney's guidelines. According to the Public Defender's Office, in the absence of such a notice the accused may expect that the prosecution will defend the plea bargain in the court of appeal too, and this expectation should not be disappointed. The Public Defender's Office disagrees with the state's arguments that the prosecution's practice of reconsidering its position in an appeal with regard to plea bargains is a well known practice, and it also disagrees with the argument that the publication of the State Attorney's guidelines is sufficient for giving notice to defendants with regard to this matter. According to the approach of the Public Defender's Office, just as an accused is warned that the court is not obliged to accept the plea bargain, he should also be warned about the possibility that the prosecution may repudiate the plea bargain in the appeal.

10. The second argument of the Public Defender's Office focuses on the way in which it interprets the rule made in *Arbiv v. Tel-Aviv District Attorney's Office* [4]. According to the Public Defender's Office, the rule in *Arbiv v. Tel-Aviv District Attorney's Office* [4] addresses four different situations that are based on the existence or

absence of two factual issues that are a 'change of position' and a 'change of circumstances.' According to the Public Defender's Office, in a situation where the accused has not adversely changed his position but there has been a change in circumstances, the prosecution may repudiate the plea bargain. By contrast, in a situation where the accused has adversely changed his position and there has been no change of circumstances, the prosecution is not entitled to repudiate the plea bargain. In the other two intermediate situations (where there is both a change of position and a change of circumstances or where there is neither a change of position nor a change of circumstances), in the opinion of the Public Defender's Office a balance should be made between the conflicting interests. According to the Public Defender's Office, an accused who pleads guilty on the basis of a plea bargain adversely changes his position in an extreme, and usually an irreversible, manner. Therefore, the expectation and reliance of an accused on the plea bargain are of considerable weight. Notwithstanding, according to the Public Defender's Office, a judgment of a court that rejects a plea bargain does not constitute, in itself, a 'change of circumstances.' The Public Defender's Office argues that the prosecution may reconsider its position only if the judgment that rejected the plea bargain addresses, for example, a circumstance that was not considered at all or a circumstance that was considered in an manner that was totally unreasonable. If, on the other hand, the court rejected the plea bargain without addressing a new circumstance, then, so it claims, there is no 'change of circumstances' that justifies a reconsideration of the plea bargain by the prosecution. The Public Defender's Office bases its arguments on the distinction found in *Arbiv v. Tel-Aviv District Attorney's Office* [4] between a 'change of circumstances' and 'a new way of thinking.' Whereas a 'new way of thinking' does not, as a rule, justify a repudiation of the plea bargain by the prosecution, a change of circumstances can justify a repudiation of the plea bargain, as actually happened in *Arbiv v. Tel-Aviv District Attorney's Office* [4].

With regard to the concrete circumstances before us, the Public Defender's Office argues that in the present case the prosecution at

most made an erroneous balancing in the trial court, and eventually the recognition that this balancing was erroneous led the prosecution to change its position in the appeal. According to the Public Defender's Office, the reasons given by the state as a justification for its new position were known to the prosecution in the trial court, and the prosecution has not indicated any new reason that would justify the change in its position. Therefore, since the respondents adversely changed their position in an extreme manner, whereas in the other circumstances there has been no change whatsoever, apart from a change in the prosecutors, there is no justification in this case for a change in the position of the prosecution with regard to the plea bargain.

12. It should be stated right away that the interpretation given by the Public Defender's Office to the judgment in *Arbiv v. Tel-Aviv District Attorney's Office* [4] is far-reaching and restricts the significance of what is stated there. It is difficult to regard the sentencing process following a plea bargain as being made up of several defined and limited situations in a schematic way in such a way that each case falls into one of these. The various proceedings and the developments associated with them should be regarded as a continuous set of events, such that at every point on that continuum there is a basis for examining the proper balancing for that point. This is the outlook that was even presented in *Arbiv v. Tel-Aviv District Attorney's Office* [4]:

> '… It is possible to point to a spectrum of possibilities, which creates various different situations that each have their own specific weight' (*ibid.* [4], at p. 404).

And later on:

> 'Indeed, at one end of the spectrum there are cases where the accused carried out his part in the plea bargain in full, whereas from the prosecution's point of view there has been no change in circumstances… at the other end of the spectrum are the cases where the accused has not yet carried out his part of the agreement whereas from the viewpoint of the prosecution there have been material

> changes in the circumstances… between these two extremes are various different situations in which the different interests are in conflict' (*ibid*. [4]).

If this is the case, we are not dealing with discrete situations but with a broad spectrum of cases that requires a balancing and weighing of the circumstances at every point.

Deliberation

Preamble

13. The problem that arises in this further hearing is not new, and it has engaged the enforcement authorities and has also come up in the courts for years. The first discussion of this issue can be found in CrimA 4722/92 *Markovitz v. State of Israel* [5]. In that case, two defendants reached a plea bargain with the prosecution, in which the prosecution agreed to propose to the court, when it presented its arguments on sentencing, that the defendants should not actually serve imprisonment behind bars but should only be sentenced to community service. The District Court in that case rejected the plea bargain and sentenced the defendants to actual prison sentences rather than community service. The defendants appealed the sentence to this court and in the judgment Justice Netanyahu said the following:

> 'Now that the trial court has refused to approve the plea bargain, which is the subject of the appeals before us, the prosecution is not joining the appellants in supporting the plea bargain, as would have been expected. It opposes them and supports the judgment. But at the same time it argues that the plea bargain is reasonable and it also argues, here for the first time, something that was not argued before the District Court either by the prosecution or by counsel for the defence, that the consideration underlying the plea bargain was that the appellants were outside Israel.
>
> I am unable to understand the position of the prosecution that speaks in contradictions — on the one hand it

> defends the plea bargain and on the other it defends the judgment. The plea bargain is reasonable, the prosecution claims, but so too is the judgment reasonable, since the offences are very serious and it is not appropriate that the sentence for them should be one of community service, as proposed in the plea bargain, since that presents less of a deterrent; in summary, the sentence is a light one and therefore the prosecution is taking the position of defending it' (*ibid*. [5], at p. 53).

Justice Mazza also addressed the position of the prosecution in that case:

> 'Finally, as required by the circumstances of this case, I would like to add that when the prosecution enters into a plea bargain, and realizes after the event that it erred in doing so (such as in a case where it discovers facts of whose existence it was not aware when it agreed to the plea bargain), it has the power to notify the accused and his defence counsel that it repudiates the plea bargain and put its position to the test (cf. *Arbiv v. Tel-Aviv District Attorney's Office* [4]). But when it has acted in accordance with the plea bargain, and the accused appeals the sentence in which the court decided to reject the plea bargain as being unworthy, the prosecution is required to adopt a position before the court of appeal. Like my colleague Justice Netanyahu, I am of the opinion that in such a case the prosecution cannot speak in contradictions, defending the sentence and defending the plea bargain in the same breath, and it must choose one of these two courses. In other words, if the reasoning of the court persuaded it that its consent to the plea bargain was a mistaken one, it should admit its error to the court of appeal and defend the sentence that is the subject of the appeal; but if it still confident and certain that the plea bargain should have been approved by the court as is, it should support the defendant's appeal' (*ibid*. [5], at pp. 57-58).

See also in this regard the remarks of Justice Mazza in CrimA 6675/95 *Shiloah v. State of Israel* [6], at p. 682. Thus we see that the question concerning the manner in which the prosecution should decide their position in the appeal arose in the past, and the prosecution's position in those proceedings was criticized by the court. Justice Mazza outlined in his remarks the two paths open to the prosecution — defending the plea bargain or defending the sentence that rejected it — and now the time has come to determine when the prosecution should follow one path and when it should follow the other.

Description of the problem

14. The typical sequence of events that lies at the heart of our deliberations can be described in the following schematic manner: at any stage, usually after the trial has begun, discussions are held between the prosecution on the one hand and the accused and his defence counsel on the other, and a plea bargain is formulated. Within the framework of this plea bargain, the parties agree that the accused will plead guilty to various charges that the prosecution attributes to him in the original or amended indictment and that the court will be asked to convict the accused on the basis of his guilty plea. The parties also agree to bring before the court a recommendation with regard to the sentence that shall be handed down to the accused (see CrimA 1958/98 *A v. State of Israel* [2], at p. 611). The recommendation with regard to the sentence incorporates, *inter alia*, a certain degree of leniency for the accused that is given to him in return for his pleading guilty (*ibid*. [2], at p. 589). In addition, the recommendation may be for a specific sentence or for an agreed range of sentences (*ibid*. [2], at p. 612). The undertaking of the prosecution within the framework of the plea bargain is to bring the recommendation concerning sentencing before the court that determines the sentence and to argue in favour of the court adopting the aforesaid recommendation. Notwithstanding, the prosecution is obliged to explain to the accused that the court itself is not bound by the plea bargain and it is not obliged to accept the prosecution's recommendation.

After the parties have informed the court that an arrangement has been reached, the court has a duty to explain once again to the accused that the court is not bound by the plea bargain and that there is a possibility that it will hand down a different sentence from the one that has been agreed (*ibid*. [2], at p. 611). At the end of these proceedings, the accused pleads guilty in the court, and if the court is persuaded that the accused has confessed willingly, without reservation, and understands the significance of pleading guilty, it convicts him. After this, the court conducts the proceeding of hearing arguments with regard to sentencing. Within the framework of this proceeding, the parties state their reasons for adopting the plea bargain, and the court examines the plea bargain in accordance with the criteria laid down in case law (*ibid*. [2], at p. 612). If the plea bargain that is being proposed properly balances the specific public interest and the general public interest in upholding plea bargains on the one hand and the benefit that is given to the accused on the other, the court will accept the plea bargain and hand down a sentence in accordance with what is proposed in the plea bargain. However, if the court is of the opinion that the balance test is not satisfied, then the court will depart from the proposed arrangement and hand down a sentence at its discretion, while taking into account the fact that the accused confessed within the framework of a plea bargain, with all that this signifies (*ibid*. [2], at p. 612).

As can be seen, CrimA 1958/98 *A v. State of Israel* [2] decided the way in which the parties and the court should act with regard to the question of plea bargains. That judgment outlined the criteria according to which the courts should assess plea bargains, and in doing so we discussed the manner in which the prosecution should conduct itself when it makes and presents a plea bargain. Our deliberations in the present case are supplementary to the judgment in CrimA 1958/98 *A v. State of Israel* [2]. Our current deliberations concern the case in which the court rejected the plea bargain that was brought before it, and sentenced the accused to a *stricter* sentence that the sentence agreed in the plea bargain. If in such a case the accused appeals against the judgment, the prosecution will be required to decide its position with regard to the appeal. The manner

in which the prosecution will formulate its position in the appeal and the considerations that it should take into account when doing so are the subject of this further hearing. It should be noted that the premise for our deliberations is the agreed assumption that it is not possible to determine a sweeping rule that the prosecution is always and in all circumstances obliged in the court of appeal to defend the plea bargain that it made in the trial court. Everyone agrees that the prosecution has discretion in the case of an appeal and the dispute between the parties concerns the manner in which this discretion should be exercised. In other words, the question is in which cases should the prosecution defend the plea bargain, in which cases should it repudiate it and defend the sentence that departs from the plea bargain, and what should be the considerations that guide it in formulating its position. One more introductory remark before we continue is this: our deliberations concern the manner in which the prosecution should determine its position in an appeal in the circumstances described above. We should remember that whatever this position is, and no matter how much weight we give to it, the sentence is ultimately the duty of the court alone, and the court may not shirk this duty. The court may take the position of the prosecution into account, and it should respect its position, but it is not obliged to accept it (see CrimA 534/04 *A v. State of Israel* [7], at paras. 14-15, and the references cited there).

The duty to give notice to the accused

15. Before we discuss the considerations that should guide the prosecution when deciding its position in the court of appeal, we should direct our attention to the stage in which the plea bargain is made and the manner in which the prosecution should act at that stage. This is because the main problem in our case is the defendant's expectation that the prosecution will also defend the plea bargain in the court of appeal, and this expectation is created at the preliminary stage when the plea bargain is made. Therefore, a partial solution to the aforesaid problem can be found first and foremost in the manner in which the prosecution's undertaking is defined in the plea bargain and in the manner in which this undertaking is made clear to the accused and to his counsel at the stage when the plea bargain is being

made. It should be remembered that a plea bargain is an arrangement that is made between the accused and the prosecution — an arrangement that has contractual aspects (cf. *Arbiv v. Tel-Aviv District Attorney's Office* [4], at pp. 400 *et seq*.; CrimA 1958/98 *A v. State of Israel* [2], at p. 615). Just as in every contract the parties to the contract define the undertakings that they are taking upon themselves within the framework of the contract, so the parties to the plea bargain should also define in the plea bargain the undertakings that they are taking upon themselves within its framework. The parties to the plea bargain should draft the plea bargain in such a way that makes the understandings between them as clear as possible, and this should include the undertakings that each party takes upon itself. This is because it is on the basis of these understandings that the parties to the plea bargain — and especially the accused — acquire their various expectations, just as every party to a contract acquires expectations on the basis of the consents reached in the contract. For this reason, as a rule, the prosecution should make clear to the accused, already when the plea bargain is made, all the limitations and rules that apply to it with regard to the implementation of the plea bargain. *Inter alia*, the prosecution should explain to the accused, whether directly or through his defence counsel, that should the plea bargain be rejected, and should an appeal be filed, the prosecution does not undertake to defend the plea bargain before the court of appeal, and it will be entitled, and, as will be clarified below, in some cases it will even be obliged to re-examine its position. The prosecution has the duty to make this limitation clear from the outset so that the accused can properly assess the risks and benefits of the plea bargain that he is making with the prosecution. By making clear to the accused, from the outset, what are the undertakings of the prosecution to him within the framework of the plea bargain, and by preventing him from relying mistakenly on it, one of the main difficulties in our case will be resolved, since the accused will know *ab initio* what he is 'receiving' within the framework of the plea bargain. It should be noted that giving a warning to the accused from the outset and the duty of the prosecution to make its limitations very clear derive also from the duty of the prosecution to act with all due

fairness and good faith in carrying out its functions. It should also be pointed out that this outlook, that a warning is required *ab initio*, is also included in the guidelines of the State Attorney's Office. These guidelines direct the prosecutor to make clear to the accused, when making the plea bargain, that he 'cannot make any undertaking *ab initio* as to the position of the prosecution in the appeal, if the court hands down a stricter sentence that the one agreed in the plea bargain and an appeal is filed against it by the accused.' The aforesaid position is also acceptable to the Public Defender's Office as a desirable solution, as it said in its pleadings:

> 'If the accused is told by the prosecutor in the trial court that there is a possibility that the prosecution will not defend the plea bargain in the court of appeal, the accused will know this, consider it before agreeing to the plea bargain, and know that he is taking a risk' (para. 16 of the summations of the Public Defender's Office).

It can therefore be seen that everyone agrees that, as a rule, the prosecution should make clear to the accused *ab initio* that all that it is undertaking in the plea bargain is to recommend a certain sentence to the court that is determining the sentence. It should be noted that this recommendation to the trial court is the heart of the prosecution's undertaking in the plea bargain. The efforts of the prosecution to persuade the trial court to accept the plea bargain are the realization of the undertaking that the prosecution gave in the plea bargain, and the prosecution should carry out this undertaking that it gave in good faith and with diligence. Notwithstanding, the prosecution should clarify that its undertaking within the framework of the plea bargain *does not also include* a promise to defend the plea bargain in the court of appeal, if it is rejected by the trial court, and for the reasons set about above, the prosecution's duty to warn the accused *ab initio* of its limitations is of great importance. Below we will address the question of the effect of a failure to give such a warning on the case of the accused and the prosecution's position in the appeal, but before we do so we should consider the question that lies at the heart of this further hearing, which concerns the considerations that should guide

the prosecution when it needs to determine its position at the appeal stage.

The relevant considerations for determining the prosecution's position in the appeal with regard to a plea bargain that was rejected in the trial court

16. The principle that should guide the prosecution when it formulates its position in the court of appeal in the situation under discussion is that as a rule, for the reasons that we shall discuss below, it should also honour in the court of appeal the plea bargain that it made, and I should support the position that it adopted in the trial. Notwithstanding, as aforesaid, the prosecution cannot undertake *ab initio* when making the plea bargain to defend it in the court of appeal if it is rejected in the trial court. Let us therefore turn to examine the considerations that should be taken into account by the prosecution when it is formulating the position that it will present to the court of appeal and the various reasons for the possible positions. We shall first examine the reasons why the prosecution should defend the plea bargain and afterwards we shall examine the reasons that may justify a change in its position in the appeal. It should already be pointed out that the reasons that can justify a change of position in the appeal are the reasons for the rule that enjoins the prosecution not to undertake *ab initio* what its position will be in the appeal stage.

The reasons for supporting the plea bargain

17. As stated above, the prosecution is not entitled to give an unqualified undertaking *ab initio*, at the stage of making the plea bargain, to defend the plea bargain in the court of appeal if it is rejected by the trial court. It is therefore obvious that in the absence of such an undertaking on the part of the prosecution, the prosecution does not have a legal duty, from a contractual perspective, to defend the plea bargain. Notwithstanding, no one denies that as a rule the prosecution ought to defend the plea bargain that it made in the court of appeal too. Even though the prosecution is not obliged, in the limited contractual' sense of the obligation — when it acted properly and in accordance with its guidelines — to defend the plea bargain in the court of appeal, as a rule it is not released from its commitment to

the plea bargain and from its undertaking to the accused. The prosecution's obligation is not based therefore on the contractual aspect of the plea bargain but on other *public* aspects in the plea bargain. Below we will discuss these aspects, which are the basis for the commitment of the prosecution to support the plea bargain during the proceedings in the court of appeal.

18. The first element that supports an obligation on the part of the prosecution to defend in the court of appeal a plea bargain that was rejected in the trial court is based on the relationship that is created between the prosecution and the accused. In this relationship, the prosecution takes upon itself several obligations to the accused. The concrete duty of the prosecution is to persuade and convince the court at the trial stage to accept the plea bargain. The prosecution also has a general duty of fairness to the accused, and this duty imposes on the prosecution a duty to take into account the expectation interest of the accused. For his part, the accused in the plea bargain waives his right to be tried in a criminal trial from beginning to end, with all that this implies. No one denies that when a plea bargain is made, the prosecution makes a representation to the accused that the plea bargain is acceptable to it. There is a substantial reason for this representation, since when the prosecution agrees to a plea bargain it is presumed to have considered it and to believe it to be balanced and proper. This conduct gives the accused an expectation that the prosecution will support the plea bargain that it took upon itself and will act to the best of its ability, within the framework of its limitations, to bring about the realization of the plea bargain. It should be remembered that the public prosecution service is one entity, whether it is represented by one of the District Attorneys or by the main office of the State Attorney. It is therefore to be expected that the prosecution will, as a rule, speak with one voice when giving expression to its policy on sentencing. Therefore when a plea bargain is made, every attorney who pleads in the court should be regarded as speaking on behalf of the general prosecution service. Admittedly, in the normal court of events, the prosecution does not undertake to defend the plea bargain in the court of appeal and therefore the accused does not have a protected reliance interest in law.

Nonetheless, in view of the representation made by the prosecution to the accused, and in view of the substantial reason that underlies it, the prosecution is required to examine carefully whether there is a basis for changing its position at the appeal stage. The duty of fairness that the prosecution owes to the accused obliges it to examine the various considerations most thoroughly before it changes its position; among the considerations that it should consider, it should also give weight to the representation that it made to the accused with regard to its belief in the propriety of the plea bargain, the expectation that it gave the accused as a result, and the extent of the waiver that the accused made when making the plea bargain. Indeed, as we have explained above, the prosecution should inform the accused that it is not undertaking to act in order that the plea bargain will be accepted in the court of appeal if it is found to be unworthy by the trial court. Notwithstanding, and despite the warning given at the outset, the hope and expectation of the accused that the prosecution will continue to support the plea bargain that it made with him cannot be ignored, even if the plea bargain is rejected. The remarks made by Justice Cheshin with regard to the warning given to the accused before he pleads guilty in the court are pertinent in this regard:

> '… when he signs a plea bargain, an accused has reason to hope that the court will accept the request of the public prosecution and deal leniently with him, and this hope is deserving of some weight in itself. Indeed, the accused is warned several times that the court is not bound by the plea bargain: his defence counsel warns him; his friends warn him; the prosecution warns him; the court warns him. But no matter how many times he is warned, and no matter how much he is told that he is taking a risk, a defendant does not despair of finding mercy, and he is full of expectation and hope. In legal language we call this the reliance interest, and the accused hopes, expects and dreams. We cannot ignore this human factor, nor indeed shall we ignore it' (CrimA 1289/93 *Levy v. State of Israel* [8], at p. 174).

Thus we see that just as the warning with regard to the court not being bound by the plea bargain only slightly reduces the expectation of the accused that the plea bargain will be honoured, so too, in our case, the warning given by the prosecution that it is not bound to defend the plea bargain in the court of appeal does not eliminate from the heart of the accused the hope that the plea bargain will receive the support of the prosecution at all stages of the proceedings. Even in a case where the plea bargain is rejected, and the accused files an appeal, it is reasonable to assume that he has an expectation that the prosecution will defend the plea bargain that was agreed. The hope and expectation of the accused in such a case are not unfounded and they should be given weight, even when they are not based on a reliance interest that is protected by law.

19. An additional element that supports the commitment of the prosecution to defend in the court of appeal a plea bargain that was rejected in the trial court lies in the public interest that the prosecution is responsible to protect. The relevant public interest in our case is the need to protect the institution of plea bargains, in view of the public benefit inherent in it, and the desire to prevent any harm to this institution. This court discussed many years ago the advantages inherent in the use of plea bargains, both for the accused and the public (see CrimA 532/71 *Bahmotzky v. State of Israel* [9], at p. 550). In CrimA 1958/98 *A v. State of Israel* [2] we confirmed these remarks and added there that:

> 'The existence of plea bargains allows a broader application of law enforcement and this in itself has a deterrent effect, which may balance the effect of the leniency in sentence in the specific case. A plea bargain that is made in accordance with the rules and in accordance with proper considerations shortens the suffering of the accused and of potential defendants who are waiting for an indictment against them. The plea bargain allows the enforcement authorities to bring additional offenders to trial, and ensures sentencing at a time that is not too distant from the time of committing the offence. It saves the considerable resources that are

> invested in the management of the criminal trial, which is sometimes complex and prolonged, and which are burdensome both to the prosecution and to the accused, and it frees the court, which is overburdened, so that it can deal with other cases. From an ethical point of view, the plea bargain has the additional value that the offender accepts responsibility for his acts. In addition to all this, a plea bargain helps the victim of the offence, by taking into account his need for a rapid recuperation and by sparing him further harm as a result of his giving testimony' (*ibid.* [2], at p. 607).

There is no doubt that the actual prohibition against the prosecution undertaking *ab initio* to defend the plea bargain in the court of appeal *prima facie* reduces the 'value' of the plea bargain. The aforesaid restriction that is imposed on the prosecution and the possibility that the prosecution will withdraw its support for the plea bargain are likely to lead to a consequence in which the number of cases that end with a plea bargain is reduced. Since this is the case, and in view of all of the advantages described above that benefit all the parties in the proceeding and the public as a whole, the prosecution is required to act with even greater care when it acts in a way that is likely to harm the effectiveness of the institution of plea bargains. The prosecution should therefore take into account, among its considerations, its duty to protect the effectiveness of the institution of plea bargains and to act from a viewpoint of a commitment to the plea bargain so that any harm to this institution is kept to an absolute minimum.

20. The third element on which the prosecution's commitment to the plea bargain is based derives from within the prosecution itself. The prosecution is one of the organs of the state and it is subject to the scrutiny of the court. Notwithstanding, we are speaking of a professional body that has broad and independent discretion in exercising its authority. In its role as the authority responsible for conducting the prosecution in a specific case, the public prosecution service may, *inter alia*, appeal a decision of the court, and in doing so it expresses the independence of its discretion and its desire to

change the decisions of the court, as they are reflected in the judgment that it is appealing. The same is true of plea bargains; when the prosecution, together with the accused and his defence counsel, acts in order to formulate a plea bargain, it is presumed to carry out its task in good faith, while taking into account the considerations that are relevant to the case. When a plea bargain is made, the public prosecution service, with its various branches, is presumed to believe — both in the trial court and in the court of appeal — that the plea bargain properly satisfies the balancing test provided in our case law. Therefore, the prosecution's support of the plea bargain is a reflection of the prosecution's confidence in its professional decision and of its belief that its discretion is proper and sound. This confidence and belief do not disappear when the court rejects the plea bargain and there is no need for the prosecution to be persuaded that it erred in making the plea bargain because of what is stated in the court's sentence. It is certainly possible that the prosecution will stand by its original position in the belief that the plea bargain that it brought before the court properly satisfies the balancing test. Therefore if the prosecution is of the opinion that the plea bargain that it proposed is a proper one and serves the public interest, it is also obliged to present this position in the court of appeal, and it is only natural that the prosecution should seek to defend its original discretion.

In the aforesaid context, it should be noted that it is natural that in many cases, where there is a plea bargain and in the absence of any evidence being presented to the court, the parties — the prosecution and defence — will be more familiar with the details of the case that the court. We discussed this in CrimA 1958/98 *A v. State of Israel* [2]:

> 'The arguments with regard to sentencing after a conviction within the framework of a plea bargain are, by their very nature, a short proceeding. As a rule, the court is not familiar with the evidence and does not even examine it, and naturally it cannot examine the facts presented to it by the parties, even if they explained to the court their reasons and even if it has full confidence in

> the prosecution and the propriety of its actions' (*ibid.* [2], at p. 606).

(See also in this regard: *R. v. Paquette* [31]). Because of the aforesaid, among the various reasons for the court rejecting the plea bargain, the decision of the court may be a consequence of a defective presentation of all of the reasons that support the adopting of the plea bargain. As stated, these reasons are known to the parties and they have the duty to present as complete a picture as possible in order to persuade the court to adopt the plea bargain. Therefore, when the prosecution thinks that the presentation of the facts was defective, it will be obliged to remedy this deficiency by presenting the plea bargain more effectively in the court of appeal. In this regard, it should be stated that as a result of the circumstances described above, a paradoxical situation may arise in the cases of defendants where there is problem in the evidence or some other problem relating to their case, as a result of which the chances of convicting them without a plea bargain are relatively low. *Prima facie* these defendants have an opportunity of making plea bargains that appear excessively lenient, even for serious offences, but they are also those cases where they waived a real chance of being acquitted. Such apparently lenient plea bargains may seem to the court to be unbalanced and the result may be that the plea bargain is rejected in cases where it was most proper (see: R.E. Scott and W.J. Stuntz, 'Plea Bargaining as Contract,' 101 *Yale L. J.* (1992) 1909, at p. 1954; see also the comprehensive discussion of this matter in E. Harnon, 'Plea Bargains in Israel — The Proper Division of Roles Between the Prosecution and the Court and the Status of the Victim,' 27 *Hebrew Univ. L. Rev. (Mishpatim)* (1997) 543, at pp. 576-579). The desire to refrain from the occurrence of this undesirable outcome reemphasizes what was stated above with regard to the duty of the prosecution to present its reasons for the plea bargain to the court effectively so that the court can understand all of the considerations that led the prosecution to agree to the plea bargain, which appears to be unbalanced (notwithstanding, cf. in this regard the remarks of Justice Goldberg in *Shiloah v. State of Israel* [6], at pp. 678-679, who was of the opinion that the court when examining a plea bargain that is

presented to it should not take into account the likelihood of the accused being convicted in a trial).

The prosecution's commitment to the plea bargain is therefore based on the grounds that we have listed above. These are also the considerations why it is proper for the prosecution to defend the plea bargain that it made in the court of appeal, even if this plea bargain was rejected in the trial court. Now let us turn to examine the reasons that are capable of justifying a change in the position of the prosecution in an appeal.

The reasons that justify a change of position in the appeal

21. There are other reasons that oppose the reasons for the prosecution's obligation to defend a plea bargain in the court of appeal. These derive from the other obligations of the prosecution. These reasons, of which we shall give details below, are the basis for the rule that the prosecution is not entitled to undertake *ab initio* to defend in the court of appeal a plea bargain that was rejected by the trial court. These reasons are also, as aforesaid, the other group of considerations that the prosecution must consider when it decides its position proper to the hearing in the court of appeal. As a rule, the reasons that can justify the prosecution's decision not to support the plea bargain at the appeal stage are derived from the prosecution's obligations to the public, from the relationship between the prosecution and the court and from the role of the prosecution in representing the public interest. Let us therefore turn to examine the aforesaid fundamental reasons.

22. As the authority responsible for representing the public interest, and as a part of its duty of faith to the public, the prosecution must conduct a continuous internal review of its decisions. The prosecution is especially required to conduct an internal review when a plea bargain that was made is rejected by the trial court. The first reason why the prosecution is liable to re-examine its position can be found, therefore, in the internal workings of the prosecution service.

When a sentence is handed down in defiance of a plea bargain, it amounts to an express or implied criticism of the plea bargain that

was made and of the prosecution's discretion. This criticism requires a reconsideration and re-examination of the plea bargain in the hierarchy of the internal workings of the prosecution (cf. HCJ 844/86 *Dotan v. Attorney-General* [10]). It should be noted that we have already said that the criticism by the court that handed down the sentence does not necessarily require a change in the prosecution's position. When the prosecution acts in good faith when making a plea bargain, and has relevant and professional considerations, it should give the plea bargain great weight. Notwithstanding, in view of the criticism of the court, the prosecution must re-examine whether there was a material defect in its discretion when it made the plea bargain. In such a re-examination the prosecution may discover that, even though it considered the case in good faith and its reasons were relevant ones, it made a significant error when it gave too much weight to one consideration over another, or it did not give expression to a factor that was relevant to the sentence, and thereby its position did not satisfy the balancing formula.

When, according to the prosecution's outlook, the criticism of the court that gave the sentence is justified and the competent echelon of the prosecution is persuaded that the prosecution erred in its considerations when making the plea bargain and the decision of the court properly reflects the correct balance, then for reasons that derive from the prosecution's duty to the public and from the prosecution's duty to scrutinize its own actions, the prosecution may notify the court of appeal that it erred in the plea bargain that it made, and that it withdraws its support for it. As a rule, it is desirable that a decision not to defend in an appeal a plea bargain that was made in the trial court should be made at a senior level of the hierarchy of the prosecution service, because of the responsibility that it has to the accused, the public and the court.

In summary, because it is an administrative authority, the public prosecution service must carry out a review of its own actions and it must re-examine itself when the circumstances change. For this reason, *inter alia*, the prosecution cannot give an undertaking in advance with regard to its position in the court of appeal, and it must re-examine the plea bargain that was rejected.

23. The second reason underlying the rule that prohibits the prosecution from committing itself *ab initio* to a position in an appeal can be found in the external sphere of the relationship between the prosecution and the court. As we said above, the prosecution is a public authority that acts professionally and independently. But when the court hands down its sentence, the prosecution cannot continue to act as if nothing has happened. The court has a 'duty to respect' the prosecution (in the words of Justice Cheshin in *Levy v. State of Israel* [8], at p. 174) and the prosecution should respect the decision of the court and take account of what it says. But this is not merely a question of respect. When it rejects a plea bargain, the court expresses its opinion that the discretion of the prosecution was mistaken. It is possible that a relevant consideration was ignored by the prosecution and it is possible that the prosecution erred in balancing the relevant considerations. Whatever the reason, if the court rejects the prosecution's proposal when handing down the sentence, this determination means that, in its opinion, approving the plea bargain will cause more damage than benefit to the public interest, and the prosecution is not entitled to ignore such a finding by the court. The sentence of the court that rejected the plea bargain constitutes a new circumstance that the prosecution must take into account (see the opinion of Justice Barak in CrimA 8164/02 *A v. State of Israel* [3], at p. 587). Such a sentence will contain the reasons for rejecting the plea bargain and the prosecution cannot decide its position at the appeal stage without considering these reasons. The need to consider the reasons of the court does not derive from a mere 'reassessment' by the prosecution but from the fact that the court has expressed its opinion with regard to the plea bargain and this cannot be ignored. It is also for this reason the prosecution cannot give an undertaking *ab initio* with regard to its position at the appeal stage, and it must consider the sentence when it presents its position in the appeal. The rejection of the plea bargain and the reasoning of the court are therefore new circumstances that the prosecution must include among its considerations when it decides its position at the appeal stage, just as it is entitled to do when there are other relevant

circumstances that were unknown to it when it decided upon its original position, which we shall discuss later.

How should the prosecution relate to a sentence that rejects a plea bargain? The answer to this question will vary, as aforesaid, from case to case in accordance with the specific circumstances. The re-examination following the sentence should, without doubt, be influenced by the reasoning in the sentence, the strength of the court's criticism and the question whether the court that handed down the sentence had before it all of the facts that in the prosecution's opinion were relevant for determining that the plea bargain reflects the proper balance between the factors that are relevant to the case. In view of the sentence that departed from the plea bargain, the prosecution must consider what was the defect in its discretion that was discussed by the court. Did the court think that the prosecution ignored relevant factors when making the plea bargain or did the court find that the prosecution did address the relevant factors but balanced them in a defective manner? What was the subject and scope of the criticism that the court made with regard to the prosecution's discretion? To what degree did the court depart from the sentence that was proposed within the framework of the plea bargain? The answers to these questions will dictate the manner in which the prosecution ought to contend with the sentence that rejected the plea bargain and the manner in which it should decide its position in the appeal.

24. The third reason for the aforesaid rule derives from the broad question of the role of the prosecution in the public sphere. The role of the prosecution is to represent the public interest in criminal proceedings (see *Arbiv v. Tel-Aviv District Attorney's Office* [4], at p. 403; CrimA 1958/98 *A v. State of Israel* [2], at p. 606; CrimA 534/04 *A v. State of Israel* [7], at para. 14). As stated, if the court found that the plea bargain that the prosecution made should be rejected, this means that, in its opinion, this plea bargain does not satisfy the balancing test and that the damage that will be caused to the public interest by adopting it is greater that the benefit that arises from it. In such a case, the prosecution cannot argue that the plea bargain should be adopted, if it does indeed harm the public interest, because then the prosecution will not be properly representing the public interest

nor will it be discharging its executive duties as it should. It should be clarified that the purpose of the prosecution is not to obtain the most strict sentence possible for defendants, but to serve the public interest in the best possible manner. Therefore, if the prosecution is of the opinion that defending the plea bargain at the appeal stage will serve the public interest better, this, then, is the path it should choose; by contrast, if the prosecution is persuaded that the plea bargain does not serve the public interest, and that the sentence handed down by the court that rejected the plea bargain serves the public interest better, then the prosecution has the duty to defend the sentence. As stated, if the harm to the public interest that is caused by the plea bargain does not satisfy the balancing test, the prosecution will be liable to balance this against the harm suffered by the public interest as a result of its repudiating the plea bargain, with all that this implies with regard to the specific case and with regard to the general system of balancing that we discussed above.

25. In concluding our discussion of the main reasons that may justify a change in the prosecution's position before the court of appeal, we should mention that apart from the sentence that departs from the plea bargain, there will only be a justification for the prosecution to change its position in exceptional and extraordinary cases. This will happen if new factors arise at the appeal stage and they are relevant to the sentence that should be handed down to the accused, or if the prosecution becomes aware of facts that it did not know when it made the plea bargain, and these could not have been discovered at that time. In such circumstances, the prosecution will be entitled, and sometimes even obliged, to reconsider its position, subject to the restrictions required by the late stage of the proceedings and subject to the weight of the waiver of rights made by the accused. It should be noted that in order to justify a change in the position of the prosecution as a result of the occurrence or discovery of new circumstances, these circumstances must be significant and of great weight (cf. *Arbiv v. Tel-Aviv District Attorney's Office* [4], at p. 404).

Interim summary — the prosecution's position

26. In our deliberations hitherto, we have discussed the reasons for the rule that states that the prosecution may not give an undertaking *ab initio* with regard to its position at the appeal stage. We also discussed all the considerations that the prosecution should take into account when it is about to decide its position in the appeal. It is therefore possible to summarize by saying that the prosecution's margin of discretion in deciding not to defend in the court of appeal the plea bargain that it made is relatively limited and requires special circumstances. This path is not followed on a daily basis. The professionalism of the prosecution, the proper working relationship between the prosecution and the defence counsel, the expectations of the accused with regard to the prosecution's position with regard to the plea bargain and the need to encourage plea bargains all should lead to the result that the prosecution does not hurry into a repudiation of its original position, even if there was a defect of some kind in its thinking. In the course of its re-examination of the case, the prosecution should place on one pan of the scales the criticism of the court that departed from the plea bargain and the public interest in respecting a sentence that has been handed down, and on the other pan it should place the specific circumstances relevant to the plea bargain that was made, the extent of the concession made by the accused so that the plea bargain would be honoured and the public interest in encouraging plea bargains. In other words, the prosecution should made a re-examination of the balancing formula at the appeal stage, in view of all of the factors that we discussed above. As a rule, therefore, the prosecution will change its position in a hearing before the court of appeal only if it is persuaded that there are reasons of great weight that justify this.

Comparative law

27. As we said in CrimA 1958/98 *A v. State of Israel* [2], it is difficult, in cases concerning plea bargains, to derive analogies from comparative law, because the attitude to plea bargains is deeply rooted in the nature of the legal system and in the role of the prosecution in the sentencing proceeding. The various characteristics of each legal system create a different system of plea bargains and each system adopts different solutions to the problems that arise

when considering them (see CrimA 1958/98 *A v. State of Israel* [2], at pp. 587-588). Notwithstanding, the question of the prosecution's commitment to the plea bargain has also arisen in other legal systems that are similar to our legal system, and below we shall consider the answer that has been given to this question in the Canadian legal system.

Our approach to the institution of plea bargains has many similarities to the fundamental approach of Canadian law in this regard (see CrimA 1958/98 *A v. State of Israel* [2], at p. 617). In CrimA 1958/98 *A v. State of Israel* [2], we mentioned the Canadian case of *R. v. Rubenstein* [32], which is considered a leading decision on the issue of plea bargains in Canada, and which presents a very similar approach to our approach with regard to the issue of plea bargains. The question under consideration in this further hearing before us arose in Canada in *R. v. Simoneau* [33]. In that case, an agreement was made between the prosecution and the defence counsel with regard to the sentence that would be recommended to the court (two years less a day) but the court rejected this joint recommendation and sentenced the accused to three and a half years imprisonment. The accused appealed, and in the appeal the prosecution chose to defend the sentence and not the position that it presented in the trial court. It need not be said that the defence counsel for the accused argued against the change in the prosecution's position. The court addressed this matter in its judgment and held:

> 'In exercising its appellate function, a Court of Appeal will not, in all cases, necessarily hold the Crown to a position taken at the trial. It will certainly consider the earlier stance of the Crown to be an important factor to be taken into account. But whether the Crown ought to be bound will depend on the circumstances of the case.
>
> In the case at bar, Crown counsel at the trial concluded that there were good reasons for joining in a recommendation of a sentence of two years less one day. There are arguable grounds for coming to that conclusion.

> I do not criticize counsel for his decision although I do not agree with it. But if the Attorney-General on further consideration has decided that the trial Judge's sentence was an appropriate one, I would not insist that he be precluded from letting the Court know of that changed view' (*ibid.* [33], at pp. 22-23).

It can be seen that the court laid down a rule in *R. v. Simoneau* [33] that is similar to the rule decided in our case, whereby the prosecution, in appropriate circumstances, is not committed at the appeal stage to the position that it presented in the trial court. If after a sentence is handed down which departs from the plea bargain, the prosecution is of the opinion that the sentence is correct, the prosecution may present this revised position to the court of appeal. In the judgment given in *A.G. of Canada v. Roy* [34], which also concerned the position of the prosecution in an appeal (although in a more problematic situation, where the prosecution was the appellant), the court said that, as a rule, the prosecution should not repudiate in an appeal its previous position, but in certain circumstances and for serious reasons such a change in position is required:

> 'The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence.'

According to the judgment in *A.G. of Canada v. Roy* [34], there must be very serious reasons for justifying a repudiation of its position in the trial court by the prosecution, and such reasons exist mainly in three situations: where the sentence handed down was unlawful, where counsel for the prosecution was misled and where the orderly administration of justice is outweighed by the lack of balance between the offence committed and its seriousness and the sentence that was agreed. In such cases, the public interest outweighs

the duty not to repudiate the plea bargain that was made with the accused. This rule was also adopted in the Law Reform Commission of Canada, *Plea Discussions and Agreements* (Ottawa, Working Paper 60, 1989), at pp. 33-34, and the guidelines of the Canadian prosecution service also direct prosecutors to act in accordance with what is stated there. It should also be stated that one of the principles discussed by the Canadian prosecution service[1] is the principle of fairness, and according to the aforesaid guidelines the prosecution is obliged, as a part of the duty of fairness that applies to it, to honour the plea bargains that it made. From the guidelines it can be seen that the prosecution can indeed change its position in an appeal and even appeal the sentence while departing from the plea bargain, but this is only if there are very exceptional circumstances, and in any case such a change in approach must be approved by the highest echelons of the prosecution. It can therefore be seen that in Canada there is, in principle, a similar rule to the position that we have presented, according to which the prosecution is not prevented from repudiating, in the court of appeal, a plea bargain that it made in the trial court, but its ability to do this is limited and restricted to exceptional cases where the original position that the prosecution presented seriously conflicts with the public interest.

The manner in which the prosecution should present its position in an appeal

28. We have discussed the various considerations that the prosecution should take into account when it decides its position before the court of appeal and the reasons why it should not commit itself *ab initio* to defending the plea bargain also at the appeal stage. The conclusion that arises from these considerations is, therefore, that if the prosecution is of the opinion that the plea bargain that it made satisfies the balancing test and that it ought to defend it, then it should present its arguments to the court of appeal and contend with the criticism that was made with regard to the plea bargain in the

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[1] This can be found on the web site of the Canadian Ministry of Justice at: http://canada.justice.gc.ca/en/dept/pub/fps/fpd/toc.html.

sentence handed down in the trial court. But if the prosecution is of the opinion that the reasons for repudiating the plea bargain are of greater weight that the reasons for defending it, then the prosecution is entitled, and in special and exceptional cases is obliged, to abandon the plea bargain and present its revised position before the court of appeal. First, the prosecution should explain, in such a case, what were the reasons that led it to make the plea bargain in the trial court. This explanation is required because when it examined the prosecution's position, the court, amount its other considerations, exercises judicial review of the prosecution's actions. The public prosecution service should satisfy the court that even if it is repudiating the position that it presented in the plea bargain in the trial court, the plea bargain was made as a result of an error in good faith, and there was no serious flaw in its considerations that arose from an irrelevant consideration, an improper proceeding or an undesirable process that go to the heart of its discretion. It is self-evident that if it transpires that a serious flaw of the aforesaid kind is revealed, there is no doubt that the prosecution should not defend the plea bargain but should repudiate it (see, in this regard, the deliberations in CrimA 1958/98 *A v. State of Israel* [2], at p. 610). After this, the prosecution should give notice of its position in the appeal and of the considerations that guided it in reaching this position. The prosecution should explain and give reasons for its position, whether it stands by the plea bargain or whether it repudiates it, and it should show how the general principles that we discussed were implemented in the circumstances of the specific case (for similar requirements that are expected of the prosecution when it wishes to change a previous position, see *U.S. v. Mooney*, 654 F. 2d 482 (1981), at p. 487).

We should further point out that, in the judgment given in CrimA 8164/02 *A v. State of Israel* [3], President Barak discussed the two alternatives available to the prosecution: defending the plea bargain or defending the sentence of the trial court. But in practice these are not the only two possibilities. The prosecution may, as a result of the re-examination that it made, present an intermediate position before the court of appeal that is different from both the plea bargain and the

sentence that rejected it. The prosecution will be entitled to argue that, admittedly, it was a mistake in its opinion to have supported the plea bargain, but, on the other hand, the sentence that was handed down and that departed from the agreed penalty in the plea bargain is also unacceptable to it because of the extent to which it departs from the plea bargain. The prosecution can, therefore, present a third intermediate option, if it is of the opinion that such an option will balance the various considerations and interests in the best possible way. It is not superfluous to point out that before the hearing of the appeal, the prosecution and the accused may, if it is agreed between them that the sentence that departed from the plea bargain cannot stand, reach a kind of new plea bargain that will be presented to the court of appeal. This will not be a plea bargain in the normal sense, since the accused has already pleaded guilty in the trial court and the accused has been convicted as a result, but it will be an arrangement within which framework the two parties will present a joint recommendation with regard to the appropriate sentence in the circumstances of the case, after the original plea bargain was rejected by the trial court. The court of appeal should, in such a case, consider the new arrangement in accordance with the guidelines that were laid down in CrimA 1958/98 *A v. State of Israel* [2], while taking into account the special factors that we discussed in our deliberations above.

The significance of the absence of an appropriate warning to the accused

29. At the beginning of our remarks, we discussed the duty of the prosecution to make clear to the accused, already at the stage of making the plea bargain, that it is not giving an undertaking to defend the plea bargain in the event that the court will decide to reject the plea bargain and hand down a stricter sentence and the accused appeals the sentence. The advance warning is intended to prevent the accused developing a mistaken reliance, and it is also intended to allow the accused to plan his actions on the basis of all of the relevant information. This leads to the question of what is the law in a case where the prosecution did not carry out its duty of notifying the accused *ab initio* that it was not undertaking to defend the plea

bargain in the court of appeal. Let us now turn to examine this question.

30. The consequence that follows from a failure to warn the accused, when the plea bargain was made, of the fact that the prosecution is not undertaking to defend the plea bargain in the court of appeal if it is rejected by the trial court requires a specific examination in each case on its merits and in accordance with all the circumstances of the case. No one denies that if the accused is warned when the plea bargain is made and is told expressly that if the court that determines the sentence does not accept the plea bargain, the prosecution will reconsider its position in the appeal, the accused does not have, nor can he have, a claim of reliance. This is also the case where the accused knew *ab initio* of the restriction that binds the prosecution and that the prosecution is unable to give an undertaking *ab initio* to defend the plea bargain in an appeal, even in the absence of an express warning to this effect. In such cases, the plea bargain that is made cannot oblige the prosecution to stand by its original position. Regrettably, however, the everyday reality of making plea bargains is more complex. Notwithstanding the guidelines of the State Attorney's Office, in many cases the plea bargains are not written and prepared in the required format, because of the constraints and pressures surrounding the circumstances of their making, and the accused is not warned *ab initio* of the fact that the prosecution does not undertake to defend the plea bargain in the court of appeal. It need not be said that in every case the plea bargain should be agreed between the prosecution and the accused, usually through his defence counsel, and in every case the significance, consequences and risks of the plea bargain, including at the appeal stage, should be made very clear to the accused, in express terms. The duty to clarify the details and significance of the agreement rests with counsel for the prosecution and naturally also with counsel for the defence. The question that we are now considering is what is the rule that ought to be adopted with regard to circumstances in which no express warning was given by the prosecution with regard to the possibility that it might repudiate its position if an appeal is filed after the plea bargain is rejected.

31. The answer to this question is based on the approach that a plea bargain, like any contract of an administrative authority, is subject to the rule that the authority is entitled to be released from the contract that it made for reasons of public interest, and as required by the authority's duty to exercise its executive powers. We have already discussed (at para. 17 *supra*) that the prosecution's commitment in the court of appeal to a plea bargain that was rejected in the trial court does not arise from the contractual aspect of the plea bargain, since, as a rule, the prosecution is not entitled to give an undertaking to defend the plea bargain in the court of appeal, and the plea bargain is implemented when the arguments on sentencing are made in the trial court. Therefore, if the plea bargain is made properly, there is no contractual relationship between the prosecution and the accused at the time of the hearing in the court of appeal. But if no warning is given *ab initio* to the accused with regard to the limited scope of the plea bargain, the accused may develop an expectation that the plea bargain will also apply after the sentence is handed down in the trial court, and this cannot be ignored,. It is clear that this expectation, in itself, is incapable of creating a contractual relationship where such a relationship does not exist. But even if we accept the approach of the Public Defender's Office that, if a warning is not given *ab initio*, a contractual relationship continues to exist between the accused and the prosecution, and that in such a case the prosecution is also obliged to defend the plea bargain in the appeal, then the prosecution will have the right to be released from this relationship by virtue of the general power given to executive authorities to be released from contracts that they made for reasons of the public interest and as required by the duty of carrying out their executive powers.

The power of the authority to be released from a contract that it made was recognized by this court long ago in HCJ 311/60 *Y. Miller Engineering (Agency and Import) Ltd v. Minister of Transport* [11]; see G. Shalev, *Contracts and Tenders of the Public Authority* (2000), at pp. 67-75. Since then, this case law ruling, which is known as the 'release rule,' has been recognized widely in our case law (see, for example, HCJ 124/79 *Tzoba v. Minister of Defence* [12], at p. 754; HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [13], at pp. 67, 78-

79 {[redacted], [redacted]}). In *Arbiv v. Tel-Aviv District Attorney's Office* [4], Justice Barak also applied the 'release rule' in the case of plea bargains (*ibid*. [4], at p. 400). The power of the prosecution to be released from the plea bargain derives from the very fact that the prosecution, as an administrative authority, is a party to the plea bargain. A failure to give the warning does not rule out this possibility; at most, it restricts the extent to which it may be used. Even if we say, therefore, that if a warning is not given *ab initio* there is a contractual relationship between the accused and the prosecution with regard to the position that the prosecution will adopt in an appeal, then the prosecution has the power to be released from this plea bargain if there is an overriding public interest (for the opinion that restricts the power of the prosecution to be released from the plea bargain in an appeal, see O. Gazal, 'The Prosecution's Position in an Appeal against the Rejection of a Plea Bargain,' 1 *Din uDevarim* (2005) 507, at pp. 527-529).

It need not be said that the prosecution should use its power to be released from the plea bargain in good faith, reasonably and with a view to the special circumstances that accompany this release. A failure to give a warning to the accused is a significant consideration that the prosecution should take into account in addition to all of its other considerations, but it is not a circumstance that will totally deprive it of the ability not to defend the plea bargain that was rejected. It should be emphasized that in the stage after the sentence has been handed down in the trial court and the plea bargain has been rejected, the natural expectation of the accused that the prosecution will defend the plea bargain with him is weakened. By contrast, the duty of the prosecution to the public and to the court that found that the plea bargain was unjustified and that it did not satisfy the 'balancing approach' is strengthened. In the new balance that the prosecution is liable to make, it must address the question of what was understood within the framework of the contacts with the accused or his defence counsel as a part of the plea bargain. If, from an examination of all the facts and circumstances that surrounded the making of the plea bargain, it appears that no understanding was reached between the prosecution and the defence counsel that the

prosecution would defend the plea bargain to the end, including at the appeal stage (and such an understanding is an unlikely scenario in view of the stated policy of the prosecution and its duty to give a warning), and if the accused did indeed understand the ordinary meaning of the undertaking in the plea bargain and the status and role of the court that is sentencing him, then in appropriate cases, as we have explained at length in our deliberations above, the prosecution will be entitled, and possibly even obliged, to express reservations with regard to the plea bargain that it made and to present new arguments with regard to sentencing in the court of appeal, even if it did not give a warning.

Thus we see that a failure to warn the accused of the possibility that the prosecution will repudiate the plea bargain at the appeal stage is a significant defect and the prosecution will be liable to consider to what extent it violates its duty of fairness to the accused in the specific circumstances. In appropriate circumstances the prosecution is entitled to refrain from defending the plea bargain even in the absence of a warning, and this is also an aspect of its power to be released from contracts that it made for reasons of the public interest. In any case, the circumstance of not giving a warning to the accused will be added to the reasons that support defending the plea bargain, and will give them considerable extra weight, even though, as aforesaid, this circumstance on its own cannot decide the matter.

32. It is interesting in this regard to turn to the relevant law in the United States, which contains a certain approach that the Public Defender's Office cited in support of its arguments. We discussed the great difference between plea bargains as practised in out legal system and plea bargains as practised in the legal system of the United States in our opinion in CrimA 1958/98 *A v. State of Israel* [2], at pp. 614-616, 619-620. This difference makes it difficult to 'import' case law from the American legal system with regard to plea bargains, and in this regard see also our remarks in para. 27 *supra*. Notwithstanding, let us briefly consider the various approaches that exist in the American legal system.

In the United States it was customary, following the decision of the United States Supreme Court in *Santobello v. New York* [25], to examine plea bargains only within an ordinary contractual framework (see *Brooks v. United States* [26], where it was said that 'A plea bargain is, in law, just another contract'). As a part of this approach, the American courts held that the prosecution will be obliged to act in one way or another only if it expressly undertook to do so within the framework of the plea bargain. It was also held that plea bargains should be interpreted with ordinary contractual tools. Therefore, in cases where the prosecution made a plea bargain in the trial court and the plea bargain said nothing on the subject of the proceedings after sentencing, the prosecution regarded itself as free to argue against the plea bargain in the aforesaid later proceedings. The courts approved the change in the prosecution's position since they thought that in the absence of an express undertaking on the part of the prosecution to support the plea bargain even in later proceedings, there was no basis for imposing such an obligation on it (see *United States v. Fentress* [27], at p. 464: 'While the government must be held to the promises it made, it will not be bound to those it did not make'). This approach establishes the liability of the prosecution to the accused in proceedings after the sentence on a limited contractual basis of the terms stipulated between the parties.

Alongside this approach, there arose a broader approach in the American legal system, and this extends the scope of the prosecution's liability to the accused and restricts its freedom of operation to repudiate plea bargains that it made, because of fundamental considerations that fall outside the contractual framework. Echoes of this approach, which is expressed, *inter alia*, in an article that the Public Defender's Office attached to its closing arguments (D.F. Kaplan, 'Where Promises End: Prosecutional Adherence to Sentence Recommendation Commitments in Plea Bargains,' 52 *U. Chi. L. Rev.* (1985) 751) can be found in the judgment given in *United States v. Harvey* [28]. In that case, the Federal Court of Appeals for the Fourth Circuit discussed how, in examining plea bargains, additional considerations that are relevant to the issue of plea bargains should be taken into account, even if

they are not contractual ones. Among these considerations, the court mentioned, *inter alia*, the constitutional rights of the accused, the interest of maintaining public confidence in the government and the interest in the effectiveness of the law enforcement system. The court also said in *United States v. Harvey* [28] that because of these and other considerations, the prosecution ought to act in order to draft plea bargains in the best and clearest way possible, and that where there is a certain lack of clarity in the plea bargain, the responsibility for this rests with the prosecution. In later judgments, it was held that in a case of uncertainty and ambiguity in a plea bargain, it is possible to use the doctrine of 'interpretation against the drafter' in order to interpret the plea bargain (see, for example, *United States v. Massey* [29]; *United States v. Rivera* [30]). This approach has led some American courts to interpret plea bargains by means of contractual doctrines that severely curtail the discretion of the prosecution at the appeal stage. In our legal system there is no basis for adopting such strict rules. This is because the prosecution is a professional body that represents the public interest in the law enforcement process, and in our legal system it has broad discretion with regard to the matter of bringing persons to trial and in determining the sentencing policy; it is also because it is possible to examine the scope of the violation of the defendant's rights and his reliance interest and to give this the appropriate weight in the circumstances of each case. Therefore, there is a basis for allowing the prosecution discretion to formulate its position in each case in accordance with its circumstances and in accordance with the criteria that we have outlined above.

Examining the sentence in an appeal — the considerations of the court

33. Up to this point, we have discussed a wide variety of issues, all of which concern the factors that the prosecution should take into account when deciding its position in the appeal. We cannot end our deliberations without addressing in brief the considerations of the court of appeal when an appeal is brought before it by a defendant with regard to a sentence in which the trial court handed down a stricter sentence than the one agreed by the parties in the plea bargain.

According to the basic principle in our legal system, the court of appeal is also not bound, of course, by the plea bargain or by the prosecution's sentencing recommendation. In our legal system, the court cannot be exempted from its responsibility for sentencing and it must determine independently the proper sentence in the circumstances of the case. This was discussed by Justice Cheshin in *Levy v. State of Israel* [8]:

> '… The authority to hand down sentences to persons who have been found guilty in their trial is entrusted to the courts — to them and to no other. With this authority comes responsibility, for it is well known that there is no authority without responsibility, just as there is no responsibility without authority. Strict sentences that the courts hand down to offenders — and the same is true of lenient sentences — are determined by the actions of those offenders, for better or for worse, but the responsibility rests with the courts. The courts are not permitted to look sideways, to try and find another body besides themselves that will take upon itself the responsibility for the sentences that they hand down; the responsibility for sentencing cannot be shared by the court with others, not even with the public prosecution service that asks the courts to hand down one sentence or another, whether in general or in a specific case' (*ibid*. [8], at p. 171).

When it is about to decide an appeal filed by the accused, the court of appeal should examine the sentence that was handed down in accordance with the same criteria that were considered in the trial court. We discussed these criteria extensively in CrimA 1958/98 *A v. State of Israel* [2] and we will cite here some of the remarks that were uttered in that case:

> 'Within the framework of considering the sentence that is proposed, the court should address all the relevant sentencing considerations and examine whether the proposed sentence satisfies the proper balance between

them. To this end the court should examine the proper sentence in the circumstances of the case and look at it from the perspective that the prosecution has presented to it in the plea bargain that it made. In examining the plea bargain, the starting point is the severity of the sentence proposed, in view of the nature and seriousness of the offence and the circumstances in which it was committed. Like in every case of sentencing, the court considers the personal circumstances of the accused and the policy considerations of proper sentencing, and takes all of these into account. The court cannot decide if there is a proper balance between the public interest and the benefit that was given to the accused without considering what would have been the proper sentence for the accused had there been no plea bargain, and what degree of leniency was shown to him as a result of the plea bargain. In order to assess the degree of leniency the court should consider, to the best of its ability and in view of the limitations arising from the facts that are before it, the extent of the waiver that the accused made in view of the likelihood of his being convicted or acquitted, had it not been for the plea bargain…

The court will, of course, examine the specific considerations of the prosecution in the circumstances of the particular case. Thus, for example, it will consider the difficulties that were anticipated in holding the trial, including the number of witnesses, the need to obtain testimony from witnesses who are not in Israel, consideration for the victim of the offence and the need to spare him the ordeal of testifying and being cross-examined. The court should also consider the public interest in the accused pleading guilty and taking responsibility for his actions. It should also take into account the public interest in the broad sense — the saving of judicial time and prosecution resources and the interest in effective use of the resources at the disposal of

> all the law enforcement authorities. *Inter alia*, the court should be aware of the need to obtain additional evidence to bring additional offenders to trial, whether in that case or in other cases that are unrelated to the case under consideration.
>
> In addition to all of these, it should be added that there is a significant consideration that the court should take into account before it decides whether to accept or reject a plea bargain, and this is the expectations of the accused. An accused who pleads guilty on the basis of a plea bargain has waived his right to be tried; he has waived the right to cross-examine the prosecution witnesses, and he has also waived the chance of an acquittal…
>
> Notwithstanding, this consideration also should be examined by the court in view of the other factors in the case before it and within the framework of considering the proper correlation between the benefit given to the accused in the circumstances of the case and the public interest in both the narrow and broad senses' (*ibid*. [2], at pp. 608-609).

These criteria are also relevant, of course, in the appeal stage, and therefore in order to decide the defendant's appeal, the court of appeal is required to examine whether the balancing formula is satisfied in the plea bargain that was examined by the trial court.

In addition, just as the prosecution has to contend with a new factor that requires its consideration at the appeal stage, namely the sentence of the trial court, so too must the court of appeal contend with this new factor. Therefore, in an appeal against a sentence that rejected a plea bargain, the court of appeal is also required to examine the reasons why the trial court rejected the plea bargain, as they are set out in the sentence, and to decide between the weight of the plea bargain that was made and the criticism levelled at it in the sentence that departed from the plea bargain. The court of appeal also has before it the revised position of the prosecution, whether it defends the plea bargain or not. The court of appeal should examine,

inter alia, whether in the circumstances of the case there really was a basis for handing down a stricter sentence than the one that was agreed in the plea bargain and whether the trial court was justified in its reasons for departing from the plea bargain. Within the framework of this examination, the court of appeal should give weight to the position of the prosecution before it; it need not be said that the more that the considerations of the prosecution are decided in accordance with the criteria that we have set out above, the greater will be the weight of its arguments. Weight will, of course, be attached to the expectations of the accused, the appellant, and at the end of the proceeding the court will determine the correct balance between the considerations that we have discussed in our deliberations above.

Summary

34. Let us go back and summarize by saying that, as a rule, the prosecution should defend its position as determined in the plea bargain, even in the court of appeal. When the court that handed down the sentence to the accused held that the plea bargain does not satisfy the 'balancing approach' and for this reason it is not accepting it, or, in other words, when the court levels criticism at the plea bargain and hands down a sentence that is stricter than the one proposed in it, the prosecution should reconsider its position in the appeal. In appropriate circumstances the prosecution may decide not to defend the plea bargain as it was made, and it may express reservations with regard to it. It will do this subject to the explanation that it will give the court of appeal with regard to the reasons for making the plea bargain in the first place and with regard to the reasons why it is not defending it at the appeal stage. Thus we see that after the plea bargain has passed through the fiery furnace of the trial court, the prosecution is entitled, and sometimes obliged, in the appropriate circumstances, to make new arguments with regard to sentencing by supporting the sentence that was handed down, or even another sentence, as it thinks fit.

We should further point out that, according to the guidelines of the prosecution itself, it is proper, when making the plea bargain, for the prosecutor who is drafting the plea bargain to make it clear to the

accused, or to his defence counsel, that he is unable to give any undertaking *ab initio* with regard to the prosecution's position in the appeal, if the court hands down a stricter sentence than the one that has been agreed. If, for some reason, the prosecution does not act *ab initio* in order to warn the accused of the possibility that it will adopt a different position in an appeal, this will not compel it to support the original plea bargain, although the absence of a warning is a reason of significant weight that the prosecution will have to consider before it changes the position that it adopted in the plea bargain.

The prosecution's position in an appeal is subject to the guiding principles of fairness to the accused and giving appropriate expression to the public interest in the broad sense, including the interest of upholding and respecting plea bargains.

The prosecution's position is, as aforesaid, merely one of the factors that the court takes into account, even though it is a factor of great weight. The court of appeal will examine the circumstances of the case before it. It will consider whether, according to the balancing test, the sentence is appropriate in view of all the relevant factors. Finally it will decide whether to accept the plea bargain, uphold the sentence, or, perhaps, hand down another sentence that is appropriate in the circumstances of the appeal before it.

From general principles to the specific case

35. In this part of our deliberations, we must address the state's request to overturn the judgment that is the subject of the further hearing and to determine that the sentences of the respondents should be as the District Court decided. According to the prosecution, the sentences that were handed down to the respondents in the appeal should be overturned and the original sentences handed down by the District Courts, after the plea bargains between the parties were rejected, should be reinstated. The prosecution is not ignorant of the case law rule that the purpose of a further hearing is to determine case law on a fundamental legal issue, but it is of the opinion that if its position is accepted, this should be given expression in overturning the judgment in the appeal, because it accepted plea bargains that are unworthy. On the other hand, counsel for the

respondents argued that whatever the decision on the fundamental question, it would be unjust to overturn the decision that was given in the appeal and to make the respondents' sentences stricter within the framework of the further hearing.

After studying the arguments of the parties, we see no reason to intervene in the sentencing outcome of the appeals under consideration. We will give details of our position in this respect below.

CrimA 7132/02 Peretz v. State of Israel

36. It will be remembered that in this case the first and second respondents were charged with rape while taking advantage of a state of unconsciousness and in the presence of another. Within the framework of the plea bargain that was made between the parties, the facts set out in the indictment were amended and the offence in the indictment was changed to one of an indecent act. It should be noted that this change was made, *inter alia*, because of a difficulty with regard to the evidence in the case. In addition to the change of the offence in the indictment, an agreement was reached with regard to the sentence and pursuant to this agreement the prosecution asked the court to impose a sentence of 18 months imprisonment whereas counsel for the defence asked the court to hand down only six months imprisonment that would be served by way of community service. In support of the plea bargain, counsel for the prosecution raised several arguments, among which he argued that the prosecution arrived at the plea bargain in view of the complainant's position that she had forgiven the respondents and was not interested in a trial being held. As aforesaid, the plea bargain that was presented by the parties was rejected in the District Court. The District Court was of the opinion that the prosecution did not properly balance the various considerations and that the sentence proposed in the plea bargain was inconsistent with the seriousness of the offence. The court was especially critical of the fact that the prosecution took into account the complainant's position, and it thought that too much weight had been given to her position. The District Court therefore handed down a sentence of five years imprisonment to each of the respondents, of

which three and a half years would actually be served. Following this sentence, the respondents appealed to the Supreme Court, and in the hearing of the appeal the state gave notice that it did not support the plea bargain that had been made with the respondents in the District Court. From the state's arguments in the appeal, it appears that it was of the opinion that the prosecution in the District Court balanced the various considerations in an erroneous manner, and therefore the sentence that was proposed within the framework of the plea bargain did not satisfy the balancing formula established in CrimA 1958/98 *A v. State of Israel* [2]. According to the state, there was indeed a difficulty in the evidence and there were also other reasons that supported the plea bargain in the case — such as the fact that the respondents did not have any previous convictions, the fact that the guilty pleas made it unnecessary to have the complainant testify and the complainant's position that she forgave the respondents — but notwithstanding these, the sentence proposed was too lenient and was incapable of satisfying the balancing formula. The state therefore chose in the appeal to defend the sentence that rejected the plea bargain and repudiated the position that it presented in the District Court. As stated above, this court allowed the respondents' appeal and sentence them to what the prosecution had proposed within the framework of the plea bargain. Since the panel that heard the appeal saw fit to approve the sentence that was agreed in the plea bargain, we see no basis for our intervention and for changing the sentence within the framework of this hearing.

37. When we now examine the state's position in the appeal, we are of the opinion that it questionable whether there was sufficient basis for the state to repudiate the position that it presented in the plea bargain. Indeed, the acts of the respondents were very serious and they were especially serious in view of the fact that they committed the offences jointly and even filmed themselves during the act. In view of this, it would appear that the sentence that was agreed in the plea bargain was lenient. Notwithstanding, it was possible, in the circumstances of this special case, to accept the sentence that had been agreed. The respondents were, at the time of the act, approximately 22 years old, with no previous convictions. The

respondents pleaded guilty to their actions in the court and expressed sincere and profound remorse. The probation officer's reports that were filed with regard to the respondents were positive, and they state that a prolonged period of imprisonment may lead to a serious deterioration in the respondents' condition and make it harder to rehabilitate them in the future. To this it should be added that the respondents pleaded guilty in the initial stages of the trial and thereby saved valuable judicial time. More important still, in view of the fact that the respondents pleaded guilty, the complainant was spared the ordeal of testifying in court and she was also spared cross-examination. In addition, the complainant's position with regard to the plea bargain, which was expressed pursuant to the provisions of s. 17 of the Rights of Victims of Crime Law, 5761-2001, was positive and counsel for the prosecution told the District Court that the complainant forgave the respondents and was not interested in a trial being held.

As we have said, the rule that is also accepted by the prosecution is that the plea bargain should be defended even at the appeal stage, except in rare cases. It is questionable whether the present case is one of those rare cases, even if the sentence provided in the plea bargain is one that showed a considerable degree of leniency to the respondents. Among the other considerations, there was a basis for giving weight to the respondents' expectation that they would be sentenced to an actual prison sentence that would not exceed eighteen months, and there was a basis for giving weight to the public interest in safeguarding the institution of plea bargains. To the aforesaid it should be added that in our case the respondents were not given a warning *ab initio* with regard to the prosecution's right and ability to repudiate the plea bargain in the court of appeal. The absence of a warning in circumstances where it is not possible to determine that the respondents were aware of this possibility is a significant factor that combines with the other reasons that justify defending the plea bargain, and it gives them significant weight. Thus we see that even if in the state's opinion it made an error in its discretion in the trial court, we have not been persuaded that this error is one of those

kinds of error that justifies a repudiation of the position that was presented within the framework of the plea bargain.

CrimA 7418/02 Mizrahi v. State of Israel

38. In the case that is the subject of this criminal appeal, the third respondent was charged with rape and committing an act of sodomy on a girl who suffers from a mild retardation. According to the indictment, the third respondent had intercourse with the complainant on three occasions, after telling her that he would marry her, while he was aware of the retardation from which the complainant suffered and while he took advantage of this circumstance to obtain her consent. When the trial began, the parties notified the court that they had reached a plea bargain and the respondent pleaded guilty to the offences that were attributed to him. The parties gave notice that they had reached an agreement with regard to the sentence, and that they were asking the court to hand down to the respondent a sentence of six months imprisonment that would be served by way of community service, as well as a suspended sentence. While presenting the arguments in the District Court, counsel for the prosecution said that although it appeared, *prima facie*, that there was a significant disparity between the acts of which the respondent was accused and the sentence that was ultimately proposed, in the special circumstances of the case there was a basis for adopting the plea bargain. Counsel for the accused explained that the retardation from which the complainant suffered was a very slight one and the complainant had gone to the police after she understood that the respondent would not honour his promise to marry her. Counsel for the prosecution discussed the considerable reservations of the District Attorney's Office as to whether it was proper to file an indictment in this case, and that it was finally decided to file an indictment in the belief that there was no basis in this case to ask for a significant prison sentence. Counsel for the prosecution also pointed out that there was also a certain problem with the evidence in the case because from tests that were conducted on the complainant it transpired that she had a tendency to fantasize and exaggerate. Counsel for both parties discussed how the seriousness of the case mainly lay in the manner in which the complainant's consent was

obtained to commit the acts and that the main harm suffered by the complainant was her feeling that she had been deceived by false promises that the respondent had used to seduce her. These arguments were also authenticated in a report about the victim that was filed in the court. There were different opinions in the District Court with regard to the plea bargain. Justice Y. Tzaban thought that in this case there was no reason to depart from the plea bargain, in view of the difficulties facing the prosecution in the case, the fact that the offence was on the lowest level from the viewpoint of its severity and the general policy of respecting plea bargains. But Justice Tzaban was in the minority. The two other justices, Justice M. Ravid and Justice Y. Hecht, were of the opinion that in the circumstances of this case, there were grounds for handing down to the respondent a custodial sentence that would be served behind bars, and notwithstanding the reasons supporting the plea bargain, it should not be accepted. Therefore the court, in the majority opinion, imposed a sentence of twelve months imprisonment, as well as a suspended sentence of another twelve months. As aforesaid, the respondent appealed the sentence to the Supreme Court, and in the appeal hearing the state presented a position that defended the sentence. According to the prosecution, after re-examining the evidence in the case, the prosecution came to the conclusion that the plea bargain was based on erroneous considerations, and that the sentence handed down by the District Court to the third respondent was the proper sentence. The third respondent's appeal was allowed by this court, which sentenced him in accordance with what had been agreed in the plea bargain. In the case of the third respondent also we saw no reason to intervene, within the framework of this hearing, in the sentence that was handed down by this court when his appeal was allowed.

39. With regard to the prosecution's position in the appeal, when we examine all the circumstances, it is possible to understand the prosecution's reservations with regard to defending the plea bargain, since it is a plea bargain that treated the respondent with considerable leniency. Notwithstanding, in the present case the prosecution presented the District Court with reasons that supported the plea

bargain, which arose both from the evidential aspect and the normative aspect of the plea bargain. The plea bargain was made in this case at the beginning of the trial, which saved time and made it unnecessary to hear the complainant's testimony. When we examine the circumstances of the case according to the criteria that we discussed above, it appears that in the circumstances of the case there was a basis for taking into account the respondent's expectation in accordance with the plea bargain. We should also add that even if there was a basis to the District Court's criticism with regard to the plea bargain, it would appear that the scope of the error in the prosecution's discretion that the District Court discussed was not so extensive, and in the absence of special reasons for this, there was a basis for giving weight to the interests that support the defence of plea bargains even in the court of appeal. To the aforesaid we should add that in this case too the respondent was not warned *ab initio* of the prosecution's ability to repudiate its original position in the court of appeal and in this case too the aforesaid circumstances should be given significant weight within the framework of the considerations for defending the plea bargain.

40. Thus we see that even though the position presented by the state in the appeal with regard to the respondents' sentences was understandable in view of the sentences that were given, it is doubtful whether it was consistent with the criteria that we have discussed in our deliberations. We should remember that the cases are difficult and borderline ones, and that the aforesaid criteria were not known to the prosecution when it determined its position with regard to the sentence in the appeals under discussion.

Therefore the respondents' sentences, as determined in the judgment which is the subject of this further hearing, will remain unchanged. With regard to the third respondent, whose sentence was stayed, the Director of Community Service shall submit an opinion within thirty days, and when that is received we will complete the judgment in his case.

Vice-President Emeritus E. Mazza

Vice-President Emeritus E. Mazza

I agree with the judgment of my colleague Justice Beinisch.

As a rule, unless there is an express stipulation to the contrary within the framework of the plea bargain that it made with the accused, the prosecution is also liable to defend the plea bargain before the court of appeal. There are rare cases that are exceptions to this rule, in which the prosecution realized after the event that it erred in agreeing to the plea bargain, whether as a result of discovering new facts of which it was unaware when it agreed to the plea bargain, or because the reasoning in the judgment of the trial court, in refusing to accept the recommendation with regard to the sentence that should be handed down to the accused, persuaded it that its consent to the plea bargain was mistaken from the outset. But when justifying the change in its position, the prosecution must give details, within the framework of its arguments before the court of appeal, of the facts and considerations that led it to reach the conclusion that it erred in agreeing to the plea bargain (*Markovitz v. State of Israel* [5], at pp. 57-58, and *Shiloah v. State of Israel* [6], at p. 682). In any case, the mere fact that the trial court sentenced the court to a stricter sentence that it was asked to do by the prosecution, on the basis of the plea bargain, cannot release the prosecution from the obligations that it took upon itself towards the accused within the framework of the plea bargain, since in essence these obligations are no different from any other contractual or administrative undertaking that an authority takes upon itself vis-à-vis the individual, from which it can be released only when there are essential public needs (O. Gazal, 'The Prosecution's Position in an Appeal against the Rejection of a Plea Bargain,' 1 *Din uDevarim* (2005) 507). From this it follows *prima facie* that the prosecution would do well in plea bargains that it makes with defendants to make sure to include an express term that restricts its obligations to act on the basis of the plea bargain to the proceeding that is taking place before the trial court. Notwithstanding, I think it should be emphasized that although the inclusion of such a term in the plea bargain will allow the prosecution to reconsider the position that it will adopt before the court of appeal, without it being dependent on the existence of circumstances that can justify its being released from its contractual

or administrative obligation under the plea bargain, nonetheless even the inclusion of such a term cannot exempt the prosecution, in its arguments before the court of appeal, from its duty to justify any change in its position with logical and proper reasons.

In principle (although not in all its details and particulars) the opinion of Justice Beinisch is consistent with my aforesaid approach. It is also consistent with the criteria that were set out recently in our unanimous judgment in CrimA 1958/98 *A v. State of Israel* [2]. Like my esteemed colleague, I too am of the opinion that in the cases that are the subject of this further hearing the prosecution did not established a solid foundation for its repudiation at the appeal stage of the plea bargains that it made with the respondents before their cases were heard in the trial court. For this reason I supported, at the appeal stage, allowing the respondents' appeals, and for this reason I agree to the denial of the state's petition that is before us.

Vice-President M. Cheshin

I agree with the opinion of my colleague, Justice Beinisch.

2. There are three 'parties' before us, and each of the three is one of the three vertices of a triangle. The three vertices are the Supreme Court, the prosecution (the state) and an accused who has been convicted and it now litigating before the Supreme Court. Each of the three sides of the triangle, which lies between two vertices, represents a relationship between the two vertices at its ends, and the three relationships are the relationship between the prosecution and the accused, the relationship between the court and the prosecution and the relationship between the court and the accused. These three relationships are not of the same standing. The third relationship, the relationship between the court and the accused, is the main and central one, and the two other relationships are subservient and defer to it. These two other relationships are secondary; the relationship between the prosecution and the accused and the relationship between the court and the prosecution merely provide the raw material for the main relationship between the court and the accused, and at the end of the proceedings in this relationship the court sentences the

accused. Let us not misunderstand; when we say that the two secondary relationships merely provide the raw material for the third relationship, we do not intend to detract from their importance; without those two relationships the third relationship would not come into existence, and their existence is a prerequisite for the existence of the third relationship. Moreover, if it is said that during the appeal proceedings the prosecution is not permitted to change its opinion with regard to a plea bargain that it made — even where the trial court decided not to accept the plea bargain that was made — then the third relationship may never come into being. But we should remember that ultimately it is the court that decides the defendant's case, whether strictly or leniently, and where the law indicates a strict sentence, that is what prevails. The *authority and power* to hand down sentences — and this is the main point — is the prerogative of the court; the *responsibility* for sentencing rests on the court's shoulders; and the court's decision is the final and decisive word on the subject. It follows from this that the prosecution's position with regard to sentencing, no matter how important, is merely one of the factor that should be considered by the court; it is without doubt an important and central factor, but in appropriate cases there may be other important considerations that outweigh it.

3. In CrimA 1958/98 *A v. State of Israel* [2], the Supreme Court discussed, in the opinion of Justice Beinisch, the considerations that should guide the court when a plea bargain is presented to it, and the relative weight that ought to be given to each of the considerations in accordance with facts of the specific case. The court of appeal should also follow this 'sentencing guide,' but in addition to the considerations that were before the trial court there are also the considerations that arise from the special event that the plea bargain was not adopted by the trial court. The same is true from the viewpoint of the three vertices: the disappointed expectation of the accused, the various considerations of the prosecution in the trial court and the court of appeal and the reasons why the trial court refused to adopt the plea bargain. My colleague Justice Beinisch discussed these considerations at length, and I will not say more. But I shall not tire of recalling that:

> 'The authority to hand down sentences to persons who have been found guilty in their trial is entrusted to the courts — to them and to no other. With this authority comes responsibility, for it is well known that there is no authority without responsibility, just as there is no responsibility without authority' (*Levy v. State of Israel* [8], at p. 171).

President A. Barak

I agree with the opinion of my colleague Justice Beinisch and the remarks of my colleague Vice-President M. Cheshin.

1. Like Justice D. Beinisch, I too am of the opinion that the plea bargain is an undertaking of the prosecution to present a lenient sentencing recommendation to the trial court. In my opinion too, as a rule, the prosecution also should honour in the court of appeal a plea bargain that it made in the trial court. Public confidence in the prosecution authorities dictates, as a rule, a uniform and well-formulated institutional position. But there may be exceptions to this rule. In practice, there is no dispute between the parties that no sweeping determination should be made to the effect that the prosecution is always committed to defend the plea bargain in the court of appeal. The sentence, which examines whether the plea bargain should be allowed to stand, according to the criteria that were outlined in CrimA 1958/98 *A v. State of Israel* [2], is an additional factor that confronts the prosecution, and it obliges it to re-examine its position. I agree with the various factors that should be considered by the prosecution when deciding its position before the court of appeal, as discussed in full by Justice D. Beinisch.

2. I agree that criticism by the trial court with regard to the plea bargain does not necessarily require the prosecution to change its position, but it does require a re-examination of all the considerations and the balance between them. At the appeal stage, the court of appeal is required to examine the judgment that rejected the plea bargain. The court of appeal should examine whether the trial court ought to have adopted the plea bargain that was presented to it by the

prosecution and the defence. When the trial court has rejected the plea bargain, the court of appeal should examine whether according to the 'balancing test' it should have adopted the plea bargain that was made (see, for example, CrimA 3694/00 *Mordoff v. State of Israel* [14]; CrimA 4886/02 *Glisko v. State of Israel* [15]). The prosecution, as a party in the appeal proceedings, cannot ignore the judgment that is the subject of the appeal. It is obliged to address it objectively, and consider its position in the appeal accordingly. We are not merely speaking of showing 'respect' to the court. This obligation is required by the very nature of an appeal, which compels the litigants to formulate a revised position with regard to the judgment that is the subject of the appeal. The prosecution is therefore liable to confront the criticism in the sentence directly. The criticism usually requires a re-examination of its considerations and in exceptional cases may even lead to a change in the original position. The prosecution's position has no real value if it is entirely based on sticking to the plea bargain for formal reasons. The prosecution should contend objectively with the sentence that did not adopt the plea bargain (on the grounds that it does not satisfy the 'balancing test'). The sentence is not merely a new circumstance. It is the decision that is the subject of the criminal appeal. It is the starting point for exercising judicial scrutiny in the appeal.

3. As Justice Beinisch has pointed out, the prosecution's position is merely one factor in the considerations of the court, which scrutinizes the sentence of the trial court. Within the framework of the appeal, the court should consider two separate questions. First, was there was a basis for departing from the plea bargain? Second, was there was a basis for handing down the sentence that was *de facto* given to the accused? If the courts finds the answer to the first question to be no, the court should allow the appeal and hand down a sentence that is consistent with the plea bargain. If it finds that only the answer to the second question is no, the court should hand down a sentence that is appropriate in the circumstances (by taking into account the criteria determined in CrimA 1958/98 *A v. State of Israel* [2]).

4. The main question that comes therefore before the court of appeal is whether the trial court rightly decided that the plea bargain did not satisfy the 'balancing test.' The 'balancing test' addresses the question whether a balance was maintained between the benefit that the plea bargain gives to the accused and the benefit that the plea bargain gives to the public interest. The balancing process is complex. The balancing process is based on conflicting considerations. On the one hand there are the advantages inherent in the plea bargain, including the avoidance of difficulties that were anticipated in conducting a trial, consideration for the victim of the offence, the guilty plea of the accused and his taking responsibility for his acts, and the savings in judicial time and the prosecution's resources. On the other hand, the court should consider the degree of leniency that was shown to the accused as a result of the plea bargain, taking into account the chances of obtaining a conviction without the plea bargain, against the background of the concern relating to public confidence in the law enforcement system and the public interest in having an appropriate sentencing policy. The question is whether there is a fitting balance between the advantages in the plea bargain (for the public and the accused) and the proper sentencing policy.

5. The prosecution, which subjects the plea bargain to the critical 'balancing test,' acts as an independent administrative authority. The prosecution assesses the probable results of the trial without the accused pleading guilty, the chances of obtaining a conviction, and it considers whether the court will regard the evidence as credible. The prosecution relies on its knowledge, professionalism and experience that assist it in assessing the results of conducting a full trial without a guilty plea and in adopting a position with regard to the plea bargain. It is a question of a factual and legal assessment. Naturally it is possibly to reach different conclusions. The balancing test does not dictate only one result. The criteria determined in CrimA 1958/98 *A v. State of Israel* [2] create, as a rule, a relatively broad sentencing margin from the viewpoint of the prosecution authorities. The prosecution is an administrative authority that exercises executive power. In exercising its power it acts independently and it has broad discretion in the administrative

sphere. It should be noted that the court that has discretion whether to adopt the plea bargain or not. When the court does not adopt the prosecution's position, this does not indicate, in itself, that there was a serious defect in the prosecution's conduct. The prosecution authorities and the court are separate institutions. The considerations are not necessarily the same. The court that exercises independent discretion in handing down the sentence may depart from the plea bargain, even when the prosecution's conduct fell within the margin of reasonableness in the administrative sphere.

6. Indeed, the court does not necessarily adopt the balance made by the prosecution between the various considerations that underlie the plea bargain. From the perspective of the rules of evidence, the court usually depends upon the prosecution. It does not know the evidence and certainly does not examine it. This is not the case with regard to the other considerations, such as the normative and institutional perspectives, sentencing policy and the public interest. The duty of fairness to the accused does not apply with the same intensity to the court. The court naturally takes into account the expectations of the accused, and it considers, as a part of the public interest, the importance of upholding the institution of plea bargains. But it does not itself have any obligation to the accused either in the contractual sphere or in the administrative sphere. All of this may result in the sentence departing from the plea bargain, even when the prosecution did not act unreasonably as an administrative authority. Similarly, at the appeal stage the prosecution may think that the plea bargain did not satisfy the balancing test and the trial court rightly departed from it, whereas the court of appeal may decide otherwise.

7. It need not be said that the criminal appeal concerns appellate judicial review of the sentence and not administrative judicial review of the prosecution. An examination of the prosecution's position is a tangential question that is merely one aspect of the question whether the court of appeal should change the sentence. The significance of the determination that there was a defect in the prosecution's conduct that seriously undermines its position is that the prosecution's position will be ignored by the court of appeal. The court will only determine that the prosecution's discretion is so flawed that it should

be ignored when the prosecution's position is unreasonable in the extreme and therefore defective under the rules of administrative discretion (cf. HCJ 935/89 *Ganor v. Attorney-General* [16]). There is a broad margin of reasonableness with regard to the prosecution's conduct. If the prosecution's position is a possible one that falls within the margin of reasonableness, there is no basis for setting it aside under the doctrine of administrative discretion and there is no basis for ignoring it in the court of appeal. The court ought to show restraint when it considers undermining the legitimacy of the prosecution's position and determining that the prosecution acted improperly. In so far as the prosecution's position is reasonable, the court should take it into account, even though it naturally is not obliged to adopt it. The mere fact that the court's decision is ultimately different from the prosecution's position does not indicate that the prosecution acted with extreme unreasonableness or with any significant impropriety.

8. With regard to the second question before the court of appeal — whether the sentence handed down was excessive — it should be remembered that the court of appeal does not tend to intervene in the considerations and conclusions of the trial court, unless the sentence departs significantly from the sentence that should have been imposed. Even when the sentence is a strict one, the court of appeal does not intervene if the sentence is not excessive (CrimA 326/99 *Abud v. State of Israel* [17]):

> 'It is well known that the court of appeal does not put itself in the trial court's place with regard to the sentence; its intervention in this regard is limited to circumstances in which the trial court made a mistake or the sentence that it handed down departs in the extreme from the sentences that are usually given in similar circumstances' (CrimA 1242/97 *Greenberg v. State of Israel* [18]).

9. Finally, I agree with my colleague Justice Beinisch that the respondents' sentences, as determined in the appeal that is the subject of the further hearing, should remain unchanged. This is a further hearing, which does not focus on the specific case that was decided in

the Supreme Court, but on the general rule that was determined. Therefore there is no basis at this procedural stage, and in view of the time that has passed and the continuing suffering to the respondents, to change the outcome in the sentence handed down in the appeal. Were I to consider the cases on their merits, I am not persuaded that the plea bargains in the two cases satisfied the 'balancing test,' especially in so far as CrimA 7418/02 *Mizrahi v. State of Israel* [1] is concerned.

Justice Emeritus J. Türkel

1. I agree with the opinion of my esteemed colleague, Justice D. Beinisch, and with the remarks of my esteemed colleagues the President, vice-President Emeritus E. Mazza and Vice-President M. Cheshin.

In her opinion Justice D. Beinisch discussed in detail the reasons that justify the prosecution supporting plea bargains in the hearing of an appeal and also the reasons that justify the prosecution changing its position. Among the reasons for supporting the plea bargain, she mentioned the prosecution's duty of fairness to the accused. I will add a few remarks with regard to the importance of this duty, which is derived, in my opinion, from the duty of executive authorities to adopt moral and just criteria in their relationship with the public as a whole and individual members of the public and which is based on values such as good faith, fairness and integrity.

2. Our rabbis, of blessed memory, imposed on the individual an obligation to conduct business faithfully and to keep promises, and it would appear that they made these demands more in the moral and ethical sphere than in the sphere of legal obligations. But, as stated above, these requirements apply not only to the relationship between one person and another but also to the relationship between government authorities or persons holding office in those authorities on the one hand and the public and members of the public on the other (*Kogen v. Chief Military Prosecutor* [13], at p. 96 {[redacted]}). In my opinion, there is a similarity between this relationship and the relationship between parties to a contract, and we should take note of the tendency of the courts in the United States to examine this relationship from the perspective of contractual relations, even though, of course, the

analogy is not a perfect one (see the reservation of Justice D. Beinisch in para. 32 of her opinion).

With regard to this duty of the state it has been said:

> 'The state, through those who act on its behalf, is a trustee of the public, and the public interest and public property have been deposited in its care for the purpose of using them for the benefit of the public as a whole… This special status is what imposes on the state the duty to act reasonably, honestly, with integrity and in good faith. The state may not discriminate, act arbitrarily or in bad faith or allow itself to have a conflict of interests. It should act in accordance with the rules of natural justice. In short, it should act fairly' (*per* Justice A. Barak in HCJ 840/79 *Israel Contractors and Builders Centre v. Government of Israel* [19], at pp. 745-746).

It has also been said that:

> 'Government authorities have the duty to respect agreements that they have signed… The duty of the authority to carry out its undertakings and promises derives, therefore, from public policy… It is also required by its general duty as a government body to act fairly and reasonably' (*per* Justice T. Or in *Kogen v. Chief Military Prosecutor* [13], at p. 78 {[redacted]}).

And elsewhere:

> 'The duty of fairness that binds an authority in its dealings with the citizen by virtue of public law precedes, and is broader and stricter than, the duty of good faith arising from the law of contracts, and it applies to the authority in the whole range of its activities both in the field of private law and in the field of public law… The authority is therefore required to exercise a degree of fairness in its contractual relationship with the individual, which is greater than what is expected of a private party to a contract' (*per* Justice A. Procaccia, in CA 6518/98 *Hod Aviv Ltd v. Israel Land Administration* [20], at pp. 45-46; see also HCJ 164/97 *Conterm Ltd v. Minister of Finance* [21], at pp. 316-319 {[redacted]}; CA 3541/98 *Di Veroli-Siani*

Engineering (1990) Ltd v. Israel Land Administration [22], at p. 153; D. Barak, *The Contractual Liability of Administrative Authorities* (1991), at pp. 57-62; G. Shalev, *The Law of Contracts* (second edition, 1995), at pp. 660-661; G. Shalev, *Contracts and Tenders of the Public Authority* (1999), at pp. 42-44, 118-119).

3. We should be watchful to ensure the observance of these duties on the part of government authorities. Let us not forget that the safeguarding of moral criteria and the values of good faith, fairness and integrity — even at the price of defending a plea bargain that the court rejected — makes society stronger and also reinforces the confidence that the public has in government authorities.

Justice E. Rivlin

I agree with the opinion of my colleague, Justice D. Beinisch, and with the remarks of my colleagues, President Barak, Vice-President E. Mazza, Vice-President M. Cheshin and Justice J. Türkel.

Justice A. Procaccia

I agree with the opinion of my colleague, Justice D. Beinisch.

Justice E.E. Levy

I agree with the opinion of my colleague, Justice D. Beinisch.

Justice A. Grunis

1. My approach is different from the approach of my colleagues. Even though I agree that the prosecution is not absolutely bound by the plea bargain that it made when the problem arises in the court of appeal, in my opinion it is only in very exceptional cases that it should be entitled to repudiate its consent. This is especially true when the plea bargain did not include a warning in this regard, namely that the prosecution is not obliged to support the plea bargain before the court of appeal. The main point in my

opinion is that in those rare cases where the prosecution before the court of appeal supports a sentence that departs from the plea bargain, the accused (the appellant) should be allowed to retract his guilty plea.

2. The premise on which my approach is based has its origins in the inherent disparity of forces between the state, which is the prosecutor in the criminal proceeding, and the accused. The forces of the state are formidable and its resources are immense. The police and the prosecution authorities have many comprehensive powers for the purpose of enforcing the criminal law. On the other side is the accused, who is sometimes not represented at all. Admittedly, in cases of relatively serious offences the accused, if he has limited means, can avail himself of the services of the Public Defender's Office (see the Public Defender's Office Law, 5756-1995). But it is no secret that the resources available to the Public Defender's Office, for example for the purposes of obtaining an expert opinion, are limited and certainly cannot be compared in any way to the immense resources available to the prosecution. Various arrangements within the framework of the rules of criminal procedure are intended to balance, even if only to a small degree, the basic inequality between the parties involved in the criminal proceeding — the state on the one hand and the accused on the other. Thus, for example, the prosecutor is obliged to allow the accused and his defence counsel to inspect the investigation material relating to the indictment in the case of an offence that is a serious misdemeanour or a felony (s. 74 of the Criminal Procedure Law [Consolidated Version], 5742-1982). By contrast, the prosecution has no reciprocal right to inspect in advance the evidence that the accused has assembled and that he intends to submit (except in the case of an expert opinion: s. 83 of the Criminal Procedure Law [Consolidated Version], 5742-1982). Therefore, when we examine issues in the field of criminal procedure and the rules of evidence we should be aware and mindful at all times of the disparity of forces between the two parties. We ought to be so even when we are examining the issue of plea bargains and the question whether and to what extent the prosecution is committed to a plea bargain that it made with the accused.

3. The institution of plea bargains exists in our legal system and in similar legal systems. There are those who forcefully and absolutely oppose this institution (see, for example, A.W. Alschuler, 'The Changing Plea Bargaining Debate,' 69 *Cal L. Rev.* (1981) 652). This is not the place to

examine the question whether the existence of this institution is justified. One thing is clear: were plea bargains not to be made between the prosecution and the defence, the law enforcement system would collapse. A significant number of criminal cases that are filed in the courts in Israel and in other countries end with a plea bargain and without holding a full trial, with all that this involves (see CrimA 1958/98 *A v. State of Israel* [2], at p. 588). The considerations that lead the prosecution to agree to a plea bargain are, *inter alia*, the following: the knowledge that it is not possible *de facto* to hold a full trial from beginning to end in each case because of the workload of the courts; a preference that the criminal proceeding should end within a short time to a protracted trial that will end a long time after the offence was committed; problems in the evidence, i.e., the possibility that ultimately the prosecution will not succeed in discharging the burden of proof; a desire to refrain from having certain witnesses testify because of the additional trauma that is likely to be caused to them by testifying (and for the other advantages inherent in plea bargains from the viewpoint of the state and the public interest, see CrimA 1958/98 *A v. State of Israel* [2], at pp. 590 *et seq.*). From the viewpoint of the accused, the plea bargain has one major advantage, namely that the sentence that will be handed down will be more lenient that the one he can expect if he is convicted in a trial that is held in the conventional manner (see CrimA 1958/98 *A v. State of Israel* [2], at p. 589). Naturally, in each specific case the relative weight of the considerations that lead to the making of a plea bargain varies, especially for the prosecution. The plea bargain includes a very significant element from the viewpoint of the accused, since the agreement to the plea bargain includes a duty to plead guilty to the facts in the agreed indictment and thereby the accused automatically waives the possibility that a full trial will end in his acquittal. It is therefore clear that both parties involved in reaching the plea bargain have an interest in the criminal proceeding ending after a short proceeding. The court is not, of course, a party to the plea bargain, and therefore the agreement does not bind it, nor is it compelled to impose the agreed sentence (whether it is a plea bargain that stipulates a specific sentence or it is a plea bargain that defines a lower and upper limit for sentencing). Notwithstanding, we cannot ignore the fact that the accused has a reasonable expectation that the court will not depart from the agreed sentence and in the great majority of cases he is not disappointed in this expectation. Indeed, in the plea bargain

itself the accused should already be warned that the court is not bound by the plea bargain. Moreover, the rule is that the court should warn the accused that it is not bound by the plea bargain. Therefore, if we examine the plea bargain from a contractual perspective, we are led to the conclusion that the accused has no cause for complaint if the court does not adopt the plea bargain. But we should not forget that premise that we have discussed, namely the disparity of forces between the parties — the state and the accused. We should recall that the law of contracts includes special arrangements that are intended to deal with contractual situations where there is an inherent inequality between the parties to a contract (for example the Standard Contracts Law, 5743-1982). Let us now address the question whether and to what extent the state is obliged to support the plea bargain at the hearing of an appeal filed by an accused who was given a sentence that departed from the plea bargain.

4. In the two cases under consideration in this further hearing the plea bargain with each of the defendants did not include any provision that warned them that the prosecution did not undertake to support the plea bargain before the court of appeal. As my colleague Justice D. Beinisch said, according to the guidelines of the State Attorney's Office a warning of this kind should be included in a plea bargain. I would not be surprised if in a significant number of plea bargains, especially those made with regard to relatively minor offences, the aforesaid guideline is not strictly observed. Such a situation gives rise to two separate questions. First, is the prosecution obliged to support a plea bargain before the court of appeal, or is it permitted to argue that the sentence of the trial court is correct and proper? Second, is the accused entitled to retract his guilty plea if the prosecution is no longer bound by the plea bargain?

The question whether the prosecution is also bound by a plea bargain in the court of appeal is likely to arise both in a case where the plea bargain included a warning in this regard and especially in a case where care was not taken to follow the guideline with regard to giving a warning. If we treat plea bargains like an ordinary contract, and I question whether this is proper, we will be required to say that the accused has no grounds for complaint if the plea bargain contained a provision according to which the prosecution is not bound to support the plea bargain before the court of appeal. Notwithstanding, it would appear that there is no dispute that even in such a

situation the rule is that the state should support the plea bargain before the court of appeal apart from in exceptional cases. The difficult question is what constitutes an exceptional case. In any case, in the two cases before us a warning as aforesaid was not included in the plea bargain. Therefore, we should answer the question whether the prosecution is entitled to ignore its undertaking, notwithstanding the fact that it did not take care to warn the accused that it would not be liable to support the plea bargain before the higher court. My colleague Justice D. Beinisch examines the aforesaid situation in accordance with the rules that apply to the question of an administrative authority being released from a contract that it made (para. 31 of her opinion). I too shall follow this path. I am therefore prepared to accept that in principle the state is entitled to be released from an undertaking that it took upon itself in a plea bargain. The critical issue in my opinion is what is the significance of the state being released from its undertaking for the accused. In other words, is the accused bound by his undertaking, namely his guilty plea to the facts in the agreed indictment after the other party to the plea bargain has been released from its undertaking, and if so, to what degree? When we are speaking of being released from an undertaking, we mean that the other party to the contract cannot enforce its performance (see CA 6328/97 *Regev v. Ministry of Defence* [23], at p. 522). This means that the accused cannot compel the prosecution to comply with its undertaking vis-à-vis sentencing. What do the laws applying to the release of an administrative authority from a contract tell us about the other party? The answer is that the other party who is not entitled to enforcement is at least entitled to the restitution of what he gave under the contract (*Regev v. Ministry of Defence* [23]; see also G. Shalev, *Contracts and Tenders of the Public Authority* (2000), at pp. 74-75). There is no need to consider the question of the right to, and scope of, any compensation, because it may be assumed that the main purpose of the accused is that he will receive the sentence in accordance with the plea bargain rather than compensation (together with a sentence that departs from the plea bargain). We should therefore examine what the accused 'gave' when he agreed to the plea bargain. The answer is self-evident: the guilty plea to the facts of the indictment is the 'consideration' that the prosecution received from the accused. It follows that if we allow the prosecution *de facto* to repudiate at the appeal stage the undertaking that it took upon itself in the plea bargain, we should also allow the accused to

retract his guilty plea (cf. O. Gazal, 'The Prosecution's Position in an Appeal against the Rejection of a Plea Bargain,' 1 *Din uDevarim* (2005) 507, at pp. 529-531). Let me clarify: the accused can choose between two alternatives. The first is to retract his guilty plea, which will result in the cancellation of the verdict, so that his trial will be conducted in the conventional manner like any proceeding where the accused denies the facts. Naturally, choosing this alternative involves a risk of a conviction and being given a sentence that is even stricter than the one that the trial court handed down when it departed from the plea bargain. The other is to support the plea bargain and try to persuade the court of appeal that the trial court erred when it decided not to accept the plea bargain and handed down a sentence that departed from it.

The possibility of retracting a guilty plea when the accused was not warned with regard to the prosecution's right to stop supporting the plea bargain before the court of appeal creates a parallel to another kind of omission. I am referring to the situation that is created when it is not made clear to the accused that the court is not bound by the plea bargain and that it is entitled to hand down a sentence that departs from it. This omission makes it possible for the accused to retract his guilty plea (see *Bahmotzky v. State of Israel* [9], at pp. 553-554; CrimA 1958/98 *A v. State of Israel* [2], at p. 614). Does logic not dictate that in both of the aforesaid cases the same law should apply?!

5. One of the arguments that can be made against my approach, according to which in certain cases the accused should be allowed to retract his guilty plea, is that the accused does not take any risk when he gives his consent to the plea bargain. If the plea bargain is not adopted by the court, he can, so it may be argued, retracts his consent and be tried in the conventional manner. My answer to this is that the accused does indeed take a risk, since he cannot know in advance whether the sentence that will be handed down at the end of an ordinary trial (assuming he is convicted) will be less than the sentence that was handed down by the court when it departed from the plea bargain. Since there is a risk in retracting his guilty plea, it is not to be expected that in every case as aforesaid the accused will indeed decide to retract his guilty plea. In any case, in our case we are dealing with a situation that was created in the court of appeal, when the prosecution no longer supports the plea bargain. We are not dealing with the question whether the accused may retract his guilty plea immediately after a sentence that departs

from the plea bargain is handed down, before it is known what the prosecution's position will be in the court of appeal (in this regard, see CrimA 1958/98 *A v. State of Israel* [2], at pp. 614-615).

6. I have addressed the issue on the assumption that it is governed by the rules concerning the release of an authority from a contract. According to these rules, we have found that the accused should be allowed to choose the possibility of retracting his guilty plea. The aforesaid possibility is, in my opinion, required even more forcefully for general reasons that concern the disparity of forces between the parties, which I have already addressed, and the duty of fairness that binds the prosecution. Let us recall once more that we are dealing with a situation of manifest inequality. A balance, albeit partial, of the disparity of the forces can be achieved by giving the accused the possibility of choosing to retract his guilty plea. Different rules of conduct apply to the state and to the accused. We expect the state to act with fairness and good faith on a high level. Therefore the prosecution should be required to comply, even in the court of appeal, with the undertaking that it took upon itself in the plea bargain in the great majority of cases. As I have said, there will be exceptional cases in which it will be possible to understand why the state saw fit to repudiate, in the court of appeal, its commitment to the plea bargain. Notwithstanding, the special requirements imposed on it with regard to fairness and good faith will be satisfied by allowing the accused to choose whether to retract his guilty plea.

7. This proceeding of a further hearing concerns the fundamental question concerning the prosecution's position in the court of appeal after a sentence that departed from the plea bargain was handed down. As I have explained, my opinion is that if the prosecution is entitled to be released from the plea bargain even though it did not include a warning with regard to its power to be released when the appeal is heard, the accused should also be allowed to retract his guilty plea if he sees fit to do so. With regard to the specific case of the respondents, I agree with the outcome recommended by my colleague Justice D. Beinisch, namely that the sentence agreed in the plea bargain is left unchanged.

Petition denied.

20 Adar II 5765.

31 March 2005.