CrimA 746/14

Appellant: **Yonatan ben Hailu Yamar**

v.

Respondent: **State of Israel**

The Supreme Court sitting as a Court of Criminal Appeals

Before: Justices H. Melcer, U. Shoham and D. Barak-Erez

Israeli Supreme Court cases cited:

[1] CrimA 2285/09 *Alalu v. State of Israel* (5.24.2011)

[2] CrimA 900/11 *Atallah v. State of Israel* (12.7.2011)

[3] CrimA 7004/09 *A. v. State of Israel* (7.17.2012)

[4] CrimA 7899/13 *A. v. State of Israel* (6.24.2014)

[5] CrimA 2480/09 *Padlon v. State of Israel* (9.7.2011)

[6] CrimA 420/09 *A. v. State of Israel* (11.23.2009)

[7] CrimA 3283/13 *A. v. State of Israel* (11.12.2014)

[8] CrimA 3636/12 *Shweiki v. State of Israel* (10.20.2013)

[9] CrimA 5582/09 *A. v. State of Israel* (10.20.2010)

[10] CrimA 8203/11 *A. v. State of Israel* (9.9.2012)

[11] CrimA 2218/10 *A. v. State of Israel* (11.21.2011)

[12] CrimA 20/04 *Kleiner v. State of Israel*, [2004] IsrSC 58(6) 80

[13] CrimA 4191/05 *Altgaus v. State of Israel* (10.25.2006)

[14] CrimA 4784/13 *Nir Somekh v. State of Israel* (2.18.2016)

[15] CrimA 6157/03 *Hoch v. State of Israel* (9.28.2005)

[16] CrimA 6147/07 *Avisidris v. State of Israel* (7.2.2009)

[17] CrimA 8133/09 *Mizrahi v. State of Israel* (7.21.2010)

[18] CrimA 4675/97 *Rozov v. State of Israel*, [1999] IsrSC 53(4) 337

[19] CrimA 1964/14 *Shimshilshvili v. State of Israel* (7.6.2014)

[20] CrimA 8687/04 *Khilef v. State of Israel* (12.12.2005)

[21] CrimFH 1042/04 *Biton v. State of Israel*, [2006] IsrSC 61(3) 646

[22] CrimA 8107/10 *Ezer v. State of Israel* (9.9.2013)

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

[24] CrimA 369/69 *Benno v. State of Israel*, [1970] IsrSC 24(1) 561

[25] CrimA 418/77 *Bardarian v. State of Israel*, [1978] IsrSC 32(3) 10

[26] CrimA 33984 *Rabinowitz v. State of Israel*, [1985] IsrSC 39(4) 253

[27] CrimA 1354/03 *Dakar v. State of Israel*, [2004] IsrSC 58(2) 83

[28] CrimA 759/97 *Alexander Eliabayev v. State of Israel*, [2000] IsrSC 55(3) 459

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

[30] CrimA 7707/11 *Laham v. State of Israel* (7.29.2015)

[31] CrimA 322/87 *Dror v. State of Israel*, [1989] IsrSC 43(3) 718

[32] CrimA 46/54 *Attorney General v. Segal*, [1955] IsrSC 9 393

[33] CrimA 6580/96 *Chicola v. State of Israel* (7.6.2000)

[34] CrimA 132/10 *Tevachau v. State of Israel* (9.5.2011)

[35] CrimA 3071/92 *Azoualus v. State of Israel*, [1996] IsrSC 50(2) 573

[36] CrimA 8641/12 *Saad v. State of Israel* (8.5.2013)

[37] CrimA 4741/13 *State of Israel v. Naamneh* (6.10.2014)

[38] CrimA 7000/10 *Alfidel v. State of Israel* (1.10.2007)

[39] CrimA 6353/94 *Bouhbut v. State of Israel*, [1995] IsrSC 49(3) 647

[40] CrimA 4419/95 *Hadad v. State of Israel*, [1996] IsrSC 50(2) 752

[41] CrimA 7992/09 *A. v. State of Israel* (6.20.2010)

[42] CrimA 6283/09 *Levy v. State of Israel* (11.24.2010)

Israeli District Court cases cited:

[43] CrimC (Beit Shemesh) 1010/07 *State of Israel v. Dromi* (7.15.2009)

United States cases cited:

[44] *State v. Norman*, 324 N.C. 23, 259 (1989)

[45] *State v. Harden* 223W Va. 796 (2009)

English cases cited:

[46] *R v. Dawes* [2013] EWCA Crim 322

[47] *R v. Gurpinar & Kojo-Smith* [2015] EWCA 178

[48] *R v. Humphreys* [1995] 4 All ER 1008

[49] *R v. Wood* [2009] EWCA Crim 651

Israeli legislation cited:

Penal Law, 5737-1977

English legislation cited:

The Coroners and Justice Act 2009 (c. 25)

Appeal on a judgment of Sept. 2, 2013 and sentence of Dec. 22, 2013, by the Central-Lod District Court (Judges R. Lorch, Z. Dotan, U. Weinberg-Nottowitz) in CrimC 22262-05-10

Adv. Alon Eisenberg - On behalf of the Appellant

Adv. Arieh Peter; Adv. Micky Foran - On behalf of the Respondent

Adv. Bracha Weiss - On behalf of the Adult Probation Service

Abstract

In the set of special circumstances of this case, in which prior to the attack on the Decedent, he threatened the Appellant and humiliated him, against the backdrop of two incidents of sexual abuse in the preceding weeks, the claim of "cumulative provocation" can apply. Therefore, the conviction of the Appellant for murder should be changed to a conviction for the crime of manslaughter. Consequently, the prison sentence imposed upon the Appellant was reduced to 12 years of imprisonment.

Criminal law – offense of murder – cumulative provocation

Criminal law – offense of murder – provocation

Criminal law – defenses – self-defense

Criminal law – defenses – putative self-defense

Criminal law – penalty – penal policy: manslaughter

Criminal law – crime of murder – reduced penalty

This is an appeal on a verdict, and alternatively, on the severity of the sentence. The background: On the evening of the fatal event, the Decedent and the Appellant met by chance. The Decedent demanded that the Appellant pay him NIS 1000. Later, the Decedent took the Appellant to a dark parking lot, threatened to beat him if he did not pay the said sum within a day or two, and then opened the zipper of his pants and exposed his penis in order to urinate, standing with his back to the Appellant. The Appellant then strangled the Decedent. He then struck him with a rock and caused his death. There is no dispute that in the weeks preceding the night of the fatal event, the Appellant was sexually abused and sodomized twice by the Decedent, and was the victim of extortion at the hands of the Decedent. The District Court convicted the Appellant of the offense of "premeditated" murder under circumstances that justified the imposition of a reduced penalty under sec. 300A(c) of the Penal Law. Consequently, the Appellant was sentenced to a custodial sentence of 20 years, and a conditional sentence. The Appellant argues that he should be exempted from criminal responsibility because he acted in "self-defense" at the time that he killed the Decedent, and alternatively, by virtue of the defense of "putative self-defense". As an additional alternative, it was argued that the actions of the Appellant were carried out in the face of provocation, or at least cumulative provocation, and therefore the Appellant should be acquitted of the offense of murder of which he was convicted, and convicted instead of the offense of manslaughter.

The Supreme Court (*per* Justice H. Melcer, Justices U. Shoham and D. Barak-Erez concurring) ruled:

The Appellant will be acquitted of the crime of murder and convicted, instead, of the crime of manslaughter. Consequently, the term of imprisonment to which the Appellant was sentenced will be reduced to 12 years imprisonment.

First, the Court determined that there is no reason to depart from the factual findings of the trial court, except in relation to the psychological reaction of the Appellant to the acts of the Decedent prior to the killing.

Pursuant to this, the Court determined that the Appellant cannot avail himself of the defenses to criminal liability of "self-defense" or "putative self-defense", and he bears criminal responsibility. In this context, the Court addressed the normative framework of "traditional" self-defense, determining that in the matter of the Appellant, the elements of immediacy and necessity were not present. The Court also conducted a comparison between the present case and that of the *Dromi* case, and ruled that this conclusion stood firm even on the assumption that leniency should be exercised in the present case in regard to the requirements of "traditional" self-defense, and that they should be compared with those relating to protection of one's home. The Court also discussed the conditions for the defense to criminal responsibility of "putative self-defense", and ruled that even had the situation been as perceived by the Appellant at the time of the incident, the defense of putative self-defense was not available to him, in view of the actions of the Appellant once the Decedent fell to the ground after being strangled.

At the same time, the Court was of the opinion that reasonable doubt arises in this case with respect to the component of "absence of provocation", which constitutes part of the special mental element of the crime of "premeditated" murder.

The case law has held that a determination on the question of the existence of provocation requires meeting two cumulative criteria. The first is the criterion of subjective provocation, which examines whether the alleged provocative behavior caused the defendant to lose his self-control and to commit the fatal acts, without weighing their moral consequences. The second is the criterion of objective provocation, in the framework of which one must ask whether an "ordinary person", had he been in the defendant's situation, would have been liable to lose his self-control and to act in the way that the defendant acted. The burden of proof of the component of "absence of provocation" lies with the prosecution, but it has been ruled that a "lesser degree of proof" is required, and the prosecution fulfills its duty by bringing evidence of the causing of the death.

In applying the subjective criterion, the Court held that in view of the Decedent's cruel treatment of the Appellant over a prolonged period preceding the night of the fatal event, the chain of events on the night of that event immediately prior to the act of killing attests to the existence of taunting, which is not of sufficient force in order to ground, itself, "regular provocation" (which is sometimes called "spontaneous provocation"), but is sufficient for the purpose of "cumulative provocation".

Establishing the existence of "cumulative provocation", which negates the mental element of "premeditation" that is required for the crime of murder, requires establishing continuous, cumulative acts of taunting on the part of the victim, and that, close to the time of the killing, an additional act of taunting (a "trigger") occurred, and that the whole set of acts of persecution drove the defendant to lose his self-control so that he could not think and understand the serious moral consequences of his actions. This "trigger" must have independent status and force, but at the same time, its force is liable to be less than that required to ground taunting in a situation of "spontaneous provocation". Moreover, the decision to kill must have formed in the defendant's mind only after the "trigger" was activated, not before.

The Court was of the opinion that in the special circumstances of the particular case, in which, prior to the attack on the Decedent, he threatened the Appellant and humiliated him, and against the background of two occurrences of sexual assault in the preceding weeks, the required "trigger" occurred close to the act of killing – or at least, there is room to surmise that it did – and therefore the claim of cumulative provocation should be accepted.

A normative examination justifies recognition of the existence of cumulative provocation in the framework of the objective test, as well. In this context, the Court ruled that "subjectivization" of the test for objective provocation should be avoided, and there should be no departure, at this stage, from the criterion of the "ordinary person". At the same time, the Court believed that the present case does not require recourse to the criterion of "the reasonable victim of a sexual offence", for the sexual abuse that the Appellant experienced – and in this regard, the earlier acts perpetrated by the Decedent on the victim must be included – falls within the parameters of the objective test, according to the traditional criterion of the "ordinary person". In this context, Justice Shoham summed up that the requirement of objective provocation is exhausted by the fact that it must overcome the hurdle of the "ordinary person", given the common history and past of the killer and the victim of the crime, insofar as they are relevant to the event described in the information.

In view of this conclusion, and because the component of "absence of provocation" constitutes part of the special mental element of the offense of "premeditated" murder, the Appellant should be acquitted of the offense of murder, and convicted instead of the crime of manslaughter. As a result, and after deliberation, the Appellant's sentence was set at 12 years imprisonment, from which the period of his detention would be deducted. This, in addition to the conditional sentence imposed by the District Court.

Justices Shoham and Barak-Erez concurred, adding some comments, in which Justice Melcer concurred.

Judgment

Justice H. Melcer:

1. The Central-Lod District Court (Judges R. Lorch, Z. Dotan, U. Weinberg-Nottowitz) convicted the Appellant in CrimC 22262-05-10 of the crime of "premeditated" murder (an offense under sec. 300(a)(2) of the Penal Law, 5737-1977 (hereinafter: Penal Law, or the Law)) in circumstances that justified a reduced sentence under sec. 300A(3) of the Penal Law. Following the said conviction, the District Court imposed the following penalties on the Appellant: imprisonment for a period of 20 years (from which the period of his detention in the course of the proceedings would be deducted); conditional imprisonment for a period of 3 years (the condition

being that the Appellant does not commit an violent felony for a period of three years from the date of his release).

The present appeal is directed at the verdict, and alternatively, at the severity of the sentence. The facts relevant to the decision will be set out below.

Background

2. Yonatan Yamar (hereinafter: the Appellant) was born in 1987, and at the time of the fatal event, lived in his sister's apartment in Netanya. The Appellant had suffered from epilepsy from the age of 17, but other than that, he led a routine life. The Appellant was described by a number of witnesses (including: his sister, his brother-in-law, his good friend Avi (hereinafter: Avi) and Rabbi Amir Kahana (director of the Chabad Institutions in Ramat Aviv – the Appellant resided in one of the institutions under his supervision when he was released, as an alternative to detention)) as a calm, quiet person, a "good boy" who "doesn't make trouble" and who does not act violently. Prior to the fatal event, the Appellant had no criminal past. He was the object of abuse by the local children, and said that children younger than him would taunt him. He also described incidents in which a 16 year old boy cut his hand with a broken beer bottle, another child cut him on the head with a knife, and later he was stabbed twice in the foot. In addition to these abuses, the Appellant was also the object of abuse by the late Yaron Eilon (hereinafter: the Decedent) – these events are described in detail below.

3. The Decedent was 24 years old when he died. Prior to his death, he, too, lived in Netanya, close to where the Appellant lived. The Appellant claimed that the Decedent was known in the neighborhood as a criminal, frightening figure. This claim was supported by the statement of the owner of the kiosk at which the Decedent and the Appellant met on the night of the event that is the subject of the charge (P/16, p. 2 lines 14-16). The Decedent also had a criminal history of violence and sexual offenses.

4. According to the Appellant, in the years preceding the event, the Decedent would harass him, extort money from him, and beat him. Thus, for example, the Appellant related that the Decedent invented a derogatory, insulting nickname for him – "Dukat" – which in Amharic means "child who carries flour". According to the Appellant, this nickname offended him deeply, and it was taken up by other children in the neighborhood. Beyond that, the Appellant reported that two

years prior to the incident, the Decedent called him, rummaged through his pockets, and took several hundred shekels in cash from him (the Appellant also claimed in his testimony, and in some of his statements to the police, that similar incidents occurred on other occasions). The Appellant, in his first statement to the police, described an additional incident that occurred about a month and a half before the fatal event: the Decedent told him that he had been beaten by a number of people, and because he claimed that the Appellant knew the assailants, he threatened him, saying: "If you don't bring those people, you'll be instead of them" (see: p. 55 of the transcript; and also: P/1, lines 78-86).

5. According to the Appellant, these acts of persecution reached their climax during the two weeks preceding the event. The Appellant claimed that in the said period, the Decedent, on two separate occasions, took him to a park known as the "Puddle Park", threatening him all along the way. When the two reached a dark area of the park, the Decedent attempted to forcefully sodomize the Appellant, making crude sexual remarks such as: "You have a beautiful behind, you should be proud of it" (P/4, lines 28-29). It will be noted that the Appellant subsequently testified that during that period, the Decedent sodomized him twice (see: the judgment, para. 3).

6. I will now describe the chain of events on the night between 1-2 May, 2010 (hereinafter: the night of the event), as described in the information, and subsequently, the versions of the Appellant in this regard in his police interrogations and in his testimony before the District Court.

The Information

7. On May 13, 2010, an information was filed against the Appellant, in which the facts of the event were described as follows:

On the evening of the event, the Appellant, together with his friend Avi, arrived together at the kiosk in Netanya, after the two had drunk alcoholic drinks together. At that time, the Decedent was at the kiosk with his friend Nathan (hereinafter: Nathan), and they, too, were imbibing alcoholic drinks. An argument developed between the Appellant and the Decedent, and they went behind the kiosk in order to talk. While they were talking behind the kiosk, when the Decedent had his back turned to the Appellant, the Appellant fell upon the Decedent from behind and strangled him with his hands for a few minutes. At some stage, the Appellant loosened his grip, and the Decedent fell to the ground. At this point, the Appellant hit the Decedent an unknown

number of times on his head with a rock that was in the vicinity. The Appellant subsequently grabbed the Decedent's leg and dragged him for 35 meters to a spot located next to a garbage bin in the parking lot, and began to hit the Decedent on the head again, with great force, with a rock. After the said beating, the Appellant went home, leaving the Decedent where he lay.

As alleged in the information, as a result of the actions of the Appellant as described above, the Decedent suffered comminuted fractures of the cranium and facial bones, lacerations to the brain membrane, and subarachnoid hemorrhaging, which led to his death.

The Appellant's Version

8. Several hours after the event, the Appellant surrendered himself to the police, and admitted to causing the death of the Decedent. During his interrogation by the police, the Appellant made five statements concerning the chain of events on the night of the event and prior to it. He participated in a reconstruction of the killing (P/2), as well as a reconstruction of his alleged sodomization by the Decedent (P/7). The Appellant also described the course of events in his testimony before the District Court. In that testimony, the Appellant added details that were not included in the police interrogation. I will now review the version of the Appellant, as it emerges from his statements and his testimony.

9. In his first statement to the police, the Appellant described the acts of cruelty perpetrated against him by the Decedent, which were mentioned above. However, the Appellant refrained from telling the investigators, at this stage, about his sexual abuse. It was only in his third police interrogation that the Appellant first claimed that sexual acts had twice been performed on him by the Decedent. According to the Appellant, he refrained from reporting these acts in his first statements out of shame and fear that they would reach the media. The Appellant added that he did not tell anyone else about the sex acts, including his family and his friend Avi, also due to shame. The Appellant claimed that following the acts of sodomy, his epilepsy, from which he had suffered from the age of 17, became worse, and that since they occurred, he has been very disturbed and has often fainted.

In the absence of evidence to contradict the Appellant's version of the background to the night of the event, counsel for the Respondent announced, upon the completion of the Appellant's

testimony in the District Court, that he cannot refute the claim of the Appellant concerning the sexual abuse and extortion by the Decedent. Therefore, these facts are not in dispute in the appeal.

10. As for the night of the event, the Appellant stated, in his first statement, that he spent the hours preceding the event in his sister's home, where he was living at the time, having dinner together with his family and his friend Avi. After eating and drinking alcoholic drinks, the Appellant and Avi decided to go to the kiosk near the home of the Appellant's sister. While they were at the kiosk, they suddenly met the Decedent and his friend Nathan. The Appellant recounted that the Decedent asked him: "Do you remember what you stole from me?" and afterwards the Decedent demanded that the Appellant come aside with him for a moment to talk (as opposed to this, the Appellant claimed in his testimony in the District Curt that it was he who asked to talk alone with the Decedent). The Appellant also said that the Decedent demanded that he pay him a sum of NIS 1000, allegedly for no reason.

The Appellant went on to mention, in his first statement, that after he and the Decedent had moved aside to talk, the Decedent continued to demand the above payment from him, threatening him that if he did not pay within a day or two – he would beat him. In his later version, the Appellant claimed that the Decedent also threatened to kill him if he did not pay him what he demanded within the set time, and in his testimony before the Court, he added, for the first time, that the Decedent made sexual remarks at that time, similar to those that he whispered to him when he was sodomizing him in the weeks preceding the night of the fatal event.

According to the Appellant's testimony, at a certain point Avi approached them, but the Appellant motioned to him to go away. This detail was also provided by Avi in his testimony. The Appellant explained in his testimony before the trial court that he did so because he was afraid that Avi would hear the sexual remarks the Decedent directed at him. The Appellant related in his testimony that after Avi left, the Decedent told him that he wants to talk to him behind the kiosk. According to the Appellant, he agreed to the Decedent's demand, and went with him behind the kiosk, frightened that the Decedent would sodomize him for a third time.

The Appellant also testified that after they turned towards the parking lot behind the kiosk, the Decedent turned around to urinate, while continuing to utter threats and sexual remarks to him. The Appellant described what happened there as follows:

> I saw that [the Decedent] finished urinating, I saw that he pulled up his pants, I saw him from behind. As he was about to turn around, the rage and all the anger, I strangled him. I was afraid that he would kill me. I was afraid that he would rape me again… (see p. 59 of the transcript; and cf: P./1, p. 3-5).

In his first statement, the Appellant described how he strangled the Decedent for several minutes, at the end of which the Decedent fell to the ground, still breathing, and also shaking. At this stage, according to the Appellant, he picked up a rock and hit the Decedent on the head with the aim of killing him. Then the Appellant dragged the Decedent, by grabbing his legs, to the spot that was next to the garbage bin that stood in the parking area behind the kiosk. In the course of reconstruction of the act, the Appellant described how, after dragging the Decedent, he picked up another rock and again hit the Decedent on the head with it. In his testimony, the Appellant changed the story that he had given to the police, and claimed that he thought that the Decedent was already dead after being strangled, and that he hit him with the rocks in a fit of rage and not in order to kill him. Finally, the Appellant said that after the events as described, he went home, changed his clothes, and several hours later turned himself in to the police (a description that already emerged in his first interrogation by the police).

The Judgment of the District Court

11. On Sept. 2, 2013, the District Court passed judgment on the Appellant. On the facts, the trial court ruled that the main thrust of the Appellant's testimony concerning the night of the event was consistent and coherent, and therefore adopted it in the main. At the same time, the District Court pointed out several contradictions and inconsistencies that emerged from the whole body of statements by the Appellant, his testimony, and the versions of other witnesses for the prosecution. The trial court was of the opinion that on these points the Appellant attempted "to blur, to obfuscate, to add and to change the emphases, in a manner that would provide a basis for the defense arguments." Below, I will refer to several of these inconsistencies and contradictions discussed by the trial court that are relevant to the present appeal.

12. *The nature of the Decedent's threat to the Appellant*. The District Court determined that the Appellant changed his version with respect to the nature of the threats that were made by the Decedent on the night of the fatal event. Whereas in his first statement, the Appellant claimed that

the threats made by the Decedent amounted to being beaten if he did not pay the NIS 1,000 within a day or two, in his testimony in court, the Appellant said that the Decedent threatened to kill him. The District Court found that this was an attempt by the Appellant to raise the level of the threat made by the Decedent, for the purpose of improving his chances to ground his various defense arguments, and therefore the court preferred the earlier version in this regard.

13. *Sexual remarks in the course of the events*. The trial court determined that the Decedent first raised the subject of the Decedent' alleged sexual remarks on the night of the event only in the course of his testimony in the District Court. The District Court chose to reject the Appellant's version on this matter and found, as a matter of fact, that such remarks were not made by the Decedent to the Appellant on that night. The court explained that between the third statement of the Appellant in which he disclosed the sodomy, and until he testified in court, there were several opportunities on which the Appellant could reasonably have been expected to mention the sexual remarks made to him, insofar as such remarks were made by the Decedent in the course of the events on which the information turned.

14. *The Appellant's perception of the state of the Decedent after he had been strangled*. In his first statement, the Appellant said that after the Decedent fell to the ground after being strangled: "He was breathing, he was trembling" (P/1, lines 171-172), and later the Appellant said that: "I had the feeling that he was dead, but I wasn't sure" (P/1, line 189). Subsequently, the Appellant hit the Decedent on the head with a rock, and explained to the police in his first statement that the purpose of hitting him was "to kill him, so he should die" (P/1 lines 189-193). As opposed to this, in his testimony in court, the Appellant said that he already understood that the Decedent was dead when he fell to the ground after being strangled, and that hitting him with the rock was done purely out of rage. The court dismissed the later version of the Appellant on this matter, too, and determined that the Appellant was not sure that the Decedent was dead when he began hitting him with the rock. Similarly, the District Court adopted the pathology report whereby the Decedent died from being hit on the head with the rock, and not from strangulation.

15. *The psychological reaction of the Appellant prior to the killing*. The District Court ruled that the Appellant suppressed his testimony with respect to his state of mind after the Decedent's threats and his demands for money, and raised these "things at a later stage in an attempt to show panic and loss of self-control, which were likely to help him in grounding his defense claims".

Therefore, the lower court preferred the Appellant's initial version, whereby he acted with calm calculation when he decided to strangle the Decedent, and ultimately to kill him.

16. After discussing all the facts of the event in accordance with its findings, the trial court proceeded to examine the legal ramifications of what happened on that day. The District Court ruled that in the circumstances of the case, the actus reus of the crime of murder under sec. 300(a)(2) of the Penal Law was met, for the Appellant caused the death of the Decedent by strangling him and striking him with rocks. The District Court subsequently examined the mental element required for a conviction of the crime of murder, and decided that it, too, was met in the matter of the Appellant. In this context, the lower court determined, based on the admission of the Appellant, that he had decided to kill the Decedent, and that alongside the decision to kill, the element of preparation, necessary for the purpose of establishing the mental element of "premeditation", was also present, this preparation being executed with the start of the prolonged choking, or at least in the course of it.

17. With respect to fulfillment of the third condition in the framework of the mental element required for conviction of the crime of "premeditated" murder, i.e., absence of provocation, the lower court separated the discussion on this subject, as is the norm, and examined it according to two sub-tests that have been established in the case law: the test of subjective provocation and the test of objective provocation.

Regarding the *subjective* aspect, the lower court determined that, in view of the facts of the events, as determined by it, the only persecution that took place was focused on the demand for money and the threats on the part of the Decedent. At the same time, the District Court held that this persecution was insufficient to constitute "provocation" for the purpose of negating "premeditation" in the framework of the crime of murder, and it was also insufficient for the purpose of serving as an "additional act of provocation" under the doctrine of "cumulative provocation" (on which I will elaborate below). The District Court further determined that the Decedent's demands for money and threats began when they were at the kiosk, and not immediately before the fatal event (as required for the purpose of normal provocation). Moreover, the District Court held that the Appellant acted calmly, and did not lose self-control in a way that prevented him from understanding the outcome of his actions. In view of the above, the lower

court determined that, according to the *subjective* test, that Appellant was not provoked immediately prior to the act of killing.

As for the *objective* aspect, the trial court held that, from a normative point of view, the insulting remarks, and even the extortion, could not be accepted as the basis for a claim of provocation. The District Court thus dismissed the defense of provocation according to the *objective* test, as well.

18. In view of all the above, the lower court held that, in the circumstances of the Appellant, the elements of the crime of murder were met in full, and it therefore convicted the Appellant of this crime.

19. The lower court dismissed the additional two main defense arguments raised: "irresistible impulse", and self-defense.

As for the first defense argument (irresistible impulse) – the Court ruled that counsel for the Appellant did not reiterate this argument in the framework of his summations, and as such, this defense was, in fact, abandoned (neither was it raised again in the framework of the appeal).

As for the argument of self-defense – the trial court determined that none of the six cumulative conditions required to prove this defense were met, and it therefore dismissed this argument as well. The lower court also addressed the possibility that this was a case of "putative self-defense", but it dismissed this possibility, too, for counsel for the Appellant tried to base this defense argument on parts of the Appellant's version that had been rejected by the Court, as described above.

20. After having determined that the elements of the crime of murder were present, and that the Appellant could not invoke the above defenses as claimed, the lower court determined, as stated, in view of the consent of the Respondent, that the act of murder was committed when the Appellant was in a state of severe emotional distress due to prior abuse at the hands of the Decedent, which justified imposing a mitigated sentence in accordance with sec. 300A(c) of the Penal Law.

The Sentence of the District Court

21. On Dec. 22, 2013, the District Court passed sentence on the Appellant, in light of its ruling concerning a mitigated sentence under sec. 300A(c) of the Penal Law. In accordance with Amendment 113 to the Penal Law, the court addressed the circumstances of the case and the relevant considerations in determining the parameters of the penalty. Ultimately, the court set the parameters of the prison sentence at between 18 and 25 years. Within the said parameters, the District Court imposed on the Appellant a prison term of twenty years (less time served), and also sentenced him to a conditional sentence as stated in para. 1, above.

The Arguments of the Appellant

22. The appeal before us is directed against the judgment of the court and against the sentence. Regarding the judgment, counsel for the Appellant challenges both the factual findings and the legal determinations of the District Court. Below are the Appellant's main arguments.

23. With respect to the factual findings: counsel for the Appellant argues that the lower court was mistaken in preferring the Appellant's first version to what he said in his later statements, and in his testimony in court. The approach of counsel for the Appellant, which runs as a common thread through the appeal arguments, is that the Appellant's original story, conveyed in the course of his first police interrogation, and the reconstruction of the killing, should not be assigned great weight. This is because it does not reflect the Appellant's true thoughts and feelings from the night of the event, since at that stage the Appellant had not yet disclosed the sexual abuse perpetrated upon him by the Decedent. Consequently, counsel for the Appellant argues that this Court should intervene in the factual findings of the lower court, cited in paras. 12-15 above, and accept what the Appellant said beginning with his third statement (in which he decided to tell, for the first time, as stated, about being a victim of sexual crimes as well), and thereafter, including in his testimony in court, even if these are not consistent with his first version.

24. Over and above his reservations about the factual findings of the District Court, and based on the Appellant's version regarding those subjects, counsel for the Appellant raises three main legal arguments, which I shall set out below:

(a) *Self-defense*: Counsel for the Appellant claims that the chain of events in this case indicates that the Appellant acted in self-defense. In this context, counsel for the Appellant contends that the circumstances of the present case are comparable to the circumstances in CrimC (Beit

Shemesh) 1010/07 *State of Israel v. Dromi* [43], in which the defendant, who killed an intruder, was acquitted because he acted in defense of his fenced farm, under sec. 34J1 of the Penal Law. He contends that this comparison justified leniency regarding the requirements of the defense of self-defense, as per sec. 34J1, and exemption of the Appellant from all criminal responsibility.

(b) *Putative self-defense*: Counsel for the Appellant argues, alternatively, that in view of the previous acquaintance between the Decedent and the Appellant, which included several incidents of sexual molestation, the elements required for self-defense should be examined as the Appellant imagined them to be at the time, according to the defense to criminal responsibility that has been recognized in the case law and termed: "putative self-defense". Counsel for the Appellant argues that, in light of the events of the weeks preceding the night of the event, the Appellant thought that the Decedent was taking him behind the kiosk in order to molest him sexually once again (and even claims that, in the absence of evidence to the contrary, it is to be assumed that this was indeed the intention of the Decedent), and began to strangle the Decedent for fear of this happening. Counsel for the Appellant claims that the Appellant also perceived that the other elements of self-defense (which will be specified below) were present, and therefore, by virtue of the defense of putative self-defense, the Appellant should be cleared of all criminal responsibility.

(c) *Provocation*: If the claims of self-defense, or putative self-defense, are not accepted, counsel for the Appellant contends that the actions of the Appellant were the result of provocation, or at least, cumulative provocation, the happenings of the night of the event constituting the additional act of provocation required to establish cumulative provocation. In view of the said provocation, counsel for the Appellant argues that the Appellant should be acquitted of the crime of murder of which he was convicted, and convicted, instead, of the crime of manslaughter.

On the question of the *subjective*-provocation test, counsel for the Appellant explains that the demand for payment and the threats to the life of the Appellant by the Decedent (as stated, the District Court determined that such threats were not made on the night of the fatal event), compounded with the sexual remarks (the claim that they were made was also rejected, as stated, by the lower court), the Decedent taking the Appellant to the dark parking lot, and the Decedent's exposing his penis to urinate, should be seen as acts amounting to provocation, in the circumstances.

Alternatively, counsel for the Appellant argues that these acts constitute, at the very least, the "trigger" required to indicate the existence of cumulative provocation. According to him, in view of the long-standing relations between the Appellant and the Decedent, which included humiliation, extortion, threats and acts of sodomy, which as he said: "…. pushed [the Appellant] to the brink of madness whenever he met the Decedent," the events of the night of the killing cannot be detached from the other acts of cruelty perpetrated by the Decedent against the Appellant. Rather, they should all be viewed as cumulative provocation.

As for the *objective*-provocation test, counsel for the Appellant argues that in this case, the Court must ask how a "reasonable victim of rape" would have acted had he been in the Appellant's situation on the night of the event. In his view, a "reasonable victim of rape" who was taken to a dark parking lot by a person who had attacked him sexually in the past, when this attacker is threatening him, "fining" him and making sexual remarks, is liable to act in the manner in which the Appellant acted on the night in question.

25. Over and above these arguments, counsel for the Appellant claims that an exceptionally harsh sentence was imposed in this case. In this context, it was argued that the Appellant's penalty should be reduced, since – according to his counsel – the penalty deviates from the accepted sentencing policy in cases such as this of imposing a reduced sentence. Counsel for the Appellant adds that this Court was prepared to show significant leniency in regard to the sentences of defendants who deviated from the conditions of self-defense. This should be the case here as well, if it be decided that the other defense arguments are not accepted.

The Respondent's Arguments

26. The Respondent relies on both components of the judgment of the District Court. In its view, although it accepts the Appellant's version with respect to his "history" with the Decedent, which included extortion and sexual assault, it is of the opinion that the elements of the crime of murder are still present here, and that the Appellant should not be exempted from criminal resonsibility due to self-defense or putative self-defense.

27. The Respondent argues that the primary arguments of the appeal challenge the trial court's findings as to the facts and credibility, in which an appeal instance does not tend to interfere. It argues that the lower court preferred the Appellant's first version to the later ones, based upon an

unmediated impression of the Appellant's testimony, examined all of the evidence, and believed that the Appellant's later version was not credible. As such, the Respondent argues that there is no reason to deviate from the factual findings of the District Court, as enumerated above.

28. As for the argument of self-defense and putative self-defense, the Respondent contends that, in view of the factual findings of the trial court with respect to the nature of the threat, there was no imminent threat to the Appellant, and therefore, the Appellant's argument in this regard should be dismissed.

The Respondent adds that even had the Appellant sincerely thought that he was facing imminent danger, a number of alternatives were available to him that made it possible to refrain from killing the Decedent, including three different opportunities to "break off contact" with him. In view of this, the Respondent argues that there is no reason to exempt the Appellant from criminal responsibility by reason of self-defense, or "putative self-defense".

The Respondent further adds that, in its view, the present case should not be compared to *State of Israel v. Dromi* [43], since the two cases involve different exceptions to criminal liability, and in view of a significant difference in the circumstances.

29. The Respondent also objects to the argument raised by the Appellant on the issue of provocation. Regarding the *subjective* test for provocation, the Respondent argues that the Decedent's demand for money and his threats to the Appellant began a few minutes before the strangulation occurred, and the Appellant even responded to these without losing self-control by conducting a long dialogue, attempting to convince the Decedent to let him off. Consequently, according to the Respondent, the actions of the Appellant did not ensue following provocation on the part of the Decedent. Additionally, the threats to the Appellant by the Decedent, and his attempt to extort money from him (which, alone, were accepted by the District Court as having occurred on the night in question) cannot be regarded as acts that amount to the "trigger" required for the existence of cumulative provocation.

Regarding the *objective* test for provocation, the Respondent argues that according to the case law, subjective elements may not be considered in the framework of this test, and therefore, we should not consider how a "reasonable victim of rape" might have acted had he been in the Appellant's shoes. Rather, we must invoke the criterion of the "reasonable person" who, according

to the Respondent, would not have acted in the way that the Appellant acted under the circumstances. The Respondent further argues that even if we examine the Appellant's reaction in accordance with the "reasonable rape victim", there is no basis for the assumption that such a victim would have reacted in such a vicious and deadly manner, as did the Appellant.

In light of the above, the Respondent is of the opinion that there is no reason to intervene in the determination of the District Court regarding the absence of provocation.

30. Finally, the Respondent objects to the appeal on the severity of the sentence. According to the Respondent, this was a vicious murder, which justifies a substantial prison term behind bars, and there is no justification for leniency beyond that which was already shown by the District Court, following the Respondent's consent to a reduced sentence by virtue of sec. 300A(c) of the Penal Law.

Later Developments

31. After the arguments in the hearings, counsel for both parties submitted additional material relating to comparative law, and counsel for the Appellant even found fit to add references and citations as recently as May 5, 2016.

It should be noted here that counsel for each of the parties did their very best, in a very professional manner, in representing the case for their side.

Now, having described the situation and the points of disagreement, and having reviewed the arguments of the parties, I will proceed to analyze the issues.

Deliberation and Decision

32. After reviewing all the material in the file, hearing the oral arguments, and examining the comparative law, I have reached the conclusion that the appeal on the judgment should be allowed in part, such that the Appellant will be acquitted of the crime of murder and will be convicted, instead, of the crime of manslaughter, under sec. 298 of the Penal Law, and I will recommend to my colleagues that we do so. At this stage, I will already mention that, in my opinion, the Appellant

cannot invoke the defenses to criminal liability of "self-defense" or "putative self-defense". At the same time, in my opinion, a reasonable doubt arises, in the circumstances of the case, with respect to the component of "absence of provocation", which constitutes part of the special mental element of the offense of "premeditated" murder, and therefore his conviction for murder should be substituted by conviction for the offense of manslaughter.

In light of this conclusion, I will propose that we reduce the prison sentence imposed upon the Appellant, and set it at 12 years of imprisonment (less time served), as explained in paras. 118-120 below.

The reasons for the said conclusion will be presented in detail below.

Factual Basis

33. There is no dispute between the parties that the Appellant did, indeed, cause the death of the Decedent. The Appellant admitted that it was he who brought about the death of the Decedent on the night of the event, after strangling him and hitting him with rocks. Similarly, there is no dispute between the parties that, in the weeks preceding the night of the events, the Appellant experienced sexual abuse, and was the victim of two acts of sodomy, and an act of extortion by the Decedent.

The Appellant's main factual arguments relate to the circumstances that preceded the death of the Decedent, and to the Appellant's state of mind prior to and during the commission of the offense. The Appellant argues, contrary to the determination of the lower court, that in this context, preference should be accorded to the later version, which was conveyed in his testimony in the courtroom, over the earlier version, given to the police at his first interrogation and in the reconstruction of the scene of the killing (which preceded the disclosure of the sexual molestation by the Decedent).

34. As is well known, an appeals instance does not normally intervene in the factual findings of the lower court and its findings regarding credibility, in view of the ability of the trial court to form an impression of the witnesses in a direct and unmediated manner (see, e.g., CrimA 2285/09 *Alalu v. State of Israel* [1], para. 11; CrimA 900/11 *Atallah v. State of Israel* [2], para. 6; CrimA

7004/09 *A. v. State of Israel* [3], para. 15; CrimA 7899/13 *A. v. State of Israel* [4], para. 17). At the same time, the case law has recognized exceptions to the said "rule of non-intervention". Thus, for example, there may be justification for intervention by the appeals court where the findings of the trial court rely on logical considerations, or where these findings are not based on direct impressions of the witnesses, for in such cases, the trial court does not enjoy an advantage over the appeals court. Moreover, it has been held that the appeals court will also deviate from the rule of non-intervention where it feels that there were fundamental contradictions in the testimony that were not adequately addressed by the trial court, or that there is a fundamental, obvious mistake in the assessment of the credibility of the testimony (see: CrimA 2480/09 *Padlon v. State of Israel* [5], para. 8; CrimA 420/09 *A. v State of Israel* [6], para. 67); CrimA 3283/13 *A. v. State of Israel* [7], para. 27).

35. As stated above, in its decision, the District Court did not give credence to the Appellant's testimony on several subjects, and preferred what he had said in his *earlier* police interrogations (see paras. 12-15 above). The lower court formed a direct impression of the Appellant in the framework of his testimony, and therefore, in accordance with the above "non-intervention rule", I see no reason to intervene in the decision of the District Court to reject parts of this testimony. However, since the trial court chose to base part of its factual findings on *written evidence* (i.e., the statements made by the Appellant to the police), and on *logical considerations*, it does not have an inherent advantage over the appeals court, and therefore, I see no barrier, in principle, to reexamining these factual findings (cf.: CrimA 3636/12 *Shweiki v. State of Israel* [8], para. 18 of my opinion).

Notwithstanding the above, after examining the said factual findings, which were based primarily on the Appellant's statements to the police, I see no reason to deviate from the factual findings of the trial court, except on the matter of the psychological reaction of the Appellant to the actions of the Decedent prior to the killing. I shall explain.

36. I would first mention that I do not accept the argument of counsel for the Appellant that what the Appellant said prior to the disclosure of the sexual abuse should be ignored. The Appellant's attempt to conceal the sexual acts perpetrated upon him by the Decedent is, indeed, liable to affect *certain parts* of his original version, but one cannot deduce from this that it ought to be dismissed entirely. Thus, for example, disclosure of the acts of sodomy cannot explain the

change in the Appellant's version regarding the nature of the threats made by the Decedent on the night of the incident (beating, or killing). Similarly, I do not believe that this disclosure necessarily affected the original version of the Appellant regarding the time at which he deduced that the Decedent was dead (after the strangulation, or only after hitting him with the rock). Hence, in my opinion, the trial court was correct in its determinations on these matters.

37. I also accept the decision of the District Court to dismiss the Appellant's claims, which were raised for the first time only in the course of his testimony, whereby the Decedent made sexual remarks to him on the *night of the event*. As explained by the District Court, between the third interrogation, in which the sexual abuse of the Appellant was disclosed for the first time, and his testimony, the Appellant had several opportunities to clarify his version, but he refrained from doing so, without providing a satisfactory explanation. Counsel for the Appellant claims that this is a matter of a suppressed memory, which came back to the Appellant only as the date of testifying approached, but in my opinion, this argument must be dismissed. This Court has acknowledged the possibility of recognizing suppressed memories that re-emerged. However, recognition and recourse to these memories will occur only in very rare cases, and with great caution (see: CrimA 5582/09 *A. v. State of Israel* [9], para. 125 *per* Justice Y. Amit; CrimA 8203/11 *A. v. State of Israel* [10], para. 9). It has also been decided in the case law that a claim of suppressed memory must be supported by external evidence, in light of the concern that the memory is false rather than suppressed (see: CrimA 2218/10 *A. v. State of Israel* [11], para. 101). In the case at hand, counsel for the Appellant's claim of a suppressed memory was raised generally, with no evidence that might have supported such a claim. This would seem to suffice to dismiss the argument raised by counsel for the Appellant on this subject. Moreover, his claim is not logically tenable, for it is unreasonable that the Appellant would remember the acts of sodomy perpetrated upon him, and the sexual remarks that accompanied these acts, but suppress those sexual remarks addressed to him when there was no sexual abuse. In light of all this, I see no reason to interfere in the findings of the lower court whereby sexual remarks were not made to the Appellant on the night of the incident.

38. Below I will more broadly address the determination of the District Court regarding the Appellant's reasoning when he began the strangulation. At this stage, I would point out that my

opinion on this matter, which differs from that of the lower court, is that the actions of the Appellant were done out of emotional turmoil that affected his reasoning.

39. In summary, apart from the Appellant's emotional reaction to the Decedent's actions before the killing, I see no reason to intervene in the factual findings of the lower court. I accept, therefore, that the Appellant met the Decedent by chance at the kiosk. The two distanced themselves from Avi and Nathan in order to talk, and there, the Decedent threatened the Appellant that if he did not pay him NIS 1000 within a day or two, he would beat him. After a while, Avi approached the two of them, and the Appellant motioned him to go away. The Decedent then took the Appellant to the empty parking lot behind the kiosk, turned his back to the Appellant, unzipped his pants and exposed his penis in order to urinate, while continuing to threaten the Appellant. When the Decedent finished urinating and begin to do up his pants, the Appellant attacked him from behind and began strangling him, continuing to do so for approximately seven minutes. When this strangulation stopped, the Decedent fell to the ground, but he was still shaking and breathing. The Appellant, who understood that the Decedent was not yet dead, picked up a rock and struck the Decedent several times. The Appellant then dragged the Decedent to a place next to the garbage bin, picked up another rock, and hit the Decedent several more times. The Appellant then went home, and several hours later, he presented himself at the police station and confessed to the killing.

40. Having addressed the factual questions required to decide on the appeal, I will proceed to examine the Appellant's legal arguments, bearing in mind the above findings.

Exemption from Criminal Liability

41. Counsel for the Appellant argues, as stated, that the Appellant should be exempted from criminal responsibility because he acted in "self-defense" when he killed the Decedent. At the same time, he argues that the requirements of self-defense should be relaxed, as was done in the *Dromi* case [43]. Alternatively, counsel for the Appellant argues that the Appellant should be exempted from criminal responsibility by virtue of "putative self-defense". I shall discuss these in the following order: First, I will present the normative framework of "traditional" self-defense, and ask whether this defense is available to the Appellant in the present case. I will then address

the comparison that the Appellant seeks to draw between this case and that of the *Dromi* case, and the possibility of leniency in relation to the elements of "traditional" self-defense in the circumstances. Finally, I will examine the Appellant's argument in regard to the existence of "putative self-defense".

Self-Defense

42. Self-defense as a defense to criminal responsibility is regulated in sec. 34J of the Penal Law, which states as follows:

> No person shall bear criminal responsibility for an act that was immediately necessary in order to repel an unlawful attack, which posed real danger to his own or another person's life, freedom, bodily welfare or property; however, a person is not acting in self-defense when his own wrongful conduct caused the attack, the possibility of such a development having been foreseen by himself.

Also relevant here is sec. 34P, which states:

> The provisions of sections 34J, 34K and 34 L shall not apply if – under the circumstances – the act was not a reasonable one for the prevention of the injury.

43. We learn from the above statutory provisions of six cumulative elements that are necessary for the purpose of grounding a claim of self-defense – elements that have been recognized in the case law of this Court and in the legal literature (see: CrimA 20/04 *Kleiner v. State of Israel* [12], 90-92; CrimA 4191/05 *Altgaus v. State of Israel* [13], para. 13, *per* Justice E. Arbel; CrimA 4784/13 *Nir Somekh v. State of Israel* [14], para. 162), and they are as follows:

(a) The actions of the defendant were for the purpose of *repelling the unlawful attack*.

(b) There was a *real danger* of harm to "the life, liberty, bodily welfare or property" of the defendant, or of another.

(c) The danger was *imminent*. There are two aspects to this condition: *First*, the defensive conduct was embarked upon only from the moment that it was imminently required to repel an attack. *Second*, the defensive conduct ceased from the moment that it was no longer required to repel the attack (see: *Altgaus v. State of Israel* [13], para. 13 *per* Justice Arbel,); CrimA 6157/03 *Hoch v. State of Israel* [15], para. 14); S.Z. FELLER, CRIMINAL, ELEMENTS OF CRIMINAL LAW, vol. 2 (1987) 426-427 (Hebrew); BOAZ SANGERO, SELF-DEFENSE IN CRIMINAL LAW (2000) 18 (Hebrew) (hereinafter: SANGERO)).

(d) The defendant *did not bring about the attack through his own unlawful conduct*, "the possibility of such an attack having been foreseen by himself."

(e) The actions of the defendant were *necessary* in order to repel the attack. This condition includes "qualitative necessity", i.e., that other alternatives were not available to the defendant, and "quantitative necessity", i.e., that it was not possible to use less force (see: *Altgaus v. State of Israel* [13], para. 13 *per* Justice E. Arbel; *Kleiner v. State of Israel* [12], at p. 90; SANGERO, at p. 178; YORAM RABIN AND YANIV VAKI, CRIMINAL LAW, vol. 2 (3rd ed., 2014), pp. 799-800 (Hebrew) (hereinafter: RABIN & VAKI, vol. 2)).

(f) The harm anticipated from the attack and the harm anticipated from the defendant's act of self-defense are proportionate (*Altgaus v. State of Israel* [13], para. 13 *per* Justice E. Arbel; SANGERO, at p. 206; AHARON ENKER, DURESS AND NECESSITY IN CRIMINAL LAW, (1977), pp. 112-114 (Hebrew)).

In the *Altgaus* case [13], it was explained that, at times, no distinction is drawn between the condition of necessity and that of proportionality, because they were both derived by the Court from the reasonableness requirement appearing in sec. 34P of the Penal Law, cited above (*ibid*., para. 14, *per* Justice E. Arbel). At the same time, it was noted there that, sometimes, the distinction between the two may be of significance, for there may be a means that is necessary but not proportionate, and vice versa (see also: CrimA 6147/07 *Avisidris v. State of Israel* [16], paras. 32-33, *per* (then) Justice M. Naor; CrimA 8133/09 *Mizrahi v. State of Israel* [17], para. 9; SANGERO, at p. 203).

44. The burden of proof in self-defense, as for all other defenses to criminal responsibility, is set out in secs. 34E and F, and 34V(b) of the Penal Law.

Section 34E of the Penal Law provides as follows:

> 34E. Unless legislation provides otherwise, any act shall be assumed to have been committed under conditions that do not include a restriction of criminal liability.

Section 34V(b) of the Penal Law provides as follows:

> 34V(b) If reasonable doubt arose, whether there is a restriction on criminal liability, and if the doubt has not been removed, then the restriction shall apply.

The words of Justice M. Cheshin are apt here:

> The "defenses" constitute a type of sleeping element in the penal system, that remain "asleep" until they are woken from their slumber, akin to: "Do not wake and do rouse them until you need them."[1] This applies to all the "defenses" enumerated in Chapter Five-A, Article Two, of the Penal Law … however, if a claim of "defense" to criminal responsibility is raised, the provisions of the "defense" awaken from their slumber, and in rising, change their surroundings and negate the criminality of the act. In this event, the "defense" reveals itself as an entity with direct influence – both concerning the presumption of innocence and concerning the question of whether the prosecution raised the burden of proof imposed on it (from the beginning). Thus, if a "defense" to criminal liability is claimed, and a reasonable doubt arises – and is not removed – as to whether that "defense" applied to the event or not, then the defense will apply (sec. 34V(b)). In other words: in that case the defendant will be presumed innocent, and the prosecution will not be deemed to have raised the burden of proof that it bears (from the beginning). Conclusion: The defendant will be acquitted (see: CrimA 4675/97 *Rozov v. State of Israel* [18], 369).

[1] Ed: *cf.* The Song of Songs 8:4.

45. It seems to me that, in light of the factual basis for the decision in the present appeal, as described in para. 39 above, the Appellant has not succeeded in establishing a reasonable doubt as to whether the fatal event presented the conditions required to base a claim of a defense to criminal responsibility due to "self-defense". As stated, the Decedent threatened the Appellant that he would beat him if he did not pay him within a day or two. From the formulation of the alleged threat, it is clear that even if the Decedent had intended to carry out the threat, he was not expected to attack the Appellant that same evening (compare: *Kleiner v. State of Israel* [12], para. 11; *Somekh v. State of Israel* [14], para. 165). As for the possibility that the Decedent would commit another act of sodomy, it appears that such an assault, too, did not involve an element of imminence, for the Appellant admitted, as stated, that he attacked the Decedent when the latter began closing his pants, and therefore, it does not seem reasonable that he was about to attack him sexually at that time. In view of this, it is clear that the Appellant was not facing imminent danger to his body, either of being beaten or sexually assaulted. Hence, his actions were not immediately necessary to repel the attack. The absence of the elements of necessity and immediacy is sufficient to dismiss the possibility that the Appellant acted out of self-defense in the "classical" sense, and therefore I do not see the need to elaborate on the other elements of self-defense.

The Dromi Affair

46. As stated, counsel for the Appellant argues that leniency should be exercised with regard to the requirements of self-defense in the present case, in which the Appellant was facing possible danger of bodily harm, as it was in the case of *Dromi*, in which there was danger of harm to property alone. In his view, the circumstances of the present case indicate that the Appellant acted out of self-defense according to the lenient requirements as aforesaid. As will now be explained, I am of the opinion that this argument, too, must be dismissed.

47. The. *Dromi* case involved the owner of a farm who shot two intruders who broke into his fields during the night. One of the two intruders was killed and the other wounded. In the course of the proceedings in the case, the legislature introduced a legislative amendment and added a special provision – sec. 34J1 of the Penal Law (hereinafter: the exception of defense of a home). In view of the said statutory provision, the District Court decided, by majority opinion, to acquit the defendant. I will elaborate on this below.

48. Section 34J1 of the Penal Law provides as follows:

> 34J1(a) No person shall bear criminal liability for an act that was immediately required in order to repel a person who broke into or entered – with the intent to commit an offense – his or another person's residential premises, business premises or fenced agricultural farm, or a person who attempts to break in or to enter as aforesaid.
>
> (b) The provision of subsection (a) shall not apply if –
>
> (1) under the circumstances of the case the act was obviously not reasonable for the purpose of repelling the person who breaks in or enters;
>
> (2) the person caused the break-in or the entry by his unacceptable conduct, foreseeing in advance the way matters would develop.
>
> (c) For the purposes of this section, "agricultural farm" includes grazing areas and areas used for the storage of farm equipment and vehicles on the agricultural farm.

From the language of this provision we learn that the section provides a defense to criminal responsibility for a person who acted in order to repel an intruder into residential or business premises, or his fenced agricultural farm, according leniency with respect to some of the requirements of regular self-defense (for elaboration see: *State of Israel v. Dromi* [43], para. 6, *per* Judge R. Barkai; *Somekh v. State of Israel* [14], para. 173; RABIN & VAKI, vol. 2, at pp. 830-840). The purpose of the said amendment was explained in *State of Israel v. Dromi* [43] as follows:

> A review of the Explanatory Notes to the Law (Bills for Knesset Law 208, of 14 Adar 5768, Feb. 20, 2008, p. 196) and to the deliberations held in the Constitution, Law and Justice Committee in regard to the said proposal (Protocol 495 of the Committee session of March 11, 2008, and Protocol 561 of the Committee session of Junew 11, 2008) indicates that the legislature sought, by this new defense, to distinguish between the

> circumstances of self-defense outside of a person's house or his yard, and circumstances of self-defense within a person's premises, and in fact expanded the defense when a person is in his house, on his premises, in the sense that it sought to accord special treatment to a person's residence and strengthened and expanded the right of a person to protect his life and his property in his home, which is his castle (para. 6 *per* Judge R. Barkai; emphasis added – H.M.).

My colleague, Justice D. Barak-Erez, discussed the emphasis on the defense of residential premises in one of the cases, saying as follows:

> One may comment that the position of the District Court comports with the approach that emerges from U.S. case law (see: Miriam Gur-Arye and Gallia Daor, *A Special Defense for Protecting Home, Farm and Business Premises: Following the Dromi Case*, 13 MISHPAT UMIMSHAL (2010) 141, 151 (Hebrew) (hereinafter: Gur-Arye & Daor), and – without establishing a hard and fast rule – is even consistent with the appropriate, cautious approach to the interpretation of defense of homes. The reason for this does not lie in an approach that sanctifies exclusive property rights in the residential home itself … the emphasis is apparently different: in a space to which special permission to enter is not required, or such permission can be given by many, and even without prior coordination, the sense of danger and threat that can be attributed to another person's very presence in that place is significantly weakened (see: CrimA 1964/14 *Shimshilshvili v. State of Israel* [19], para. 38).

From the above, it emerges that the legislature thought it proper to be lenient regarding the requirements for self-defense when a person's home is involved, as opposed to self-defense that occurs outside his home. The basis for this distinction drawn by the legislature appears to derive, inter alia, from the assumption that normally, a person who breaks into the home of another endangers the people who are at home. Application of the lenient requirements of sec. 34J1 of the Penal Law to the present case is, therefore, contrary to the language of the section and its purpose, and therefore, I do not accept the argument of counsel for the Appellant on this matter.

49. Over and above what is strictly necessary, I will point out that even if we were to be lenient in regard to the requirements of self-defense, and were to apply the requirements of sec. 34J1 of the Penal Law, *mutatis mutandis*, to the case at hand, this would not help the Appellant, for the element of immediacy and necessity, which, as stated, were not present in this case, are also included in the framework of the said section.

Putative Self-Defense

50. Counsel for the Appellant argues, alternatively, that the circumstances of the case justify recognition of the special defense that has been recognized in the case law and termed: "putative self-defense". This defense derives from a combination of sections 34J and 34P of the Penal Law, cited above, together with sec. 34R of the Law, which treats of misinterpretation of the situation. Section 34R states as follows:

> 34R. (a) If a person commits an act, while imagining a situation that does not exist, then he shall bear criminal responsibility only to the extent that he would have had to bear it, had the situation really been as he imagined it.
>
> (b) …

Combining the above sections shows, therefore, that a person who claims to have acted out of "putative self-defense" will bear criminal responsibility only to the extent that he would have borne it had the situation actually been as he had mistakenly imagined it to be (see: the *Altgaus* case [13], para. 16, *per* Justice E. Arbel; RABIN & VAKI, vol. 2, at pp. 841-842). In other words, the existence of the conditions of self-defense should be examined in view of the defendant's mistake, as long as the mistake was genuine. Only such a mistake will enable an examination of recourse to "putative self-defense". But note: the defendant's mistake need not be reasonable, even though the reasonableness of the mistake will help in assessing how genuine it is (see: the *Altgaus* case [13], para. 16, *per* Justice E. Arbel, and the references cited there).

51. *From the general to the specific*: In considering all the circumstances in this case, and especially in view of the fact that the Decedent, *on the night of the event*, took the Appellant to a

dark, isolated place, after having sexually molested him twice in the preceding weeks, the Appellant's argument that he imagined that the Decedent was about to commit another act of sodomy upon him is not inconceivable, even though the Decedent had begun to do up his pants at that time. Therefore, I am prepared to assume that at the initial stage, which was the time when the strangling began, the Appellant genuinely thought that he was facing immediate danger of unlawful attack by the Decedent, such that he believed that he was exposed to real bodily harm, and that the act of strangling was necessary in order to prevent the attack. I am also of the opinion that, at that time, the Appellant did not bring about the attack by his own wrongful conduct. Parenthetically, I will further assume in the Appellant's favor that it may have been possible to shorten the duration of the strangling, at the level of quantitative necessity, but in view of the Appellant's statement in his first police interrogation whereby he did not release his hold for fear that the Decedent would kill him, I accept that in this element, too, there was a genuine mistake on the part of the Appellant.

Notwithstanding the above, it appears that, already at the first stage, the possibility of retreat was available to the Appellant before he began strangling the Decedent, when the Decedent was urinating with his back to him. Under cross-examination in the course of his testimony in the District Court, the Appellant was asked why he did not run away at that stage, and his response was: "If I had run away, I would have been nervous about where I would get the NIS 1000." The Appellant's response attests to the fact that he did not feel that he could not escape at that stage and avoid the *immediate* threat facing him, but that he thought that escaping would cause him problems with the Decedent in the *future*. Hence, also in terms of the situation as the Appellant perceived it, the option of running away from the immediate threat was available to him, and therefore the "element of qualitative necessity", which is required as part of the claim of self-defense as a defense to criminality, was not present, even in the eyes of the Appellant.

Moreover, the way in which events continued to unfold negates the possibility of grounding a claim of "putative self-defense", as I will explain below.

52. As noted, in his first statement, the Appellant said that after the strangling, the Decedent fell to the ground, breathing and shaking, and at a certain stage he stopped moving. The Appellant explained that he understood from this that the Decedent was injured, but had not yet died. This is consistent with the pathology report, which determined that the Decedent was killed by the head

injury caused by the rock, and not as a result of strangulation. Hence, from the moment at which the Appellant stopped strangling the Decedent (the strangling continued some seven minutes, according to the Appellant's estimate), at the end of which the Decedent fell to the ground and began shaking, all immediate threat was removed, as the Appellant saw, for at that time it was clear that the Decedent was no longer capable of hurting him on that occasion. Thus, although the Appellant understood that the immediate threat had abated, he did not desist from performing acts of "defense". Rather, at that stage, he picked up a rock and began hitting the Decedent on the head, until he brought about his death (*cf*: CrimA 8687/04 *Khilef v. State of Israel* [20], para. 11). As such, the Appellant, in his own eyes, carried out the said acts in the absence of real danger of unlawful attack on the part of the Decedent, and in any case it was not necessary to hit the Decedent with a rock in order to prevent such an attack.

53. Regarding the possibility of recognizing the Appellant's actions as self-defense, even though he continued hitting him after he fell to the ground and was neutralized, we permitted the parties to submit references from foreign legal systems after the hearing. From the material submitted to us by the parties, it appears that my above conclusion comports with comparative law. Thus, for example, the Respondent cited a judgment of the Supreme Court of North Carolina in the U.S., describing the case of a woman who killed her husband – who had abused her physically, verbally and psychologically over many years – while he was sleeping. The Supreme Court dismissed the defendant's claim that she acted in self-defense, mainly because there was no immediate threat at the time of the killing. The following appeared in the judgment (hereinafter: the *Norman* case):

> The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from *imminent* death or great bodily harm at his hands. (see: *State v. Norman* [44]; emphasis original – H.M.).

And further:

> The evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was "imminent" or about to happen to the defendant when she shot her husband (at p. 261).

54. Counsel for the Appellant countered with an American case that also dealt with a battered wife, who killed her husband after she experienced, as the Court called it, "a night of domestic terror", which included several hours of continuous physical beating, sexual abuse, and threats to her life and the lives of her children. In this case, the Supreme Court of the State of West Virginia decided to acquit the defendant of criminal responsibility, even though she killed her husband when it seemed that he was sleeping, or had passed out on the sofa, since it held that she acted in putative self-defense (see: *State v. Harden* [45] (hereinafter: the *Harden* case)). The Court there explained, inter alia, that the circumstances of the case point to the reasonable possibility that the defendant believed that although her husband was asleep on the sofa, she was facing imminent danger to her life and the life of her children (at pp. 812-813). The Court also ruled that a reasonable person, too, had he been in her situation, would have believed that an imminent threat existed (at p. 815).

55. Upon reading the said judgment, we see that even if we were to apply the criteria adopted there to the case at hand, this would not lead to the conclusion that the Appellant should be exempted from criminal responsibility. As noted above, the Appellant's own words indicate that he was not facing *imminent* danger from the Decedent from the moment that the late Yaron Eilon fell to the ground after being strangled, and that even the Appellant himself did not believe otherwise. In this, the circumstances here differ from those described in the *Harden* case [45], and are more similar to those in the *Norman* case [44].Therefore it cannot be said that the Appellant acted out of putative self-defense.

56. To summarize this section: the circumstances of the present case do not show that the Appellant acted in self-defense, in the classical sense, inter alia, in view of the lack of imminence of the danger facing the Appellant, insofar as it even existed. This conclusion holds even were I prepared to be lenient with respect to the criteria for self-defense, and to equate them to those relating to *defense of one's home*.

Neither does consideration of the special defense of "putative self-defense" lead to the conclusion that the Appellant should be exempted from criminal responsibility. Although I was prepared to assume that the Appellant imagined that he was about to experience further sexual abuse, and I further assumed, in his favor, that he did not release his stranglehold on the Decedent for fear that the Decedent would attack him, it appears that the elements of self-defense are not

present in the circumstances of the case, in view of the actions of the Appellant after the Decedent had fallen to the ground. The significance of this is that even had the situation been as the Appellant perceived it to be at the time of the fatal event, a claim of self-defense is not available to him, and he is criminally responsible.

57. After having decided on the matter of the defenses to criminal responsibility of self-defense and putative self-defense, I will now proceed to consider the arguments of the Appellant relating to the element of "absence of provocation" as part of the mental element of the crime of "premeditated" murder. I will begin the analysis with a short background to the homicide offenses in Israeli law, and the proposed reform that is currently under consideration.

The Law of Homicide in Israel

58. The Penal Law includes, at present, three types of homicide offenses: causing death by negligence – an offense which is punishable by up to three years imprisonment (sec. 304 of the Penal Law); manslaughter, an offense that relates to cases of causing death with mens rea, and that carries a maximum penalty of 20 years imprisonment (sec. 298 of the Penal Law); and murder, an offense that carries a mandatory penalty of life imprisonment (sec. 300 of the Penal Law), and which is divided into several particular situations. Of these situations, relevant here is the situation of causing death with "premeditation" (sec. 300(a)(2) of the Penal Law). Alongside the offense of murder is a provision that allows for a reduced penalty in certain circumstances (sec. 300A of the Penal Law). In the framework of the present case, mention should be made of sec. 300A(c) of the Penal Law, which permits the imposition of a reduced sentence when "the defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused."

Besides these offenses, there is also the offense of attempted murder (sec. 305 of the Penal Law), and several particular offenses of causing death that are not relevant in our context.

59. In 2006, a judgment was handed down in CrimFH 1042/04 *Biton v. State of Israel* [21] by a panel of seven justices. In the main opinion, President A. Barak reviewed the existing laws of homicide in the Penal Law, and particularly the offense of "premeditated" murder. At the end of the judgment, President Barak called upon the legislature to re-examine the existing laws of

homicide, saying: "I hope that a comprehensive examination of the laws of homicide will be undertaken as soon as possible in Israel, and that the government and the Knesset will consider this complicated issue with appropriate speed" (para. 68). The other justices on the bench concurred with President Barak.

60. Following the above comment, in 2007, the then Minister of Justice, Professor Daniel Friedman, appointed a committee chaired by Professor Mordechai Kremnitzer, which was charged with "examining the elements of the homicide offenses" (hereinafter: the Committee). The Committee discussed the need to amend the offenses of murder and manslaughter, and the creation of a different hierarchy between them. In August 2011, the Committee submitted its recommendations for a redrafting and redefinition of the chapter on the offenses of Causing Death in the Penal Law, in the framework of which the following (non-negligent) homicide offenses are defined: murder in aggravated circumstances (carrying a mandatory sentence of life imprisonment), murder (carrying a maximum sentence of life imprisonment), causing death in circumstances of reduced responsibility (with a maximum sentence of 20 years imprisonment), reckless homicide (with a maximum sentence of 12 years imprisonment), and causing death upon request due to a severe medical condition (which carries a maximum prison sentence of five years). The recommendations of the Committee were presented in the Penal Law (Amendment no. 119)(Offenses of Causing Death) Bill, 5774-2004, and recently into the Penal Law (Amendment no. 124)(Offenses of Causing Death) Bill, 5775-2015 (which is basically identical to the version proposed in Amendment no. 119, except for the non-inclusion of a special offense of causing death due to a severe medical condition) (hereinafter: Bills to Reform the Laws of Homicide). Because these proposals have not yet gained the status of a law, they do not apply to the present case. Nevertheless, I will address the recommendations of the Committee and the said amendments below, insofar as I find them to be relevant to our matter for the purpose of comparison.

61. Having provided a brief background to the laws of homicide in Israeli law and to the proposed reforms to these laws, I will now proceed to examine the arguments of the Appellant regarding the offense of murder. As stated, counsel for the Appellant argues that if it is decided that the Appellant is not exempt from criminal responsibility due to the claim of self-defense, he should be convicted of the offense of manslaughter, and not of murder. According to him, the mental element required to ground the offense of "premeditated" murder was not present. The

Appellant's main argument in this context concerns the condition of absence of provocation. I shall address this below.

Murder or Manslaughter?

62. The Appellant was convicted of "premeditated" murder, under sec. 300(a)(2) of the Penal law, which states as follows:

> 300(a) If a person does one of the following, then he shall be accused of murder, and is liable to life imprisonment, and only to that penalty:
>
> …
>
> (2) he caused the death of any person with premeditation.

63. The actus reus of the offense of murder is causing a person's death. The Appellant does not dispute that this element is present here.

64. The mental element required in the framework of the offense of murder is "premeditation", which is defined in sec. 301 of the Penal Law as follows:

> 301. (a) For the purposes of sec. 300, a person who killed a person shall be deemed to have killed him with premeditation, if he resolved to kill him and killed him in cold blood without any provocation immediately before the act, under circumstances in which he was able to think and to understand the result of his actions, and after he prepared himself to kill him or prepared the instrument with which he killed him.
>
> (b) In respect of the decision and preparation to kill, it is immaterial whether he resolved to kill that person or any one – specified or unspecified – member of his family or of his race.
>
> (c) In order to prove premeditation, it is not necessary to show that the defendant was in a certain state of mind for any period of time before the offense was committed or that the instrument with which the offense was committed was prepared at a certain time before the act.

According to the above section, "premeditation" comprises three components: a decision to kill, preparation, and absence of provocation. The additional argument of the Appellant concerns, as stated, the component of *absence of provocation*. According to counsel for the Appellant, an examination of the entire set of circumstances of the *night of the event* and the period that preceded it leads to the conclusion that the actions of the Appellant were carried out as a reaction to provocation, or, at least, to "cumulative provocation". I will now address this.

Absence of Provocation

65. The absence of taunting (which is also called "absence of provocation") is the central question in the framework of examining "premeditation", and it carries the main "burden" for the purpose of the distinction between ordinary "intention" (which is not sufficient for the purpose of a conviction for murder, but only for manslaughter) and "premeditation", which is required to ground the offense of murder under sec. 300(a)(2) of the Penal Law (see the *Biton* case [21], para. 20, *per* President A. Barak). The case law holds that a decision on the question of the existence of provocation requires an examination of two cumulative criteria: the subjective provocation test, and the objective provocation test, and only if it is found that there was provocation according to both these tests is it possible to rebut the existence of the element of "absence of provocation" in a manner that justifies downgrading the offense from murder to manslaughter (see, e.g., the *Biton* case [21], para. 20, *per* President A. Barak; CrimA 8107/10 *Ezer v. State of Israel* [22], para 26; see also: YAAKOV KEDMI, ON CRIMINAL LAW (Part 3) 1140 (2006) (Hebrew) (hereinafter: KEDMI).

66. Although this is a negative element, the burden of proving the element of "absence of provocation" falls upon the prosecution, but it has been decided that a "lesser degree of proof" is required (see: CrimA 28/49 *Zarka v. Attorney General* [1950] IsrSC 4, 504, 532). In this context, in CrimA 6167/99 *Ben Chelouche v. State of Israel* [23] the Court also stated as follows:

> The burden of proving the element of absence of provocation lies with the prosecution, but due to this matter being within the special knowledge of the defendant, if he does not present evidence as to the possible existence of provocation, and if there is no support in the evidence for the possible existence of provocation, the prosecution fulfils its obligation by bringing evidence of the causing of death (at p. 595; see also: KEDMI, at p. 1135).

The discussion of the relevant tests for the purpose of the element of "absence of provocation" will proceed in two stages: immediately below I will examine the *subjective test*, and in paras. 94-102, below, I will focus on the *objective test*, which is relevant mainly to the analysis that will be undertaken there.

The Subjective Test

67. "Absence of provocation" has been defined in the case law as "a situation of crystallization of an intention to kill out of careful consideration, level-headedness, composure and self-control on the part of the defendant (see: the *Biton* case [21], para. 25, *per* President A. Barak). The existence of provocation does not necessitate a state of mind that negates the intention to kill; rather, it assumes an awareness that death will be caused and an aim to cause it, but requires that the intention to kill was formed spontaneously, as a result of taunting on the part of the victim, and without the defendant having exercised discretion. Accordingly, insofar as it is determined that there was provocation in this case, the offense should be changed from murder to manslaughter, for even though there was the intention to kill, it was not "premeditation".

68. The *subjective provocation* test is anchored in sec. 301 of the Penal Law, which states, in the framework of the mental element of premeditation, that the defendant killed the victim "… in cold blood, without any provocation immediately before the act, under circumstances in which he was able to think and to understand the result of his actions...". From the language of the section, we see that provocation requires taunting, which led the defendant "to lose self-control, such that he committed the fatal act without thinking about the consequences of his action" (see CrimA 369/69 *Benno v. State of Israel* [24], at p. 577; see also, e.g., CrimA 418/77 *Bardarian v. State of Israel*, [25], at p. 11; the *Biton* case [21], para. 22, *per* President A. Barak). Justice Goldberg defined the test of subjective provocation as a situation in which:

> The defendant was able to evaluate his acts and the fatal outcome, and he indeed desired that outcome, but in his turmoil, his mental restraints were weakened to the point where he did not *morally* evaluate the fatal outcome, and did not elevate the value of the victim's life to the level appropriate to it as a rational, composed person (see: CrimA 33984 *Rabinowitz v. State of*

Israel [26], at p. 262 – emphasis added – H.M.; See also: CrimA 1354/03 *Dakar v. State of Israel* [27], at p. 95; the *Biton* case [21], para. 24, *per* President A. Barak).

69. From the above, we learn that the absence of provocation was intended to distinguish between a cool-headed decision to kill the victim, and a decision to kill without weighing the *moral* consequences of the act of killing. This is the main emphasis in the distinction between "premeditation", in which the perpetrator calmly considers the moral consequences of his actions, and spontaneous intention, in which there is, indeed, a decision to kill, but it is not accompanied by *moral assessment* of the ramifications of the actions.

70. A similar distinction was also drawn in the literature following the decision in the *Biton* case [21]. On this subject, the scholars M. Kremnitzer and L. Levanon wrote as follows:

> The second characteristic of the subjective dimension is that of absence of assessment. The opinion of President Barak in the *Biton* case places the dimension of absence of assessment in the center, and divides it into characteristics from which the opposite characteristics of premeditation are reflected well: absence of consideration and composure, thought about the consequences, moral assessment of the action and of its consequences.
>
> The characteristic of absence of assessment is, indeed, the dominant characteristic of the subjective dimension in the framework of the conception of provocation as a distinguishing factor between premeditation and spontaneous intention. The importance of the characteristic of absence of assessment, including its integration into the doctrine of provocation in general, lies in its contribution to clarifying the distinction between premeditation and spontaneous intention: by way of juxtaposition to the lack of assessment in the general framework of the paradigm of provocation, one can easily discern that premeditation includes cognitive elements of paying attention – to however small a degree – to the moral significance of causing death; the internalization of the true essence of the act of killing, not on the level of a slogan or headline, and of the depth of its ramifications (see: Mordechai Kremnitzer and Liat Levanon, *On the*

Element of Absence of Provocation in the Definition of "Premeditation" in the Wake of CrimFH 1042/04 Biton v. State of Israel, DAVID WEINER VOLUME – ON CRIMINAL LAW AND ETHICS 547, 577-578 (Dror Arad Eilon, Yoram Rabin and Yaniv Vaki, eds., 2009) (hereinafter: Kremnitzer and Levanon)).

Note: The *objective test* and its application in this matter will be addressed, as noted, in paragraphs 94-102 below.

71. The above applies primarily in the case of "regular provocation" (which is sometimes called "spontaneous provocation"). That does not seem to be the type of provocation in the case at hand, for the actions of the Decedent close to the time of the killing – which included "fining" the Appellant, threatening to beat him if he did not pay the "fine" within a day or two, and taking the Appellant behind the kiosk, at which time the Decedent unzipped his pants in order to urinate (while standing with his back to the Appellant) – do not amount, in their intensity, to taunting, as required in the framework of this element. At the same time, as stated, counsel for the Appellant argues that even if it be decided that the actions of the Decedent close to the time of the killing indeed did not amount to taunting for the purpose of "spontaneous provocation", in this case one must consider the element of *cumulative provocation* – a creation of the case law – in view of the continued persecution of the Appellant by the Decedent, which included humiliation, extortion, threats and acts of sodomy. I will address these below.

Cumulative Provocation

72. The case law has recognized the possibility of "cumulative provocation" in cases of continued, accumulating tormenting by the victim of the offense. On this subject, it was decided in the *Eliabayev* case [28] as follows:

> Situations are possible in which a person is subject to ongoing, accumulating provocation, causing an ever-increasing feeling of rage and frustration such that on the basis of these feelings, and following an additional act of provocation, a person commits an act of homicide. Even in these circumstances, the question that arises is whether the last act of provocation was of sufficient magnitude to be the sole cause of the

> defendant losing his self-control, following which he was led to commit the act. The preceding acts of provocation are examined only in relation to the degree that they affected the psychological state of the defendant leading up to the time of the last act. The question that arises is whether the prolonged process of provocation had a gradual effect on the formation of the idea of killing on the part of the defendant, for in that case it is not compatible with the requirement of spontaneity and suddenness of the reaction that is required for recognition of provocation that negates premeditation. *As opposed to this, it is possible that the last act of provocation is of such magnitude and character that it, in itself, brings about a sudden reaction of loss of self-control on the part of the defendant, when the acts of provocation are liable to affect the severity of the last provocation. And thus, in certain situations, it is possible to regard the preceding stages of provocation as cumulative circumstantial events that are liable to create a background of psychological readiness for the provocative effect of the last act of taunting as long as that act, alone, led to the prohibited act out of loss of control and spontaneity* (at pp. 475-476; emphasis added – H.M.; see also: KEDMI, at pp. 1152-1153).

In effect, this is an expansion of the requirement of the existence of taunting, which is anchored in sec. 301 of the Penal Law. According to the above doctrine, in appropriate circumstances, the element of taunting must be examined as part of a whole set, such that it includes previous acts of taunting that were not perpetrated close to the time of the killing. At the same time, in CrimA 686/80 *Siman Tov v. State of Israel* [29], at p. 268, it was decided that recognition of the claim of "cumulative provocation" was subject to two cumulative conditions:

(a) That the decision to kill had *not* already formed in the mind of the defendant beforehand;

(b) That immediately prior to the act, there had been an additional provocation, which was of independent status and intensity (sometimes called the "trigger").

In this context, in CrimA 7707/11 *Laham v. State of Israel* [30] the appeal of the defendant, who had been convicted of murder for shooting and causing the death of the decedent

was denied. The offense was committed against a backdrop of sexual abuse of the appellant's sister by the decedent, and after the appellant heard people sitting in a café talking about similar subjects. This Court dismissed the appellant's claim of provocation raised in that case, under those circumstances, in view of the fact that the sexual abuse had occurred many years prior to the appellant's acts, and there had been no concrete provocation on the part of the decedent or any other person. My colleague Justice U. Shoham said as follows in that case:

> Like the lower court, I too am of the opinion that the element of absence of provocation, which is required to prove the mental element of the crime of murder under sec. 300(a)(2) of the Penal Law, was satisfactorily proved. The Appellant recounted that on the day of the event, he was sitting in a café in the village, and he heard the people in the café talking about rape and about prostitution, and he said that "this bothered me psychologically, I left the place and started to wander around the village" (p. 311 of the transcript, lines 25-26). The Appellant also said that in the course of his wanderings in the village, he saw the Decedent getting out of his car and walking towards his home. *Even if we proceed from the assumption that when he saw the Decedent, the Appellant's anger was rekindled, and he felt rage towards him because of what had happened in the past, these acts, which happened many years before the shooting, cannot support a claim of provocation. The decision to take revenge on the Decedent formed in the appellant's mind without it having been preceded by any act of taunting on the part of the Decedent or of anyone else, and the accumulation of rage and anger against the Decedent over the years cannot be regarded as fulfilling the requirement of subjective and objective provocation. Accordingly, the obvious conclusion is that there was no act of provocation that led the appellant to commit the shooting* (para. 56; emphasis added – H.M.).

73. To sum up the above, determining the existence of "cumulative provocation" that negates the mental element of "premeditation" necessary to the the crime of murder, is contingent upon the existence of cumulative, ongoing taunting on the part of the victim, upon an additional act of

taunting having been committed ("trigger") close to the time of the killing, and upon the entire set of provocations having caused the defendant to lose his self-control so that he could not think and could not understand the severe *moral consequences* of his actions. The "trigger" must have independent status and force, but at the same time, its force is liable to be less than that required as a basis for taunting in a situation of "spontaneous provocation". Similarly, the decision to kill must have formed in the defendant's mind only subsequent to the "trigger", and not beforehand.

Comparative Law

74. At this stage, I will to examine the principles prevailing in English law on the present subject of cumulative provocation. In England, the subject is arranged in The Coroners and Justice Act 2009 (c. 25) (hereinafter: the new English Law), which changed the traditional defense of provocation in its previous formulation that had prevailed for generations in the Common Law (for background and development of the legislation in this context see: DAVID ORMEROD & KARL LAIRD, SMITH AND HOGAN'S CRIMINAL LAW 583-586 (2015) (hereinafter: ORMEROD & LAIRD)).

75. The new English Law today includes a "partial defense" due to loss of self-control which is caused by a "qualifying trigger". This "qualifying trigger" applies in relation to the crime of murder in that acceptance of the defense reduces the charge from the crime of murder to the crime of manslaughter. ORMEROD AND LAIRD discussed the relationship between self-defense and the "partial defense" due to loss of self-control, explaining as follows:

> If D has lost his self-control, self-defense is not available, but LOSC [loss of self control] may be. If D has used excessive force, the complete defense of self-defense will fail, but D may still be able to rely on LOSC; the excessive amount of force being explicable by reference to the "loss of self control" (ORMEROD & LAIRD, p. 516).

76. Section 54 of the new English Law, as relevant to our matter, is formulated thus:

> 54**. Partial defense to murder: loss of control**
>
> (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if –

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D

…

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) …

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

77. Contrary to the legal situation preceding it, the new English Law clearly states in sec. 54(2) that the requirement of loss of self-control need not comply with a requirement of immediacy:

> For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

78. Section 55 of the new English Law defines the qualifying "trigger" for the existence of this partial defense, and in what is relevant to our subject it states:

> 55 **Meaning of "qualifying trigger"**

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

…

79. In the case of *R v. Dawes* [46], the Court of Appeal recognized the possible cumulative impact of incidents that preceded the crime, allowing for a time lapse between the defendant's acts and the conduct of the victim (this fact is particularly apt in relation to the crime of violence within

the family, where loss of self-control is liable to occur due to a cumulative effect). It decided as follows:

> A reaction to circumstances of extreme gravity may be delayed. Different individuals in different situations do not react identically, nor respond immediately. Thus for the purposes of the new defence, the loss of control may follow from the cumulative impact of earlier events. For the purposes of this first ingredient, the response to what used to be described as "cumulative provocation" requires consideration in the same way as it does in relation to cases in which the loss of control is said to have arisen suddenly. Given the changed description of this defence, perhaps "cumulative impact" is the better phrase to describe this particular feature of the first requirement (para. 54).

English case law demanded that there be a causal connection between the loss of self-control and the trigger, and also that the existence of the trigger be examined according to an objective criterion (see*: R v. Gurpinar & Kojo-Smith* [47]). It was explained that in establishing whether the requirement of loss of self-control was indeed met, the nature of the conduct created by the trigger, the circumstances of the defendant, and the passage of time between the trigger and commission of the offence must be examined. The English literature clarified that the time that elapsed between the trigger and the commission of the offence still remained an important consideration, but it was no longer essential that the gap be short (see: ORMEROD & LAIRD, at pp. 584-585). The demand for a partial defense due to loss of self-control is based on the fact that the defendant is a person with a reasonable level of restraint and tolerance (see: sec. 54(1)(c) of the new English Law). As such, the amount of time available to the defendant to think and to "cool down" between the trigger and committing the offence is likely to be significant (see: ORMEROD & LAIRD, *ibid*.).

80. The defendant in *R v. Humphreys* [48] – a judgment to which the legal situation preceding the enactment of the new English Law applied – was a 17-year-old prostitute whose partner, with whom she had been involved for only a short time prior to the offense, lived, inter alia, off her earnings, and had beaten her on several occasions. On the night of the event, the defendant slit her wrists deliberately for fear that when her partner returned, he would hit her and force her to have

sex with him, having previously threatened to do so. When the partner returned to the apartment, he turned to the defendant and said to her that he wants to have sex with her, and prepared himself to do so. When the defendant refused, the partner laughed at her, and said to her that she was unable to commit suicide properly. At this stage, the defendant stabbed her partner to death. The Court of Appeal overturned the conviction of the defendant for the crime of murder, substituting a conviction for the crime of manslaughter, taking into consideration, inter alia, the state of mind of the defendant. The Court decided, inter alia, as follows:

> This tempestuous relationship was a complex history with several distinct and cumulative strands of potentially provocative conduct building up until the final encounter. Over the long term there was continuing cruelty, represented by the beatings … immediately before the killing, quite apart from the wounding verbal taunt, there was his appearance in an underdressed state, posing a threat of sex which she did not want … Finally, of course, there is the taunt itself, which was put forward as the crucial trigger which caused the Appellant's self-control to snap (pp. 1023-1024).

In this case, the partner's violence constituted an initial trigger, and the threats that he made to the defendant, his demand to have sex with her, and his harsh, mocking reaction to the defendant's desperation constituted an additional trigger, which in its cumulative impact complied with the requirement of cumulative provocation (see *ibid*., at pp. 1023-1023, *per* Justice Hirst; see also: Tony Storey, *Loss of Control: The Qualifying Triggers, Self-Induced Loss of Self Control and Cumulative Impact*, 77 J. CRIM. L. 189, 192-193 (2013)). Having looked at English law, I will proceed to apply the general principles of the case law to the matter at hand.

81. *From the general to the specific*: In the present case, there is no basis for assuming that the Appellant decided to kill the Decedent before the additional taunting on the *night of the event*, and even the Respondent does not make such a claim. According to the facts of the event, as determined by the District Court, the meeting between the parties was accidental. From this we learn that the Appellant, apparently, did not seek out the Decedent with the aim of killing him, but just happened to meet him, and he decided to kill him just before he began strangling him, or while doing so.

82. The District Court dismissed the Appellant's claim as to the existence of "cumulative provocation", and held in its verdict as follows:

> One cannot dismiss the acts of cruelty and humiliation perpetrated by the Decedent on [the Appellant] for a prolonged period before the act of killing. Nevertheless, I did not find that immediately before the act of killing there had been an additional provocation of independent status and force, even in a lesser manner (para. 24).

It further held:

> The cruelty of the Decedent towards the [Appellant] and the acts of sodomy that he described, led, with near certainty, to the growing feelings of rage and frustration of the [Appellant] and these affected the [Appellant's] mood on the night of the events, but, as stated, the financial demands and the threats made by the Decedent as to what would happen if the Appellant did not bring the money cannot be regarded as acts of provocation of independent force and magnitude (para. 24).

From the above, it emerges that the District Court recognized that it could not rule out that there had been ongoing, cumulative provocation on the part of the Decedent in the particular case, which led to feelings of rage and frustration on the part of the Appellant, and affected his mood on the night of the events. At the same time, the District Court was of the opinion that the actions of the Decedent just prior to the act of killing did not constitute provocation of sufficient magnitude in order to create the required "trigger".

My opinion on this matter is otherwise. As I see it, in view of the acts of cruelty by the Decedent towards the Appellant over a prolonged period preceding the *night of the event*, what happened on that night just prior to the act of killing indicates that there was provocation, which may not have been of sufficient severity to stand alone as the basis for "spontaneous provocation", but which was sufficient for the purpose of "cumulative provocation". I will now explain my reasons for this conclusion.

83. As already described, according to the factual findings of the District Court, after the Decedent demanded that the Appellant pay him NIS 1,000, he took him to the dark parking lot behind the kiosk, threatened to beat him if he did not pay him that amount within a day or two, and then unzipped his pants and exposed his penis in order to urinate, standing with his back to

the Appellant. Such a sequence of actions would not seem, of itself, to amount to "provocation" as a basis for "spontaneous provocation". Nevertheless, it would appear that an examination of the *entire set* of acts of cruelty perpetrated by the Decedent towards the Appellant in the period prior to this killing, which included *two acts of sodomy* in the period preceding the *night of the event*, points to the possibility of recognizing, under the circumstances, the existence of "accumulated taunting" that is a sufficient basis for "cumulative provocation". On this issue, my opinion is therefore different from the position adopted by the lower court, inasmuch as the Appellant's chance meeting with the Decedent on the *night of the event*, his being taken by the Decedent to an isolated parking lot, where the Decedent demanded, with threats, that he pay him NIS 1,000, while at the same time he was unzipping his pants in order to urinate – in my opinion, all these would seem, in the particular circumstances, to constitute additional provocation close to the time of the killing, of sufficient magnitude to constitute the "trigger" for that cumulative provocation, even in view of the determination of the lower court that the said actions were not accompanied by sexual remarks made by the Decedent .

84. Having determined that the Appellant was subject to cumulative provocation from the Decedent, and also that the required "trigger" occurred close to the time of the killing, or that at least a doubt exists in this regard, it remains to examine how the Appellant was affected by that "trigger", and if this caused him to lose his self-control and commit the fatal acts without considering their moral consequences. I shall now discuss this.

85. In his testimony, the Appellant described his psychological reaction to the above "trigger" as follows: "I saw him pulling up his pants. I saw him from behind. As he was about to turn around, the rage and all the anger, I strangled him" (p. 60 of the transcript, lines 2-3). And in the course of cross-examination he said: "I strangled him when I was standing and I looked at him, I simply saw all that had happened, particularly the rape. I stand and he takes out his penis and urinates. As he was taking out his penis all kinds of things came to me, *my head was spinning*" (p. 66 of the transcript, lines 3-6; emphasis added – H.M.).

The above statements may indeed attest to spontaneous loss of self-control on the part of the Appellant, preventing him from understanding the ramifications of his actions. However, as we have said, the trial court chose not to accept what the Appellant said on this matter, and gave precedence to what he said in his *first* statement. Based mainly on that first statement, the trial

court concluded that the Appellant "acted in a calculated manner and understood the consequences of his actions in real time." As pointed out above, my conclusion in this context is different from that of the District Court, despite and irrespective of what the Appellant said in the framework of his testimony, which was dismissed by the trial court. I will begin by saying that in my opinion, the Appellant did, indeed, form a decision to kill the Decedent, but a reasonable doubt arises as to whether the Appellant was acting in a state of composure, or whether he acted out of a loss of self-control as a result of the accumulation of acts of physical, sexual, verbal and psychological cruelty inflicted on him by the Decedent, and of the actions of the Decedent close to the time of the killing, which prevented him from considering the moral consequences of his actions. Below I will explain the reasons for my position.

86. As noted above, the Appellant told about the sexual abuse by the Decedent only in his third police statement. As I wrote, this does not mean that one may absolutely refrain from using what he said in the preceding statements, but one must be cautious in considering parts of those statements that are liable to be affected by the non-disclosure of the relevant sexual background. Among those, we should include what was said about the Appellant's psychological reaction to the "trigger", for how could the Appellant explain the loss of self-control that derived from his being taken (without resisting) to an isolated parking lot and seeing the Decedent open his pants and expose his penis, without disclosing the that he had been sexually abused by the Decedent in the preceding weeks?

87. In view of the above, one must be cautious in relation to what the Appellant said concerning his psychological reaction to the "trigger", and one must try to learn about this reaction, insofar as possible, from everything that the Appellant said, from the sequence of events, and from external evidence.

88. In my view, the sequence of events in the present case gives rise to a reasonable doubt as to whether the Appellant's actions were carried out in "*cold blood*". As already described, after the strangulation, once the Decedent fell to the ground, the Appellant hit him with a rock and, according to the pathologist's report, brought about his death. The Appellant said in his *first* statement that at this stage he understood that the Decedent was dead, and he dragged him. He describes it thus:

Q. Why did you drag him towards the garbage bin? What was your purpose in dragging him?

A. He could be seen easily and so I took him towards the garbage bin because the bin hid it a little, so I took him towards the bin.

Q. Why did you want to hide him?

A. It was easy to see so … afterwards I already understood that he was dead, so would I leave a body that can be seen easily?

This also emerges from what the Appellant said during the reconstruction at the scene of the killing:

Master Sergeant Shekalim: He was dead. And what did you do at that moment?

Suspect: I dragged him by the feet.

In the reconstruction, the Appellant also described how, after he had finished dragging the Decedent towards the garbage bins, and although he understood that the Decedent was no longer alive, he hit him several more times with the rock:

Master Sergeant Shekalim: … Where did you drag him to exactly?

Suspect: To here. He lay here. Here. Here he lay.

Master Sergeant Shekalim: He lay here?

Suspect: Yes. Give me a moment. He lay here. Here – a brick just like this one, and I hit him several times.

The above statements of the Appellant are supported by photographs from the crime scene in which a curbstone stained with blood can be seen in the area in which, apparently, the strangulation occurred, and another three rocks (which, according to the opinion of the expert on behalf of the Criminal Identification Division, constituted one rock before the attack on the Decedent) next to the garbage bin towards which the Appellant dragged the Decedent.

89. This sequence of events indicates that the Appellant did indeed intend, at the time of the strangulation, to kill the Decedent. However, the real possibility presents itself that this was a

sudden decision, which was not taken calmly, but rather out of an inner turmoil that made him continue hitting the Decedent with the rock even after he understood that he was already dead.

90. The possibility that the Appellant acted out of a sudden loss of self-control receives support from the pathology report, which stated that on the body of the Decedent "there was a tear in the groin and the penis which had almost certainly been caused after death." The Appellant was asked about the said finding in the course of his *fifth* police interrogation, and he responded thus:

> Q. Did you, before the death or thereafter, abuse the [Decedent] in that you intentionally caused a wound to his penis or his groin?
>
> A. Not intentionally.
>
> …
>
> Q. Could it be that because you were drunk at the time of the murder, you don't remember … that you hurt [the Decedent] in the area of his genitals deliberately as revenge for his having sexually abused you weeks before the murder?
>
> A. I don't know what to tell you about that, that day was a holiday, Lag Ba'Omer, so I drank here and there and apparently I drank more than I should, so if you say that his genitals were injured, then after I strangled him and he died, then it could be that the rock also got to his genitals because at that time I had all kinds of thoughts and fears (P/8, lines 28-37).

91. A combination of the pathology report and the above does not constitute evidence of the Appellant causing injury to the Decedent's genitals in revenge for having been sexually abused by him. However, it may add to the doubt that arises concerning the Respondent's claim that the Appellant acted calmly and calculatedly. So, too, the nature of the Appellant, who was described as a calm, introverted person who does not normally act violently, lends support to the possibility that his actions were carried out when he was in a state of emotional turmoil, and they were not considered carefully.

92. From the above, it emerges that although the Appellant was able to physically assess his actions and their fatal outcome, and even wanted this outcome, the possibility exists – and it is not negligible – that the situation he faced, which was similar to a certain extent to the situations that preceded the previous acts of sodomy he experienced, caused a state of turmoil within him in which his psychological constraints were weakened, to the extent that he did not morally weigh up and assess the fatal outcome of his actions.

93. Interim summary: It appears that in the present case, a reasonable doubt arises with respect to whether there was an absence of provocation according to the subjective test, under the conditions of "cumulative provocation" discussed in para. 72 above. I will now address the other test for deciding on the question of the absence of provocation, which is the *objective test*.

The Objective Test

94. As stated, the case law has ruled that provocation also requires compliance with the objective test. Over the years, recourse to this test has been criticized, both by judges and by scholars (see: YORAM RABIN AND YANIV VAKI, CRIMINAL LAW, vol. 1, 441-443 and the references there (3rd ed., 2014) (hereinafter: RABIN & VAKI, vol. 1)). In the *Biton* case [21], this Court considered at length the question of whether recourse to the objective test, as one of the components of the element of "premeditation" in the offense of murder, is justified, and it decided that despite the difficulties that arise from introducing an objective criterion as part of the definition of "premeditation", the criterion should remain in place until such time as the legislature decides to change it (para. 65, *per* President A. Barak). Indeed, it should be mentioned that in the framework of the Bill to Reform the Homicide Laws, a significant change was made on the subject, in that the element of provocation in its entirety was removed from the definition of the mental element of the offense of murder, and it appears, instead, as a circumstance justifying the downgrading of liability from murder to "killing in circumstances of reduced liability" (see: sec. 301B(a)(1) of the Bill to Reform of the Homicide Laws).

95. In the framework of the objective test of provocation, one must examine whether an "ordinary person", had he been in the situation of the defendant, would have been liable to lose his self-control and act in the way that the defendant acted. This criterion is designed to constitute an

"ethical constraint intended to impose norms of conduct" (see: CrimA 322/87 *Dror v. State of Israel* [31], at p. 724), and its purpose was defined at length in the *Benno* case [24] by President S. Agranat as follows:

> It is important to understand that the meaning of the objective test is not that the court must ask itself the question of whether most of the people in the State, had they been in the defendant's position, would have acted, under the influence of provocation, in the fatal manner in which the defendant acted, for in truth, it must be assumed that most would overcome the effect of the provocation and refrain from a fatal reaction. The question that the court must ask itself, according to the said test, is only whether the provocation directed at the defendant was so serious, in the circumstances of the case, that it must be concluded that most people would have great difficulty not succumbing to its influence, and would therefore be *liable* to act in the fatal manner in which the defendant acted (at p. 580; emphasis added – H.M.)

96. In the framework of the objective test, competing values and principles are balanced. President A. Barak described this balance well:

> On the one hand, it is not prepared to recognize the "frailty of human nature" as sufficient reason to negate responsibility for murder in every case of intentional killing in which the provocation led to a spontaneous, sudden reaction; it is not prepared to distinguish between different types of people and thus violate the principle of equality; it is based on the need of members of society to maintain the restraints essential for society. It is not prepared to consider only the loss of control as a result of the provocation, and thus "to ignore any attempt to impose normative conduct and to apply the principle of equality before the law" (Justice M. Shamgar in the *Siman Tov* case [29], p. 261). On the other hand, it is prepared to take into consideration those special situations of "frailty of human nature" which do not involve a clear anti-social position and which are the result of loss of control following severe provocation that civilized people, too, are liable to be

> unable to withstand, and to go wrong in their dealing with it (the *Biton* case [21], para. 34 *per* President A. Barak; emphasis original – H.M.).

97. Counsel for the Appellant argues that the objective test should be "subjectivized" in this case, in the sense that the standard of the "reasonable person" should be replaced by "the reasonable rape victim." Claims for recognition of subjective features in the framework of the test for absence of provocation have been *rejected* in the past by this Court on a number of occasions. Thus, for example, Justice Berenson refused to take into consideration the country of origin, ethnic group or race of the defendant for the purpose of the test for absence of provocation (see: CrimA 46/54 *Attorney General v. Segal* [32], at p. 434 (hereinafter: the *Segal* case). Similarly, in CrimA 6580/96 *Chicola v. State of Israel* [33], Justice M. Cheshin ruled that the term "average Ethiopian" was unacceptable, and that there could be no relaxation of the requirements of the objective test in relation to such a group (for a review of the case law on the question of the subjectivization of the objective test, see: RABIN & VAKI, vol. 1, at pp. 443-447)).

98. In the *Biton* case [21], President A. Barak dealt at length with the considerations relating to the subjectivization of the *objective test*, including a review of comparative law, and concluded that subjective particulars of the defendant ought to be taken into consideration in the framework of this test. However, President Barak expressed concern that departure from the pure format of the *objective test* is liable to lead to a slippery slope, and thought that the job of determining the "end point" of subjective considerations that may be introduced in the framework of the objective test should also be left to the legislature (para. 68 of his opinion). The other justices on the panel concurred in President Barak's opinion on this point.

99. In accordance with the ruling in the *Biton* case [21], it appears that "subjectivization" of the objective test for provocation should be avoided, and there should be no departure, at this stage, from the standard of the "reasonable person." At the same time, I believe that the present case does not require recourse to the standard of the "reasonable victim of a sex crime", for in my view, the sexual abuse undergone by the Appellant falls within the bounds of the objective test. I will explain.

100. As stated, the objective test for provocation examines "whether an ordinary person, if he were subject to *the situation of the concrete defendant*, would be liable to lose his self-control and react in a fatal way as did the defendant" (the *Eliabayev* case [28], at p. 467, emphasis added –

H.M.). From the definition of the said test we learn that, from the point of view of the reaction of "an ordinary person", certain concrete circumstances must be introduced in the framework of the "situation of the defendant". The question is whether the sexual abuse that the Appellant experienced falls within the bounds of those concrete circumstances that may be introduced in the framework of the objective test, or whether doing so would be "prohibited" subjectivization according to the decision in the *Biton* case [21]. As I will now explain, my view is that, in the circumstances of the present case, the prior acts that the Decedent perpetrated upon the Appellant must also be included within the objective test, and such inclusion would not constitute prohibited subjectivization.

101. As in other cases, here too, "the story does not begin 'in the middle'" (see: CrimA 132/10 *Tevachau v. State of Israel* [34], para. 8, *per* Justice Hendel). The acquaintance between the Appellant and the Decedent did not date from the *night of the event*. Several years earlier, the Decedent began to torment the Appellant by calling him derisive names, threatening him, and taking his money. The persecution reached a peak in the weeks preceding the *night of the event*, when the Decedent perpetrated severe sexual offenses upon the Appellant on two separate occasions. Clearly the relationship as described between the parties cannot be discounted in the framework of the objective test, just as one cannot ignore the conduct of the Decedent in the moments preceding the killing. Here, too, we are concerned with an *ongoing* relationship that directly affected the level of provocation of the Appellant relative to the Decedent on the *night of the event*, which constitutes part of the situation of the Appellant at the time of committing the act of killing. Hence, we must include, in the circumstances of the case, the history between the Appellant and the Decedent in the framework of the objective test for provocation in its classical format.

Things would be different, for example, had it been a matter of another person being killed, one who was not connected to the sexual offenses committed against the Appellant. In those circumstances, any consideration of the Appellant having been the victim of sexual offenses would have appeared as "prohibited" subjectivization, since it would take into account a circumstance that is external to the relationship between the defendant and the person who was attacked.

102. My above conclusion also derives from recognition of circumstances that justify invoking the doctrine of "cumulative provocation" in the framework of the subjective provocation test.

Clearly, insofar as events that preceded the date of the killing are taken into account in the framework of the subjective test, they must also be considered in the framework of objective provocation – otherwise, the doctrine of cumulative provocation would be totally devoid of content, since it would never be possible to meet the test of objective provocation, all in accordance with the circumstances.

Take, for example, a case in which a woman causes the death of her husband after years of prolonged physical abuse, when close to the time of the killing, an additional act of provocation was committed by the husband in the form of verbal threats that he was going to beat her. On its face, the incident described justifies a charge of manslaughter and not of murder, for the circumstances are those of cumulative provocation, and it might be ruled that there was provocation according to the subjective test, when all the actions of the husband are examined. At the same time, this would clearly not pass the test of objective provocation if the history between the wife and the decedent were not included, for it is doubtful whether the threats made by the decedent close to the time of the killing, detached from the acts of abuse in the past, would be sufficient to permit acknowledging that the "ordinary person" would have acted as the wife acted.

103. *From the general to the specific*: In the present case, my opinion is that a normative examination justifies recognition of cumulative provocation in the framework of the objective test as well. An ordinary person, who happens to meet a person who has sexually abused him, is taken by him to a dark, isolated place where there is basis for assuming that he is about to undergo further sexual abuse, and then, when he sees that the abuser is unzipping his pants and exposing his penis (even though he does not actually commit a sex act on him or try to do so), he is indeed liable to succumb to the "frailty of human nature", lose his self-control, and react in a spontaneous manner, as the Appellant reacted. In the circumstances as described, it is possible that the reasonable person would have lost his self-control, failed to understand the moral consequences of his actions, and would not have elevated the value of the life of the abuser to the appropriate level by virtue of the principle of the sanctity of life. Therefore, I am of the opinion that provocation should be recognized in the present case under the *objective test of provocation* as well, by virtue of the traditional standard of the "ordinary person".

104. This should not be construed as saying that that the Appellant's behavior was reasonable, or that most people in the country would have acted as did the Appellant. The Appellant made a

decision, albeit spontaneously, to kill the Decedent, and he did so. Therefore, he cannot be exempted from criminal responsibility, but must bear the appropriate penalty for his deeds., In his opinion in the *Segal* case [32], Justice M. Silberg wrote as follows in this regard:

> A person who reacts with an act of murder to real provocation is not entitled to any "cleansing of guilt" due to provocation on the part of the victim. And rightly so! For there is no provocation in the world that can justify an act of murder, and there is no murder that would be a reasonable act, even if the provocation that caused it is liable to affect the reasonable person. For the sanctity of life is an absolute moral obligation … all this diminution from murder to manslaughter is only a concession that the law makes to the said frailty of human nature (at p. 497).

Recognition of provocation under the objective test in the present case is, therefore, intended to avoid branding the Appellant with the mark of Cain of a murderer for reacting as many others in his situation would have been *liable* to do in the same circumstances (see: CrimA 3071/92 *Azoualus v. State of Israel* [35], at p. 580).

105. My conclusion is also consistent with the anticipated changes in the framework of the Bill for the Reform of the Laws of Homicide. Section 301B of the Bill provides, inter alia, that in a situation in which a person kills another following provocation, he will be charged with the offense of "causing death in circumstances of reduced responsibility", and not of murder, and his penalty will be a maximum of twenty years imprisonment. An identical provision was proposed in the framework of that section for a person who killed under certain circumstances, including when he was in a state of deep psychological distress, following severe, ongoing abuse on the part of the decedent. The Explanatory Notes to the section said that the reduced responsibility was designed to prevent branding a person who killed in the special circumstances described in the section as a "murderer", as opposed to the present sec. 300A, which only allows for a reduction of the penalty in those circumstances (at p. 870) .

106. In view of the above, having decided that there was provocation according to the *objective test*, and that a reasonable doubt exists as to whether or not there was subjective provocation in the circumstances of the case, I have no option but to decide that the Appellant indeed intended to kill the Decedent, but it was not a matter of "premeditation". Accordingly, I propose to my colleagues

that the Appellant be acquitted of the charge of murder, and that instead, that he be convicted of the charge of manslaughter (an offense under sec. 298 of the Penal Law).

The Penalty

107. As stated, if my opinion is accepted, the Appellant will be convicted of the offense of manslaughter under sec. 298 of the Penal Law. The said section allows for the imposition of a maximum penalty of 20 years imprisonment. At the same time, this is a maximum sentence, and a shorter period of imprisonment can be imposed, in light of the principles of Amendment 113 to the Penal Law.

108. Amendment 113 to the Penal Law establishes a three-stage test for determining the sentence of a person who has been convicted. At the first stage, the court must decide whether this was a single event, or several events. At the second stage, the court must decide the range of the sentence, in view of the guiding principle that there must be an appropriate relationship between the gravity of the deed under the circumstances and the defendant's culpability, and the type and level of punishment imposed upon him (sec. 40B of the Penal Law). Finally, at the third stage, the court must examine whether, in the specific case, there are circumstances that justify departing from the range of punishment – for reasons of rehabilitation, or the protection of public peace. If there are no circumstances justifying such a departure, a sentence within the range of punishment set at the second stage will be imposed, taking into account considerations of deterrence of the individual and the public, as well as circumstances that are not connected to the commission of the crime (see: CrimA 8641/12 *Saad v. State of Israel* [36]; CrimA 4741/13 *State of Israel v. Naamneh* [37]).

109. Our case involves an isloated act and a conviction for one offense. I will therefore proceed immediately to the second stage, at which the range of punishment is determined. For that purpose, several parameters that are listed in sec. 40C of the Penal Law must be considered. They are: the accepted penal policy, the protected interest that was harmed by the commission of the offense, the extent to which it was harmed, and the circumstances surrounding the commission of the offense.

110. Regarding the consideration of the accepted penal policy, the case law has stated:

> In relation to the crime of manslaughter, there is a broad spectrum of penalties, in accordance with the variety of situations and circumstances, and therefore the appropriate penalty is derived from the particular circumstances of each case. As such, it is not possible to determine the penalty by way of arithmetical comparison (see: CrimA 7000/10 *Alfidel v. State of Israel* [38]).

111. In view of the aforesaid, counsel for each of the parties referred to different outcomes in cases that have come before us. In the sentencing arguments, the case of CrimA 6353/94 *Bouhbut v. State of Israel* [39] was cited. This case concerned a wife who killed her husband "in light of violence, abuse and terror perpetrated [on her] by the decedent over the course of the 24 years of their marriage." After she was charged with and convicted of the offense of manslaughter, the Supreme Court, by majority opinion, sentenced her to 3 years imprisonment. There is a certain similarity between the circumstances of the present case and those in the case of Mrs. Carmela Bouhbut, for in both the abuser was killed by the victim of the abuse. However, there are several clear differences between the cases that require different sentences. Inter alia, these include the length of the period of abuse; the fact that the police were brought in, and the difficulty faced by Carmela Bouhbut, for this was the husband with whom she was living.

Mention should also be made of CrimA 4419/95 *Hadad v. State of Israel* [40], in which the appellant was convicted of manslaughter after he shot his father to death with the weapon of his soldier-brother. This followed his father's acts of physical and verbal abuse against him, and other members of the family over many years. The District Court sentenced him to ten years imprisonment, and his appeal against the severity of the sentence was denied by the Supreme Court.

Also relevant to our case is CrimA 7992/09 *A. v. State of Israel* [41]. In that case, the District Court convicted the appellant, who was a minor at the time the offense was committed, inter alia, of the offense of manslaughter, after he fatally stabbed the decedent, who had tried to molest him sexually when he slept at his house. Inter alia, the District Court sentenced the appellant to eight years imprisonment. The Supreme Court accepted the appeal of the appellant against the sentence, and set his penalty at six-and-a-half years of imprisonment. However, the two cases ought to be distinguished. In the latter case, it was ruled that this was a "case that was exceptional

and special in its circumstances", and that there was nothing wrong with the appellant's decision to defend himself, but that his reaction was excessive to the point of it becoming unreasonable. The circumstances of the perpetrator in the latter case are also different: the appellant there was a minor, aged 16 at the time of the commission of the crimes, and he confessed to the charge against him.

Finally, in his final supplementary brief, submitted on May 4, 2016), counsel for the Appellant cited another case: CrimA 6283/09 *Levy v. State of Israel* [42]. In that case, the appellant was convicted of manslaughter as a result of assaulting the decedent and causing him a serious head wound. The decedent was rushed unconscious to the hospital, and two weeks later, was pronounced dead. The verdict found that the appellant had been sexually assaulted by the decedent on several occasions when he was a child, and before he attacked the decedent, the appellant spotted the him as he was about to molest another minor. In that case, the court also determined that 20 minutes elapsed between the appellant seeing the decedent trying to sexually assault the said minor and the time when he returned and attacked the decedent a second time , this time without seeing anyone else who was in any danger. The District Court sentenced him, inter alia, to seven years imprisonment, and his appeal against the severity of the sentence was denied by the Supreme Court, which mentioned that at the second stage of the events, the attack was an act of revenge, where the appellant anticipated the fatal outcome of his actions.

Here, too, there is a certain resemblance between the *Levy* case [42] and the circumstances of the present case. However, it is difficult to draw a full analogy between the cases. In *Levy*, as opposed to our case, the appellant was initially charged with the offence of aggravated assault causing bodily harm. Only after the death of the decedent was the charge changed to manslaughter, of which the appellant was ultimately convicted. Moreover, in the *Levy* case, the offense was committed with less violence, and the fatal outcome there was not immediate. This Court also determined that the sentence that was imposed upon the appellant in that case "is not at all severe," so it is difficult to view it as a guide for general penal policy in similar cases.

112. The harm to a protected societal interest in the present case is extremely serious. On this subject, it is appropriate to quote from the judgment in the *Hadad* case [40]: "The principle of sanctity of life applies equally to every person as a person. The blood of a violent, despicable criminal is no less red than the blood of others" (at p. 764). This consideration therefore justifies

setting a strict range of penalties for offenses of the type of which the Appellant was convicted. In the *Hadad* case, the Court further stated:

> It is the sanctity of life that motivated the legislature to establish a penalty of mandatory life imprisonment for the crime of murder, and this is what underlies establishing a penalty of twenty years imprisonment – which is the period set by the law for life imprisonment that is not mandatory – for the crime of manslaughter. *Preservation of the sanctity of life, including imprinting this sanctity on every person's consciousness, is first among the purposes of punishment when a life has been taken, and the court must bear this in mind in pronouncing sentence for the crimes of murder and manslaughter*. It is no mere coincidence that the commandment, "Thou shalt not kill" is the first of the commandments expressing the basic norms for life in a civilized society, for there is nothing more terrible act than that … (at p. 765).

113. In this context, I would add that the sense of justice and public confidence in the legal system are liable to suffer if too great a disparity should develop between the penalty for the offense of premeditated murder and the penalty for crimes of manslaughter that are committed in aggravating circumstances (see: ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE, 130 (6th ed., 2015) (hereinafter: ASHWORTH)). The English Court of Appeal referred to this in one particular case, saying as follows:

> …vast disproportion between sentences for murder and the sentences for offences of manslaughter which can sometimes come very close to murder would be inimical to the administration of justice (*R. v. Wood* [49], par. 22).

In addition, the sentence for the offense of manslaughter must continue to reflect moral censure which singles out the taking of human life, and distinguishes these types of offenses from other violent offenses that do not involve causing death (compare: ASHWORTH, at p. 277).

114. Sentencing in cases such as these is, therefore, a hard task. From a comparative perspective, the *English sentencing guidelines* that deal with manslaughter due to provocation explain that in his sentencing, the judge must weigh up, inter alia, the following variables, and strike a balance

among them (see: SENTENCING GUIDELINES MANUAL, MANSLAUGHTER BY REASON OF PROVOCATION (2005) (hereinafter: The English Guidelines)):

First, the degree, nature and duration of the provocation. In this framework, the judge must consider whether the provocation is particularly extreme, whether the victim threatened only the defendant, or also his children, or someone close to him, abuse of the defendant by the victim in the past and its nature, the mental state of the defendant and its effect on the perception of the provocation. An important factor is the nature of the provocative behavior, its duration, and its cumulative impact over time, if such exists. When examining the nature of the provocation, the judge must consider whether the victim was actually physically violent towards the defendant, or whether he confined himself to verbal threats, and whether the acts of the defendant were motivated by fear, or by frustration or anger and the desire for revenge – these elements constituting mitigating and aggravating circumstances, as the case may be.

Second, the extent, force and nature of the loss of self-control on the part of the defendant. In this framework, the judge must consider, inter alia, the amount of time that passed between the provocation (or the last act) and the commission of the offense, whether the provocation built up over time, whether the defendant used a weapon and which type of weapon, and whether the weapon was prepared in advance. Another factor for consideration is whether the defendant took advantage of the fact that the victim was not prepared for, or that he slept at the time of the commission of the offense, whether the victim and the defendant were in a relationship at the time that the provocation took place, and the nature of the power balance between them.

Third, the actions of the defendant after commission of the offense and the motives. Did the defendant help the victim, or was he present at the scene after committing the crime, and as opposed to this, did the defendant try to destroy incriminating evidence, or mutilate the corpse?

The English Guidelines set three sentencing ranges for cases of manslaughter by reason of provocation, in accordance with the degree of provocation. The starting sentence is set for cases in which the provocation occurred over a short period prior to the commission of the offense. The Guidelines state that the judge must relate to the starting sentence in accordance with the degree of provocation, its duration, and taking into account the aggravating and mitigating circumstances. The starting sentence set for a low degree of provocation is 12 years imprisonment, and the range is from ten years to life-imprisonment. The starting sentence set for a substantial degree of

provocation is 8 years, and the range is from 4 to 9 years imprisonment, and the starting sentence set for a high degree of provocation is three years, and the range is up to 4 years imprisonment.

The circumstances that are connected to the commission of the offense in English law, and particularly the considerations of absence of pre-planning, the past history of the Appellant and the Decedent and the nature and degree of the provocation, are also relevant in our case.

115. Beyond an examination of the protected interest that has been harmed, one must also take into account the circumstances connected to the commission of the offense (see: sec. 40C(a) and sec. 40I of the Penal Law). The Appellant committed a vicious act of killing, which led to the grave harm of taking the life of the Decedent. Nevertheless, the Appellant acted with no earlier preparation, and as noted by the District Court, it may be assumed that had the Appellant not run into the Decedent by chance on the night of the fatal event, the crime might not have been committed. Similarly, another mitigating factor is the history between the Appellant and the Decedent that included violence, threats, extortion and sexual abuse, which led to the Appellant's state of mental distress, and ultimately, to the commission of the offense. This last consideration led the District Court, with the consent of the Respondent, to reduce the sentence of the Appellant under sec. 300A(3) of the Penal Law after he was convicted of murder, and it seems that it should also be accorded significant weight when we decide on his sentence after convicting him of the offense of manslaughter.

116. As for the Appellant's ability to refrain from the act – the District Court held that this was an aggravating consideration since the Appellant could have "broken off contact" with the Decedent on three different occasions on the night of the fatal event, but refrained from doing so. The Appellant could also have contacted the police before the night of the fatal event, in light of the criminal persecution by the Decedent. These considerations are legitimate in my eyes in the framework of sentencing, but they should be accorded only minor weight under the circumstances, in view of the Appellant's submissive character and the natural difficulty of the victims of sex crimes in seeking help.

117. As for the Appellant's ability to understand the wrongful nature of his conduct, it is this element that served me in my decision on the question of provocation, and I therefore do not think that it should be taken into consideration here as well.

118. After weighing all the circumstances and above considerations, I am of the opinion that the appropriate range of sentencing in the circumstances of the case is between 10 and 15 years imprisonment. In the absence of considerations of rehabilitation and protection of society in our case (secs. 40C(b), 40D and 40E of the Penal Law), I see no reason to depart from the said sentencing range, and therefore, in the framework of the third stage, the Appellant's sentence should be determined within the sentencing range.

119. On this matter, I am satisfied that the District Court carefully considered the circumstances that are not connected to the commission of the offense, such as the absence of a criminal record, the Appellant's cooperation with the legal authorities, his confession to the deed, his positive character, his medical condition and his life circumstances. The District Court concluded that, in view of the above considerations, the penalty of the Appellant should fall within the sentencing range – and I concur in this conclusion (compare the starting sentence fixed according to the English Guidelines for a low degree of provocation). Accordingly, I believe that the penalty imposed upon the Appellant should be set at imprisonment for a period of 12 years, from which the period of his detention will be deducted, and this – in addition to the conditional sentence imposed by the District Court.

120. In view of all the above, I propose to my colleagues that we grant the Appellant's appeal in the sense that we acquit him of the offense of murder, and convict him of the offense of manslaughter under sec. 298 of the Penal Law. I also propose that we reduce the prison sentence imposed upon the Appellant, setting it at 12 years imprisonment, from which the period of detention will be deducted, with no change to the conditional sentence imposed upon the Appellant by the District Court.

121. Following the above, I read the opinions of my colleagues Justice U. Shoham and Justice D. Barak-Erez, and I concur in their incisive comments.

Justice U. Shoham:

I concur in the comprehensive, thorough opinion of my colleague Justice H. Melcer, and in his conclusion concerning the penalty. I, too, am of the opinion that the Appellant cannot invoke

one of the defenses to criminal responsibility, namely self-defense, defense of one's home, and putative self-defense, all as extensively elucidated by my colleague.

As for the elements of the crime of premeditated murder, I agree that "*cumulative provocation*" has been proven in the present case, and it may be said that, in the circumstances of the case, the requirement of subjective and objective provocation has been met. Regarding subjective provocation, this was a case involving a long period of cruelty on the part of the Decedent towards the Appellant, which included a array of incidents of violence, threats of violence, including threats to the Appellant's life, financial extortion, and sexual abuse which included two acts of sodomy. In these circumstances, the Appellant being drawn to the alley and the Decedent exposing his penis (even if for the purpose of urinating), when beforehand the Decedent had tried to extort NIS 1000 from the Appellant – all these had the effect of a type of "trigger" that caused the Appellant to lose control and kill the Decedent. In this, the present case is different from that of CrimA 7707/14 *Laham v. State of Israel* [30], which was cited by my colleague in para. 72 of his opinion. There, the Appellant sought to take revenge on the Decedent for the rape of his sister several years earlier, and therefore the fact that he spotted him when he was walking in the direction of his family's home cannot provide a basis for the claim of provocation.

As for objective provocation, I concur with my colleague that this provocation must be considered in accordance with the criterion of the ordinary person, but without ignoring the history that predated the act of killing. This applies, of course, in a case of "*cumulative provocation*" such as our case, for otherwise it would not be possible to recognize this type of provocation. Thus, the requirement of objective provocation must meet the criterion of the "*ordinary person*", given the history and the common past of the killer and the victim, insofar as they are relevant to the event described in the information. According to this criterion, the Appellant also met the requirement of objective provocation, and therefore, he should be convicted of manslaughter and not of premeditated murder.

In addition, the penalty proposed by my colleague, which includes 12 years imprisonment, is appropriate and balanced in the circumstances of the case, and I concur in that as well.

Justice D. Barak-Erez:

1. I concur in the comprehensive opinion of my colleague Justice H. Melcer.

2. This is one of those cases in which the law cannot grasp the full complexity of life and of human suffering. Furthermore, this is a case that requires a balance between considerations of individual distress and those of general social justice, including preservation of the sanctity of a person's life – even that of a sinner – and concern about providing legitimacy for taking the law into one's own hands and revenge.

3. Yonatan Hailu Yamar, the Appellant, fell victim to sexual abuse, and also suffered from a life of illness and hardship, which made it difficult for him to accept help in "real time" by turning to the authorities or other support circles. At the same time, Yonatan Hailu Yamar also took the life of another person, not in circumstances of self-defense, albeit under the influence of distress and suffering.

4. I agree with my colleague Justice Melcer that, in the circumstances of the case, no factual basis was laid for the claim of self-defense, not even for a claim of putative self-defense. As long as the person who is attacked has the possibility of retreating, that possibility is to be preferred. In the present case, unlike the situation in some cases of violence that take place within the family, the alternative of leaving the scene was possible and obvious.

5. Even when we are concerned with victims of a crimes like Yonatan Hailu Yamar, if we are a life-affirming society we cannot grant legitimacy to acts of violence by victims of crimes, and especially acts of violence that have fatal consequences, in the framework of the defense of self-defense, unless it is self-defense in the simple, immediate sense. Self-defense is the justification that recognizes the absolute legitimacy of an action taken in order to save one's life and soul. Sometimes, it may extend to those who mistakenly, though reasonably, thought that they were in danger. However, a fatal act that clearly was not necessary for the preservation of life cannot be condoned. Indeed, sometimes we cannot be "too particular" with a person who was assaulted with respect to the precise measure of the use of force, and even more so with respect to those who are physically weaker than their assailant (see: Daphne Barak-Erez, *The Reasonable Woman*, 6 PLILIM 115 (1998) (Hebrew)). However, this approach of "not being too particular" certainly cannot

provide a complete exception to criminal responsibility in the case of use of force against a person who is helpless, however great his original guilt.

6. Once we arrived at the conclusion that the Appellant should be convicted, our discussion focused on the question of the offense of which the Appellant ought to be convicted, and how harsh his sentence should be. Under the present law, there are two paths that may lead to a reduction in the sentence of one who took the life of another against a background of continuous abuse – accepting the claim of provocation, or accepting a claim of reduced penalty under sec. 300A of the Penal Law, which applies, inter alia, "when the defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused." Alongside the similarity between the two paths, in the sense that both of them lead to a lighter sentence for the defendant, there is a significant difference in relation to criminal liability. Acceptance of the argument of provocation leads to a reduction in the conviction from murder to manslaughter, and consequently, also allows the court to be lenient in sentencing the defendant in the framework of the discretion it is given in determining the sentence for the crime of manslaughter. As oppose to this, an argument for reduced penalty under sec. 300A of the Penal Law allows for leniency in the penalty, but the conviction remains a conviction for the offense of murder.

7. The District Court based its judgment on sec. 300A of the Penal Law. My colleague Justice Melcer, on the other hand, ruled that, in the circumstances of the case, the claim of provocation raised by the Appellant should be accepted, and the Court should therefore be satisfied with his conviction of the offense of manslaughter, rather than the offense of murder. This determination has legal, moral and social implications, and I therefore would like to discuss it, even if on the practical level it would have apparently been possible to reach the same penal outcome within the framework of sec. 300A of the Penal Law.

8. My colleague Justice Melcer explains that, in the circumstances of the case, the claim of provocation raised by the Appellant should be accepted in the framework of the development of the doctrine of "cumulative provocation", which has been recognized in the case law of this Court. This is not a trivial determination. Indeed, on the level of principle, this claim of cumulative provocation should be recognized to the extent that our legal system recognizes the principle of provocation in the framework of the present structure of the offense of murder. However,

implementing the claim of provocation always involves a concern that it will be understood as indirectly legitimizing the taking of life due to inflamed passions, since the court is called upon to decide, inter alia, on the question of whether the "reasonable person" would have failed by taking the life of the decedent in the same circumstances.

9. The enactment of sec. 300A of the Penal Law postdated the groundbreaking judgment in the matter of Carmela Bouhbut (CrimA 6353/94 *Bouhbut v. State of Israel* [39]), which clearly brought to the forefront the problem of the victim of continued abuse who takes the life of his abuser. Apparently, the section was designed to provide a response to cases of this type. However, the choice of the solution of only a reduced penalty, under which a person who suffered from abuse and as a result took the life of his abuser would be labeled a "murderer", left unanswered the question of the circumstances in which it is nevertheless appropriate to talk of a person who "killed" and not "murdered" on the basis of the claim of provocation, with all that that involves. It bears mention, in this context, that the bill that engendered the amendment to the Law was originally directed at reducing the responsibility from murder to manslaughter, as opposed to the formulation of the law as it was ultimately passed (see: Penal Law (Amendment no. 41) (Reduced Liability) Bill, 5755-1995; Penal Law (Amendment no. 44), 5755-1995).

10. The starting point for the response to the question lies in the fact that sec. 300A of the Penal Law focuses only on the distress of the perpetrator of the offense (against the backdrop of ongoing abuse on the part of the decedent). It does not relate to any additional act on the part of the decedent that acted as a "catalyst" or an "arousal" to his being killed. As opposed to this, the claim of cumulative provocation involves the combination of an act that occurred close to the time of the fatal event, with a background of ongoing abuse. In this sense, the parallel between the situations is not absolute. In order for the claim of cumulative provocation to be accepted, one must also examine – after the continued abuse has been proven – whether the behavior close to the time of the causing of death was sufficiently serious in order to serve as the basis for this claim, against the backdrop of the past. The decision on this matter will necessarily be contextual and case-specific.

11. My colleague Justice Melcer is of the opinion that, in the set of special circumstances of the case, in which prior to the attack on the Decedent, he threatened the Appellant and humiliated him – and all this against the backdrop of two incidents of sexual assault in the preceding weeks –

there is reason to accept the claim of cumulative provocation. After much thought, I concurred in this conclusion. However, I wish to stress that I did so in view of the circumstances and the proven facts of this case. The fact that a person is the victim of ongoing abuse should not serve, per se, as a basis for acceptance of the claim of provocation. In other cases in which the elements of provocation are not present, victims who suffered from continuous abuse and killed the perpetrator may be shown leniency in the framework of sec. 300A of the Penal Law, which is based on the assumption that there was indeed a "murder", but at the same time, it expresses a position of understanding of the distress of the victim who became a perpetrator, in the format of a reduced penalty.

12. Neither does taking into consideration the distress of the victim who became a perpetrator, in the framework of sec. 300A, necessitate a discussion of the question of "reasonableness", as in the context of the claim of provocation, with all the difficulties involved and the complexity arising from the differences between people and their different personal circumstances (see and compare: CrimFH 1042/04 *Biton v. State of Israel* [21], at pp. 713-718, 720-723). I would add that I agree that the standard of the "reasonable person" has to be applied contextually, as explained in my above-cited article. Nevertheless, like my colleague, I believe that we would do well to refrain from defining a standard of the "reasonable rape victim", as counsel for the Appellant sought to do. I do not think that we should decide who is a "reasonable rape victim", and neither should we set "standards" for a victim's conduct. Concretization of the reasonableness – yes; rigid categorization that creates "molds" and "models" for behavior in the format of the "reasonable rape victim" – no.

13. It may be added that the proposed reform of the homicide offenses (in the last-published version – Penal Law (Amendment no. 124) (Offenses of Causing Death) Bill, 5775- 2015) – is formulated in such a way that causing death in circumstances of provocation and causing death against a background of abuse (to which sec. 300A of the Penal Law applies today) will both be regarded, in equal degree, as causing death in circumstances of reduced responsibility. If this proposal is accepted, there will no longer be any practical significance to a discussion of the claim of cumulative provocation in circumstances of ongoing abuse. According to what was explained above, this aspect of the reform, if it should be approved, is anticipated to facilitate the adjudication of the subject, and even more importantly, it will correctly reflect the consideration accorded to

crime victims who suffered abuse, without going into questions of the level of reaction in the framework of the laws of provocation.

14. In applying the principles that were laid down in the case law for determining the sentence of a person who was convicted of manslaughter in circumstances of this type, we had to tread the narrow path between according full weight to the personal circumstances and the deep distress of the Appellant on one hand, and the principle of preservation of human life and total negation of taking the law into one's own hands, on the other. In my opinion, despite the difficulty involved in imposing a penalty on the Appellant that is not light, my colleague's judgment achieved the right balance between these considerations.

15. On a broader view, I will point out that, in the course of the hearings in this Court, it was repeatedly argued that the Appellant was alone in his distress, he did not turn to the authorities for help after he was abused, and he received no protection from them. Against this background, and beyond the decision in the present case, it is appropriate to add that the reality in which crime victims find themselves in a difficult position with respect to complaining to the enforcement authorities is distressing. Often, this results from the emotional barriers involved in filing a complaint and dealing with it. Sometimes, it may also derive from fears of those who belong to weaker sectors of the population in turning to the enforcement authorities and placing their trust in them. This is a barrier that the state authorities must fight and must not accept. The educational system must address it. Police authorities must address it and "extend a helping hand" to the communities within which they operate. Neither should the victim be judged on the fact that it was hard for him to ask for help. Nevertheless, this alone cannot legitimize every act of violence on his part. Needless to say, this is also true for all victims of violence – man or woman, and whether the violence be sexual or otherwise.

Decided in accordance with the opinion of Justice H. Melcer.

23 Iyar 5776 (31 May 2016).