CrimA 4596/98

A

v

State of Israel

The Supreme Court sitting as the Court of Criminal Appeals

[25 January 2000]

Before President A. Barak and Justices D. Beinisch, I. Englard

Appeal on the judgment of the Tel-Aviv–Jaffa District Court (Justice S. Rotlevy) dated 3 June 1998 in CrimC 511/95.

Facts: The appellant was convicted of offences of assault and child abuse. The acts for which she was convicted included hitting a child on his mouth, which resulted in the child losing a milk tooth. The appellant was found to have hit her children regularly on various parts of their bodies, both with her hand and with a sandal, and to have been accustomed to throw shoes at them. The appellant argued, both in the trial court and in the Supreme Court, that her use of force was for educational purposes, to curb the wild behaviour of her children.

Held: The use of corporal punishment for educational purposes is forbidden by law.

With regard to the offence of child abuse, Justice Beinisch held that a series of acts might amount to abuse, even though each act in itself might not constitute abuse. President Barak agreed with this position. Justice Englard held, in a minority opinion, that the term abuse should only be applied to acts involving severe violence and cruelty and a humiliation or degradation of the victim.

Appeal against conviction on the offence of assault denied. Appeal against conviction on the offence of child abuse was denied by majority opinion, Justice I. Englard dissenting.

Basic Laws cited:

Basic Law: Human Dignity and Liberty.

Legislation cited:

Adoption of Children Law, 5741-1981.

Civil Torts Ordinance, 1944.
Court Martial Law, 5715-1955, ss. 65, 65(a).
Criminal Procedure Law [Consolidated Version], 5742-1982, s. 56.
Cruelty to Animals Law, 5754-1994, s. 2(a).
Family Violence Prevention Law, 5751-1991, s. 3(3).
Foundations of Justice Law, 5740-1980.
Legal Capacity and Guardianship Law, 5722-1962, ss. 14, 15, 17, 22, 27.
Palestine Order in Council, 1922, s. 46.
Penal Law (Amendment no. 26), 5750-1989.
Penal Law, 5737-1977, ss. 1, 20(a), 34Q, 34U, 323, 368B, 368B(a), 368C, 378, 379, 382(b), Chapter 10 Article 6A.
Protection of Dependents Law, 5726-1966.
Rules of Evidence Amendment (Protection of Children) Law, 5715-1955, ss. 9, 11.
Torts Ordinance [New Version], ss. 24(7), 27(6).
Youth (Care and Supervision) Law, 5720-1960, s. 3.

Regulations cited:
Emergency (Court Martial Law 5708) Regulations, 5708-1948, r. 87.

International conventions cited:
Convention on the Rights of the Child, 1989, art. 19(1).

Draft legislation cited:
Draft Penal Law (Amendment no. 31), 5749-1989.
Draft Penal Law (Preliminary Part and General Part), 5752-1992, ss. 49, 49(5)

Israeli Supreme Court cases cited:
[1] LCrimA 3904/96 *Mizrahi v. State of Israel* [1997] IsrSC 51(1) 385.
[2] CrimA 192/56 *Yehudai v. Attorney-General* [1957] IsrSC 11 365.
[3] CrimA 532/82 *Faber v. State of Israel* [1983] IsrSC 37(3) 243.
[4] CrimA 694/83 *Danino v. State of Israel* [1986] IsrSC 40(4) 249.
[5] CrimA 387/83 *State of Israel v. Yehudai* [1985] IsrSC 39(4) 197.
[6] CrimA 4009/90 *State of Israel v. A* [1993] IsrSC 47(1) 292.
[7] CrimA 1121/96 *A v. State of Israel* [1996] IsrSC 50(3) 353.
[8] CrimA 85/80 *Katashwilli v. State of Israel* [1980] IsrSC 34(4) 57.
[9] FH 25/80 *Katashwilli v. State of Israel* [1981] IsrSC 35(2) 457.

[10] LCA 1684/96 *'Let the Animals Live' Society v. Hamat Gader Vacation Enterprises Ltd* [1997] IsrSC 51(3) 832.
[11] CrimA 5224/97 *State of Israel v. Sedeh Or* [1998] IsrSC 52(3) 374.
[12] CrimA 3783/98 *A v. State of Israel* (unreported).
[13] CrimA 142/97 *A v. State of Israel* (unreported).
[14] CrimA 7861/96 *A v. State of Israel* (unreported).
[15] CrimA 2696/96 *A v. State of Israel* (unreported).
[16] CrimFH 9003/96 *Pizanti v. State of Israel* (unreported).
[17] CrimA 295/94 *A v. State of Israel* (unreported).
[18] CrimA 2011/95 *A v. State of Israel* (unreported).
[19] CrimA 7/53 *Russey v. Attorney-General* [1953] IsrSC 7 790.
[20] CrimA 3779/94 *Hamdani v. State of Israel* [1998] IsrSC 52(1) 408.
[21] CrimA 4405/94 *State of Israel v. Algeny* [1994] IsrSC 48(5) 191.
[22] CA 2266/93 *A (a minor) v. B* [1995] IsrSC 49(1) 221.
[23] CFH 7015/94 *Attorney-General v. A* [1996] IsrSC 50(1) 48.
[24] CA 6106/92 *A v. Attorney-General* [1994] IsrSC 48(2) 833.
[25] CrimA 3958/94 *A v. State of Israel* (unreported).
[26] CrimA 3754/97 *A v. State of Israel* (unreported).

Israeli District Court cases cited:

[27] CrimC (TA) 570/91 *State of Israel v. Asulin* [1992] IsrDC 5752(1) 431.

Israeli Court Martial cases cited:

[28] CMA 209/55 *Chief Military Prosecutor v. Corp. Nehmad* [1954-1955] IsrCM 614.
[29] CMA 224/54 (unpublished).
[30] CMA 4/52 *Chief Military Prosecutor v. Capt. Timor* [1951-1953] IsrCM 181.
[31] CMA 152/78 *Aharon v. Chief Military Prosecutor* [1978] IsrCM 200.
[32] CMA 290/58 *Chief Military Prosecutor v. Lieut. Gad* [1959] IsrCM 56.
[33] CMA 156/70 *Capt. Meir v. Chief Military Prosecutor* [1970] IsrCM 280
[34] CMA 143/72 *Chief Military Prosecutor v. Capt. Yosef* [1972] IsrCM 194.
[35] CMA 85/62 *Sgt. Brown v. Chief Military Prosecutor* [1962] IsrCM 180.

American cases cited:

[36] *State v. Arnold* 543 N.W. 2d 600 (1996).
[37] *Raboin v. North Dakota Dept. of Human Serv.* 552 N.W. 2d 329 (1996).

[38] *State v. Gallegos* 384 P. 2d 967 (1963).
[39] *In Re S.K.* 564 A. 2d 1382 (1989).

English cases cited:

[40] *R. v. Hopley* (1860) 175 E.R. 1024 (S.A.).

Canadian cases cited:

[41] *R. v. Komick* [1995] O.J. 2939.
[42] *R. v. D.W.* [1995] A.J. 905.
[43] *R. v. D.H.* [1998] O.J. 3347.
[44] *R. v. Dupperon* (1984) 16 C.C.C. (3d) 453.
[45] *R. v. James* [1998] O.J. 1438.
[46] *R. v. J.O.W.* [1966] O.J. 4061.

Israeli books cited:

[47] A. Barak, *Interpretation in Law*, vol. 2, *Interpretation of Legislation*, 1993.
[48] S. Z. Feller, *Fundamentals of Criminal Law*, vol. 1, 1984; vol. 2, 1987.
[49] A. Barak, 'Immunity from Liability or Prosecution; Denying the Victim's Right or Denying his Claim', in G. Tedeschi ed., *The Law of Torts — the General Doctrine of Torts*, 2nd ed., 1977, 349.
[50] P. Shifman, *Family Law in Israel*, vol. 2, 1989.
[51] B. Bettelheim, *A Good Enough Parent*, 1993.
[52] A. Barak, *Interpretation in Law*, vol. 3, *Constitutional Interpretation*, 1994.

Israeli articles cited:

[53] H. H. Cohn, 'The Values of a Jewish and Democratic State — Studies in the Basic Law: Human Dignity and Freedom', *HaPraklit — Jubilee Volume*, 1994, 9.

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[54] C. Lyon & P. de Cruz, *Child Abuse*, Bristol, 2nd ed., 1993.
[55] A. B. Wilkinson & K. Mck. Norrie, *The Law Relating to Parents and Child in Scotland*, Edinburgh, 1993.
[56] P. M. Bromley & N. V. Lowe, *Family Law*, London, 7th ed., 1987.
[57] C. Barton & G. Douglas, *Law and Parenthood*, London, 1995.
[58] M. A. Straus & D. A. Donnelly, *Beating the Devil Out of Them: Corporal Punishment in American Families*, 1994, New York.

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[59] D. Orentlicher, 'Spanking and Other Corporal Punishment of Children by Parents: Undervaluing Children, Overvaluing Pain', 35 *Hous. L. Rev.*, 1998, 147-185.

[60] S. A. Davidson, 'When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws', 34 *U. Louisville J. Fam. L.*, 1995-1996, 403.

[61] K. K. Johnson, 'Crime or Punishment: The Parental Corporal Punishment Defense — Reasonable and Necessary or Excused Abuse?', *U. Ill. L. Rev.*, 1998, 413.

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[62] Exodus 10 2.

[63] Rabbi Avraham Ibn Ezra, *Commentary* on Exodus 10 2.

[64] I Samuel 6 6; 31 4.

[65] Numbers 22 29.

[66] Judges 19 25.

[67] I Chronicles 10 4.

[68] Jeremiah 38, 19.

[69] Babylonian Talmud, Tractate *Sanhedrin*, 56b.

For the appellant — Avner Schnetzer.

For the respondent — Hovav Artzi, Senior Assistant to the State-Attorney.

JUDGMENT

Justice D. Beinisch

The appellant, the mother of the child H.B., who was born in 1987 (hereafter — H or the girl), and of the child N.B., who was born in 1989 (hereafter — N or the boy), was convicted in the District Court of assaulting her children and abusing them. She is appealing this conviction before this court.

According to the indictment, on various occasions during the years 1994-1995 the appellant hit her two children on the bottom and slapped their faces. In addition, the appellant was charged with hitting her daughter, on an

unknown date, with a vacuum cleaner. She was also charged with hitting her son, on Yom Kippur 1994, in his face with her fist, and breaking one of his teeth. For these acts the appellant was indicted for child abuse, an offence under s. 368C of the Penal Law, 5737-1977, and for assault of a minor, an offence under s. 368B(a) (last part) of the Penal Law.

The Tel-Aviv–Jaffa District Court (*per* Justice S. Rotlevy) decided not to convict the appellant of assaulting a minor under s. 368B(a), but it convicted her of an offence of assault under s. 379 of the Penal Law. The appellant was also convicted of an offence of child abuse. In the sentence, the court put the appellant on probation for eighteen months, and the probation officer was ordered to report to the court about progress in the treatment once every three months. The appellant was also sentenced to twelve months' imprisonment that was suspended over a three year period from the date that the sentence was given.

Before us is an appeal both against the conviction and against the severity of the sentence.

The verdict of the District Court

1. Following information that was received by the Ramat-Gan police from a welfare officer, the children were summoned on 24 October 1995 to give testimony before the child interviewer Ami Ron (hereafter — the child interviewer). The children's testimonies before the child interviewer were submitted as evidence in the trial court under s. 9 of the Rules of Evidence Amendment (Protection of Children) Law, 5715-1955 (hereafter — the Protection of Children Law).

The child H testified before the child interviewer that the appellant used to smack her and her brother on their bottoms, and she confirmed that these smacks were painful and left a red mark. The girl was asked by the child interviewer about smacks that she received on other parts of her body, and she replied that the smacks were only on her bottom. The girl denied that she had been bitten by the mother, and she said that her mother's boyfriend did not smack her or her brother. When she was asked whether she was hit by the appellant with a belt or a stick, she did not reply, but she told of an occasion when she was hit by her mother with a vacuum cleaner on the waist 'and when I got up it hurt a lot' (prosecution exhibit 6 at pp. 19-20). In reply to the child interviewer's question about the loss of N's tooth, the girl said that on a day when there was no school she and her brother were at home: N was making noise and behaving wildly 'so mummy wanted to give him a punch,

and that was what happened: his tooth fell out' (*ibid*., at page 17). The girl also said, without being asked, that her brother was smacked more than her: 'she gives me less because I behave nicely and he [N] does not listen…' (*ibid*., at page 23). She added that on the morning of the day on which she was interrogated, 'he [N] again caused trouble… so mummy gave him a slap here and he cried…' (*ibid*.). With regard to the frequency of the smacks, the girl said that she was smacked 'every day' (*ibid*., at page 22). The child interviewer found the testimony of the girl H reliable, natural and realistic, and he added that the girl 'is not vengeful and does not express any anger towards the mother. There are no contradictions in her statements' (prosecution exhibit 7, at page 3).

The trial court held that the testimony of the girl that was given before the child interviewer was reliable, in view of the signs of truth that emerged from her testimony, and in view of the court's impression from listening to the tape of the conversation between the girl and the child interviewer and from reading the transcript of the conversation between them. The court said that the interview of the girl was flowing and that the tone of her speech on the tape changed in accordance with the contents of her statements. The court also received the impression that although H's language was not rich, nonetheless her remarks were clear, based on reality, intelligible and logical, and she clearly distinguished between the different figures in her life. The trial court further found that the girl tried to give exacts details about what she was saying, to the best of her ability, and that she was uninterested in maligning her mother or in making up stories.

The court accepted the assessment of the child interviewer that it was possible that the girl exaggerated when she said that she was smacked 'every day'. Nonetheless, the court raised a hypothesis that the girl might not be distinguishing between physical blows and anger and shouting, and therefore she claimed that the smacks occurred every day. The court went on to say that even if the smacks were not inflicted every day but less frequently, this fact did not, in its opinion, undermine the reliability of the girl's testimony.

2. The boy N, in his testimony before the child interviewer, described the angry responses of his mother to wild behaviour or noise made by him or his sister. He also spoke of the mother's violent responses: he told how he had been smacked on his bottom or his head with a rubber sandal and he said that his mother hit him with the sandal also on his neck and his hand. He also added: 'she can also give me slaps' (prosecution exhibit 9, at pages 10-11). The boy testified of his own initiative about the occasion when he lost the

tooth, and his description exactly matches the description of his sister about that same occasion: 'Do you know why I lost a tooth?... because she [the appellant] gave me a punch… because I made a lot of noise. She told me to be quiet' (*ibid*., at p. 9) The boy also said that he was hit more than his sister '… because I make more noise' (*ibid*.). With respect to the frequency of the smacks, he said that he was smacked about once a week, and that the last time he was hit was 'when my tooth fell out' (*ibid*., at pp. 11, 14). After he finished what he had to say, the boy was asked if he would like someone to speak to his mother so that she would stop hitting him, and he said that he would.

The child interviewer thought that the testimony of the boy N was reliable. The trial court held that his impression in this respect was well-founded: the boy's statements corresponded with the testimony of his sister both in minor details (such as the joint daily schedule of the two children) and in material points (such as the circumstances in which N lost his tooth). The boy's description of being hit with a sandal was strengthened by the testimony of the appellant, according to which she had the habit of throwing shoes at them; even N's testimony that the appellant gave him 'slaps' is strengthened by the very testimony of the appellant that she sometimes gave the children 'friendly slaps on the neck'. The court thought that the description of the violence given by the boy was not melodramatic or exaggerated, and as with his sister's attitude, it appeared that with N also the harsh responses of the mother to his behaviour were integrated naturally into his life.

The trial court addressed the fact that the testimony of the boy was different from the testimony of his sister in two details: the frequency of the hitting (H claimed that the hitting took place every day whereas N said that it occurred once a week), and the last time when N was hit (H claimed that on the very morning of the day of the interview before the child interviewer the appellant slapped N's face, whereas N testified that the last time he was hit by the appellant was when he lost his tooth). Despite these points of difference, the court held:

> 'This discrepancy does not undermine the credibility of either of the children. From their testimony, from the testimony of the accused [the appellant] and from other evidence it transpires that the atmosphere in the home was an atmosphere of strict education, shouting and violence.

> It could well be that, unlike a hit with a sandal and a punch to his face, a "mere" slap is not considered by N to be a real hit, and it could be that he did not wish to speak about the event that morning, in the light of the statements of H, who said that he did not want them to know what happened to him (even though we cannot ignore the fact that N raised the issue of losing his tooth of his own initiative).
>
> In any event, these discrepancies do not detract from the credibility of N's testimony, and I find that it is reliable' (page 60 of the verdict — square parentheses supplied).

3. The three kindergarten teachers who taught the children in 1994 testified in the trial court. According to the kindergarten teachers, the two children was frequently late for the kindergarten, almost every day, and were even absent on a significant number of days. Each of the kindergarten teachers testified that she saw marks on the children's bodies that appeared to be from hitting.

N's kindergarten teacher said that at least on two occasions that were three weeks apart, the boy came to the kindergarten with signs of violence next to his eye. When the kindergarten teacher asked the appellant for an explanation as to the marks, the appellant replied that it was an allergy, and for several days thereafter she did not send N to the kindergarten. The kindergarten teacher added that when she approached N he would respond by shrinking from her and a movement indicating fear, in her words 'like do not touch me' (p. 10 of the court record).

The kindergarten teacher's assistant in H's kindergarten said that the girl appeared at the kindergarten one day with yellow marks on her hand. According to the teacher's assistant, she asked H about the marks, and the girl told her that the appellant hit her with a stick, because her room was not tidy. The teacher's assistant also testified that:

> 'Also when I used to speak to them, more than once when I simply raised my hand, she (H) made a defensive movement and was even prepared to hide under the table because she thought that I wanted to hit her, and this did not happen only on one occasion but frequently' (p. 14 of the court record).

H's kindergarten teacher told how the girl was absent from the kindergarten for three days, and when she returned to the kindergarten she said that the appellant had hit her on the arm. According to the teacher, it was

not easy for the girl to say this, and it took time until she worked up the courage to say that she had been hit by the mother. The kindergarten teacher testified that when H told her about the hit that her mother gave her on her arm, she saw a blue mark, like that of internal bleeding, in the area indicated by H.

The trial court held that the testimonies of the kindergarten teachers who taught the children were, in its opinion, credible. It added that it received the impression that they were motivated by the best interests of the children, and it could not be said that the kindergarten teachers tried to exaggerate the severity of the findings or to make up stories about the appellant, as the appellant claimed.

4. The appellant herself made two statements to the police. Both in her statements to the police and in her testimony in court, the appellant did not deny that she hit her children. She even admitted that the methods of education adopted by her were harsher than the norm, but she claimed that she hit her children only when it was essential, and she added: 'I regard the hits as a deterrent' (prosecution exhibit 2). According to her, she does not hit her children frequently and she 'does not count the days from one case where he [N] receives a slap or a smack on the bottom to the next' (*ibid*.). With regard to the nature of the hits, the appellant said that she hits N on his bottom 'and sometimes, in jest, a friendly slap on the neck' (*ibid*.). When the appellant was confronted with what the children said about the specific occasions described by them, she denied them. Thus, for example, when she was asked in her interrogation by the police whether she hit H with a vacuum cleaner, she said: 'I really do not remember such an occasion' (*ibid.*). In her testimony in court, she presented a different position, when she said: 'I never hit my daughter with a vacuum cleaner. I do not have a vacuum cleaner at home…' (p. 30 of the court record). The appellant was confronted also with N's description of his being hit with a rubber sandal on various parts of his body, such as his bottom, his head, his neck and his hand. She denied hitting her son with the sandal, but she made a partial admission that 'it may be that once I threw a shoe in his direction' (prosecution exhibit 2). According to her, when she is tired and asks one of the children to do something, she throws a shoe at him and he understands her meaning and does it: 'it is agreed and he knows that nothing will happen to him…' (p. 33 of the court record).

The appellant did not deny the fact that N lost his tooth, especially in view of the photographs in which the boy was seen to be missing a tooth.

Nonetheless, unlike her children who described how they had been making noise and in consequence their mother had hit N with her fist and one of his teeth fell out, the appellant presented a more complex story. According to her, the children were hitting each other so hard that she became afraid for their safety. While she took H to one room, N went into the bathroom. The appellant went in after him and began to scold him. According to her, 'he began to tell me that she (H) did this and that, and to justify himself, to drive me crazy with stories. He did not express any regret at all. I became very angry with him and gave him a slap on the mouth and then the tooth came out and a little blood trickled out…'. According to her, the tooth was a milk tooth that had already become loose in his mouth. In her testimony in court she added that at the time of the event she had not acted in an uncontrolled manner and that 'it is not correct that I became heated' (p. 32 of the court record).

The appellant admitted that during the period stated in the indictment, the children did not come to the kindergarten regularly. In her first statement at the police she said that it happened as a result of a difficult and traumatic period for her, in which she suffered also from health problems. Notwithstanding, in her testimony in court she changed her position and claimed that 'with all respect to the education establishment, the home is also important and a day out with the mother teaches more than the kindergartens' (p. 28 of the court record). When she was asked about her reply to the police, she answered that this was 'an answer that I gave to satisfy them at that time' (p. 37 of the court record).

The appellant did not express regret for hitting her children and even refused to undertake to stop hitting the children when it seemed to her necessary.

The trial court did not put any faith in the testimony of the appellant, and it held that it was given manipulatively, while the appellant tried to present herself as a victim of the welfare services and the court, of the education system and the kindergarten teachers, and as a victim of her children's lies. Thus, for example, the court held that the explanations given by the appellant about the absences of her children from the kindergarten were not credible in view of the statements of the kindergarten teachers and the testimonies of the children. It was held that it was more reasonable that the late arrivals and absences of H and N from the kindergarten were the result of the appellant not troubling to get up in the morning and prepare them to go to the

kindergarten, and of her attempts to hide the bruises from the kindergarten teachers.

5. The testimonies of the children before the child interviewer constituted the basis for proving the guilt of the appellant. In view of the finding that the testimonies of the two children were credible, the trial court proceeded to examine whether their testimonies could be corroborated, in accordance with the requirement of s. 11 of the Protection of Children Law.

With regard to the charge of hitting the children during 1994, the trial court found that the testimonies of the children corroborated each other, and it also found corroboration in the testimonies of the kindergarten teachers who taught the children at the relevant period. With regard to hitting the children in 1995, it was held that the statements of the children corroborated one other, and they were also corroborated by the statements of the appellant herself. With regard to the part of the indictment concerning the hitting of H with a vacuum cleaner, it was held that there was no specific corroboration of this, and therefore it was not possible to determine that the alleged incident actually occurred.

Relying on the testimonies of the children and the corroboration thereof, the trial court held that the children were hit by the appellant on various parts of their bodies (head, neck, hands, bottom), and that sometimes the appellant used to throw shoes at them and at other times she hit them with a sandal. The trial court rejected the explanation of the appellant about throwing shoes at her children, saying:

> '… this explanation is, at the least, incomprehensible. "Training" children by throwing shoes is a totally unacceptable measure. The claim that the child agrees to it and understands that he will not be hurt shows more than anything that the children are regarded by the appellant as her property, with which she can do as she likes. At her whim, she may hit them on their mouths or their bottoms, and at her whim, she may throw shoes at them, threaten them or punish them.
>
> Her remarks contain corroboration of N's statements about his being hit with a shoe or a sandal, and although this item is not expressly mentioned in the indictment, it constitutes a part of the overall charge of hitting' (p. 68 of the verdict).

The trial court added that in this case the use of systematic and prolonged violence by the appellant against her children had been proved: even if each

act of hitting on its own was not 'cruel' and on its own could be regarded only as an act of assault, all the incidents taken together and the whole picture of the cumulative violence were serious, and amounted to abuse.

6. Further on in its verdict, the trial court discussed the part of the indictment that concerned the loss of N's tooth. It held that the description given by the children about the incident of losing the tooth was not significantly different from the appellant's version of this incident: from both of them it transpired that the appellant hit N hard on his mouth and as a result N's tooth fell out. The trial court pointed out in this respect that it was irrelevant whether it was a slap (as the appellant claimed) or a punch (as the children testified). The court further held that it was possible that the milk tooth was about to fall out and that therefore the loss of the tooth was not the result of a blow hard enough to break a permanent tooth, but the blow was strong enough to be a painful and traumatic event not only in the memory and body of N, but also in the memory of his sister H. Notwithstanding, the court held that no intention had been proved on the part of the appellant to cause the boy real harm. Therefore, because of the incident in which the tooth fell out the court did not see fit to convict the appellant of an offence of assaulting a minor under s. 368B(a) of the Penal Law, and it chose to convict her for that act of the offence of assault under s. 379 of the Penal Law.

7. As shall be discussed extensively below, the appellant argued before the trial court that even if the factual elements of the said offences were proved, her acts did not amount to assault or abuse, since punishing her children with corporal punishments in order to educate them to obey does not breach any legal norm. The trial court rejected this argument, and it held that imposing punishments on children on a regular basis, hitting a child on his mouth, throwing a shoe at him and hitting him with a sandal do not pass the test of reasonableness and are wrong from a legal and moral viewpoint.

In conclusion, the appellant was convicted of the offence of child abuse and the offence of assault.

The proceedings in the appeal

8. At the outset I should point out that I found no basis to overturn the findings of fact and credibility held by the trial court. The District Court heard the witnesses that appeared before it and formed an impression of them. It also heard the tape of the conversation between the children and the child interviewer and stated in detail how it was impressed by their

testimonies. According to the policy of this court, we see not basis for overturning the conclusions of the trial court in these matters.

Corroboration under s. 11 of the Protection of Children Law

9. The first argument of counsel for the appellant is that the trial court erred when it held that there was the required corroboration for the testimony of the children before the child interviewer.

The nature of the provisions regarding the testimony of children under the Protection of Children Law was described by Justice Goldberg as follows:

> 'The Protection of Children Law was designed to balance between three interests; the social interest in bringing offenders to trial and punishing them; the social and private interest in protecting children from additional emotional damage resulting from exposing them to legal proceedings, including their cross-examination, and the interest — shared by the accused and society — in holding a fair trial and discovering the truth.
>
> The balance in the statute is reflected in the provisions enacted therein. The protection of children is reflected, *inter alia*, in the provisions that state that a child may be interviewed only by a child interviewer, or in testimony in court with the permission of a child interviewer (s. 4 of the Law)… the social interest in the punishment of offenders is reflected in the fact that testimony obtained by a child interviewer is made admissible, even though it has not stood the test of cross-examination, and notwithstanding the rule disqualifying hearsay evidence (s. 9 of the Law). And the interest in a fair trial and discovering the truth is reflected in ss. 10 and 11 of the Law. Under s. 11, a person may not be convicted on the basis of evidence obtained by a child interviewer unless it is corroborated by other evidence' (LCrimA 3904/96 *Mizrahi v. State of Israel* [1], at p. 395).

In the present case, the children did not testify before the District Court, because of the fear that testifying in court would cause them psychological harm (prosecution exhibit 7, at p. 3; prosecution exhibit 10, at p. 3; p. 24 of the court record). As stated, the children's testimonies before a child interviewer were submitted as evidence to the court, under s. 9 of the Protection of Children Law.

Relying on the testimony of a child before a child interviewer, without the court having an opportunity to form a direct impression of the child and his

testimony, and without the accused having an opportunity to cross-examine the child, violates the rights of the accused. The requirement of corroboration for the testimony of a child under s. 11 of the Protection of Children Law is intended to mitigate the severity of this violation, and to ensure the holding of a fair trial. Consequently it has often been held that the corroboration required under s. 11 of the Protection of Children Law is not a mere technicality but a substantive and real requirement (see: CrimA 192/56 *Yehudai v. Attorney-General* [2], at p. 367; CrimA 532/82 *Faber v. State of Israel* [3], at p. 247; CrimA 694/83 *Danino v. State of Israel* [4], at p. 263). It has been further held that, in order for evidence to serve as corroboration, it must comply with three separate conditions: it must derive from a source that is separate and independent from the testimony that requires corroboration; it must implicate or tend to implicate the accused with liability for committing the act alleged against him, even though it need not refer to all of the elements of the act; and in addition it must refer to a material 'point' in dispute between the parties (see: CrimA 387/83 *State of Israel v. Yehudai* [5], at p. 203; CrimA 4009/90 *State of Israel v. A* [6], at p. 297). To this we must add that the probative weight of the corroboration required varies from case to case, in accordance with the credibility and probative weight of the main testimony requiring corroboration (see: CrimA 4009/90 *State of Israel v. A* [6], at p. 298; CrimA 1121/96 *A v. State of Israel* [7], at p. 360).

10. The argument of counsel for the appellant before us is that the trial court erred in that it regarded the testimonies of the children as mutual corroboration for the purpose of s. 11 of the Protection of Children Law. This argument must be rejected. Our case-law has already established many times that testimony that requires corroboration may itself act as corroboration. Thus, for example, it has been held that the testimonies of partners in crime may corroborate each other, when they require corroboration (see, for example: CrimA 85/80 *Katashwilli v. State of Israel* [8], at p. 69; FH 25/80 *Katashwilli v. State of Israel* [9], at p. 464). This approach applies also to the testimonies of children made before a child interviewer. Even though these testimonies require corroboration under s. 11 of the Protection of Children Law in order to serve as the basis for a conviction, they can corroborate each other (see, for example: *Danino v. State of Israel* [4], at p. 262; CrimA 4009/90 *State of Israel v. A* [6], at pp. 297-298).

In the case before us, the child interviewer obtained the testimonies of the two children separately, so that neither knew nor was influenced by the contents of the other's testimony. The trial court found the testimony of each

of the children credible and was prepared to rely on what they said. The two children testified about the harsh discipline that prevailed in their home, about their mother's anger in various circumstances and about her violent responses. Both of them testified that N suffered most of the blows, and they explained that of the two of them he was the one who made more noise and behaved more wildly. Both of them told how they had been smacked by their mother on their bottoms. The main corroborating evidence is the description of the incident in which N's tooth fell out. Thus we see that the testimonies of H and N support one another and confirm one another on material points, and therefore they constitute mutual corroboration.

11. The other argument of counsel for the appellant in this respect is that the trial court erred when it found corroboration of the children's testimonies in the testimonies of the kindergarten teachers. This argument has no merit; the kindergarten teachers testified that they saw marks of violence on the bodies of H and N. This constitutes corroboration of the testimonies of the children that they were hit. The trial court was also right in holding that the testimonies of the kindergarten teachers with regard to the behaviour of the children in the kindergarten (such as the children making defensive movements and recoiling when the kindergarten teachers approached them) are similar to testimony about the mental state of a victim of a crime, and as such they can corroborate the testimony of the children about the commission of acts of violence against them (cf. *A v. State of Israel* [7], at pp. 361-362).

The appellant herself admitted that she was accustomed to hitting her children, to throw shoes at them, and even sometimes to give them 'slaps' on the neck. She also admitted that her violence resulted in the loss of N's tooth. Therefore it is possible to hold that there is corroboration for the testimonies of the children about their being hit by their mother, even in the statements of the appellant herself. It can be held, therefore, that there is sufficient corroboration for the testimonies of the children about the violence that the appellant inflicted on them.

The offence of abuse

12. Counsel for the appellant also argued before us that the evidence contains nothing to indicate that his client abused her children.

Section 368C of the Penal Law, which is titled 'Abuse of a minor or helpless person' says as follows:

> 'Someone who does to a minor or to a helpless person an act of physical, emotional or sexual abuse shall be liable to seven years' imprisonment; if the perpetrator was in charge of the minor or the helpless person, he shall be liable to nine years' imprisonment.'

The Penal Law does not define the concept of 'abuse'. Even the explanatory notes of the draft law and the proceedings of the Knesset did not give it any definition (see the draft Penal Law (Amendment no. 31), 5749-1989; Knesset Proceedings 115 (5750) 609. See also LCA 1684/96 *'Let the Animals Live' Society v. Hamat Gader Vacation Enterprises Ltd* [10], at p. 847, *per* Justice M. Cheshin).

We referred to the dictionary definition of the word 'abuse', in order to obtain a starting point for interpretation. A. Even-Shoshan defines the word 'abuse' in his dictionary as follows:

> 'Harsh and cruel behaviour; inhuman treatment' (A. Even-Shoshan, *The New Dictionary*, vol. 1, 1998, at p. 319).

The linguistic meaning does not necessarily express the legal meaning, and therefore we cannot resort merely to the linguistic definition in order to determine what is 'an act of abuse', within the meaning of the statute. The legal meaning of the language of statute is to be interpreted in accordance with the purpose of the statute and by exercising judicial discretion (A. Barak, *Interpretation in Law*, vol. 2, Interpretation of Statute [47], at pp. 79-104).

With regard to the purpose of the legislation, we should note that s. 368C of the Penal Law is included in article 6A of chapter 10 of the Penal Law. This article is concerned with harm to minors and helpless persons and it was enacted within the framework of the Penal Law (Amendment no. 26), 5750-1989 (hereafter — Amendment no. 26). From the explanatory notes to the draft law we can deduce the purposes that were the basis for the change of the statute. These say the following:

> 'Harming persons who cannot protect themselves, such as children, the elderly and the disabled, whom in this draft law are described as helpless persons, justifies special consideration of the legislator, both with regard to sentencing and also with regard to the duty to report harm done to helpless persons' (draft Penal Law (Amendment no. 31), at p. 146).

The amendment of the Law that introduced section 368C reflects a social trend that developed particularly in the period preceding the enactment of the amendment. The increasing social awareness as to the seriousness of the phenomenon of harming children and helpless persons and the extent of this phenomenon led the Israeli legislator to treat the perpetrators of these acts more severely. This awareness led to a more intense struggle against the negative phenomena of this kind not merely in Israel but also in other countries. Against this background, and in accordance with the wording of the section, there can be no doubt that one of its purposes is to protect children and helpless persons from the harm to which they are exposed. With this in mind, let us consider the meaning of the word 'abuse' in section 368C of the Penal Law.

From the wording of the section we can see that the legislator recognizes three types of abuse: physical abuse, sexual abuse and emotional abuse. The boundaries between the types of abuse are frequently blurred. Thus, for example, cases of sexual abuse may also include bodily or physical abuse, and cases of physical and sexual abuse may of course also include emotional abuse (see C. Lyon & P. de Cruz, *Child Abuse* [54], at p. 12).

In the case before us, the dominant element in the violence done by the appellant to her children is physical, so we will focus on the question of the existence of 'physical abuse' in this case.

13. What is 'physical abuse'? What distinguishes between it and the offence of assault, and where is the boundary between them? The answer to these questions is not simple. As a rule, it would appear that abuse, including physical abuse, refers to cases of a nature and type that our conscience and feelings cannot regard merely as acts of assault. Because abuse is behaviour that involves cruelty, intimidation or degradation — the nature of which we shall consider below — it acquires a stigma of immorality which does not necessarily accompany every criminal act that involves the use of force.

Just as it is difficult to give a comprehensive and exact definition of the word 'abuse', it is equally difficult to define 'physical abuse', because of the

conception that abuse has a negative ethical-normative meaning, which describes a multi-faceted phenomenon that incorporates a large number of possible behaviours (see Lyon & de Cruz [54] *supra*, at pp. 3-4). Our case-law, which has in many cases upheld convictions on an offence of abuse, has only minimally addressed the meaning of the term, and has not yet given it a comprehensive definition. Notwithstanding, case-law has given substance to the offence of abuse as it has progressed from case to case. We too shall not presume to give a comprehensive definition, and we shall confine ourselves to presenting the elements of the offence and the traits that in our opinion characterize cases of 'physical abuse'.

14. The offence of abuse is an offence of behaviour and not an offence of consequence. For this reason, the prosecution does not need to prove that actual damage has been caused when it seeks to prove that an offence of abuse has been committed. As Justice Dorner said in CrimA 5224/97 *State of Israel v. Sedeh Or* [11], at p. 383:

> 'The offence of abuse of a minor under section 368C of the Penal Law is an offence of behaviour, and not an offence of consequence whose completion is dependent on proof of the occurrence of some consequence. On the contrary, it is possible to conceive of severe cases of abuse that do not leave behind any marks and yet will be considered exceptional and cruel acts.'

Physical abuse can be perpetrated by an active deed, but it can also take the share of an omission (thus, for example, it is possible to conceive of a situation in which starving or neglecting a minor amounts to physical abuse).

In general it would appear that behaviour, whether by an act or an omission, that amounts to 'physical abuse' includes the use of force or physical measures directly or indirectly against the body of the victim, in a manner and to a degree that are likely to cause physical or emotional damage or suffering, or both (with regard to 'the use of force' — cf. the definition in s. 378 of the Penal Law).

One can assess whether the behaviour has the potential to cause damage or suffering, *inter alia*, from the contact and from the nature of the measure adopted; from the degree of force used against the victim and its power; from the context and the circumstances in which the force or the physical measure were used; from the frequency of using them and from the period of time during which they were used; from the systematic nature of the use of force

or the physical measure; from the exceptional nature of the behaviour and from its deviation from what is accepted by society, and similar criteria.

Although causing actual damage is not one of the elements of the offence of abuse, it is obvious that proof of physical or emotional damage to a victim may serve as a probative tool to prove the existence of potential to cause suffering and damage, and the severity or the exceptional nature of the act that allegedly constitutes abuse.

Since in many cases the victim is in a position of inferiority and has a relationship of dependence upon the person abusing him, in assessing the nature of the behaviour, in assessing its force and the degree of harm caused by it, it is hard to give much weight to the attitude of the victim. It is possible that the victim did not even feel the degradation or did not recognize the cruel treatment that he received. Because of the status of the victim and in view of the purpose of Amendment no. 26 — protection of children and helpless persons — we must conclude that the decisive attitude for the purpose of determining the existence of behaviour that amounts to an offence of abuse is that of the bystander, i.e., the objective viewpoint that examines the behaviour of the abuser to the victim.

15. In addition to the aforesaid, we can point to several indicators that are characteristic of behaviour that constitutes abuse. These characteristics, even though they do not amount to a comprehensive or closed list, may be of use in identifying behaviour that amounts to abuse.

First, we will usually tend to regard as 'physical abuse' a case of a continuing series of acts (or omissions). In so far as continuing physical abuse over a period of time is concerned, it is possible that an act (or omission) in the chain of abuse does not of itself have a cruel or degrading nature. Notwithstanding, the accumulation of acts (or omissions) and their continuation over a period of time are what lead to a level of severity and cruelty, degradation and humiliation or intimidation that amount to abuse (see, for example, the cases considered in CrimA 3783/98 *A v. State of Israel* [12]; CrimA 142/97 *A v. State of Israel* [13]; CrimA 7861/96 *A v. State of Israel* [14]).

Although as a rule it is easier to identify an act of abuse when it is composed of a series of acts, even an individual act (or omission) may constitute an act of physical abuse. In order that an individual act of using force can be considered physical abuse, it must comply with a requirement that sets it aside from assault. In general, it will be characterized by one or more of the following: cruelty, significant terrorization or intimidation of the

victim, blatant degradation and humiliation of the victim, or a particularly severe potential for harming him (physically or emotionally) (cf. CrimA 2696/96 *A v. State of Israel* [15] and also CrimFH 9003/96 *Pizanti v. State of Israel* [16], where it was held that an isolated act of cutting off one of the sidelocks of a sleeping child by his father amounted to emotional abuse. See also CrimA 295/94 *A v. State of Israel* [17], in which it was held that cutting off a girl's hair by force in order that she will not become corrupted in her ways is an act of abuse).

Another indication that characterizes abuse is that usually the behaviour is intended to impose authority, to terrorize, punish or extort, even though this is not essential (see, for example, CrimA 2011/95 *A v. State of Israel* [18]).

It is also possible to point out that usually the abuser will be in a position of power of authority vis-à-vis his victim, such that the victim is in a position of inferiority, without any ability to protect himself. The result of this characteristic of disparity of strength is that often the humiliation and the intimidation of the victim are built into the act of abuse. A relationship in which there exists a disparity of strength and status between the abuser and his victim exists not only with regard to the abuse of children but is also found in other penal provisions that prohibit abuse. See, for example, s. 65 of the Court Martial Law, 5715-1955; s. 2(a) of the Cruelty to Animals Law, 5754-1994, and also s. 3(3) of the Family Violence Prevention Law, 5751-1991. When we seek to examine the existence of the elements of the offence of abuse in the relationship between a parent and his children, we must remember that in this relationship there are significant disparities of strength: the parent has the power of authority and control, whereas the child needs his parent and is dependent on him. In this disparity of strength, the child does not have the physical and emotional strength necessary to protect himself effectively against his parent. For this reason, when we seek to interpret the statute, we must give expression to the sensitive and vulnerable position of children and the position of inferiority and helplessness in which they find themselves, when an adult who has authority over them, and especially one of their parents, uses against them a physical measure that causes suffering or may cause suffering or damage, in the way described above. In such circumstances, if the characteristics that we discussed above exist, we will identify the act as 'an act of abuse'.

16. The mental element required for an offence under s. 368C, which is as stated an offence of behaviour, is *mens rea* according to the meaning thereof in s. 20(a) of the Penal Law (see *Sedeh Or v. State of Israel* [11], at pp. 383-

384). Therefore, proof of an intent to produce a harmful outcome is not required, providing that there was an awareness of the nature of the behaviour (the acts or the omissions) and the existence of the relevant circumstances set out in the offence under discussion.

17. In concluding this part I would further add that since we have held that the term 'abuse' inherently incorporates a negative ethical meaning, it is difficult to conceive of circumstances in which an act of abuse will be justified. Since abuse is behaviour that includes cruelty, intimidation or humiliation, it acquires the stigma of a moral deviation, which is not necessarily applicable to every act of using force even if it is prohibited.

Consequently, if we determine that a certain act (or omission) constitutes abuse (as opposed to assault), we adopt a negative moral attitude towards it which is inconsistent with a justification in law, or with a defence of justification that is based on an accepted social norm (with regard to a social norm as a justification, see Prof. S.Z. Feller, *Fundamentals of Criminal Law*, vol. 2 [48], at pp. 497-500).

From the general to the specific

18. In the case before us, the appellant is the mother of the children and therefore she falls within the definition of '… a person responsible for the minor or for the helpless person…' in s. 368A of the Penal Law. This fact is an element that constitutes an aggravating circumstance with regard to an offence under s. 368C.

As stated above, the children were hit by the appellant during the years 1994-1995. The appellant hit the children on various parts of their bodies (head, neck, hands, bottom), sometime with a sandal and sometimes by throwing shoes. We are not talking of an isolated act, but of a pattern of violent and continuing behaviour. The children were hit by the appellant frequently and systematically, until the children, who were under her control, learned their 'lesson' that there was a connection between their behaviour and the violence being directed against them. This was the impression of the trial court, which held that the violence that the appellant inflicted on the children became part of their lives and seemed to them to be 'natural'.

It is possible that each individual hit was not, in itself, cruel. Nonetheless, the systematic nature of the hitting, its continuation over a period of time and the frequency of the violence experienced by the children from their mother, being hit with an object such as a sandal and also the atmosphere of terror and harsh authority that prevailed in the home, where trivial matters were

followed by a painful physical blow and outbursts of rage — all of these indicate that we are dealing with cruel behaviour of the mother to her children and humiliating them, regarding them as property that she can do with what she wishes.

There is no doubt that the violence directed by the appellant against the children had the potential to damage them; what is more, the kindergarten teachers noticed bruises on the bodies of H and N, and even testified about the recoiling and the fear that overcame the children when they approached one of them; the recoiling indicated their emotional state as battered children. Thus the trial court was correct in holding that the appellant's acts of violence against her children amounted to abuse.

It is indeed possible that the appellant did not intend to cause harm to her children, and she said with regard to hitting N on his mouth: 'I did not intend to harm him and I am sorry' (prosecution exhibit 2). But, as we have already made clear, the absence of intent to abuse or to cause harm on the part of the appellant is irrelevant in determining whether the offence under s. 368C of the Penal Law was committed.

19. I should point out in this regard that s. 368B(a) of the Penal Law, which deals with an assault of a minor or a helpless person that causes him real injury, an offence with which the appellant was charged, does not require the assailant to intend to cause a serious injury; a mental state of rashness with regard to the possibility of causing this outcome is sufficient. For this reason, the blow that the appellant gave N on his face and which caused his tooth to fall out (and for this purpose, it is irrelevant whether we are talking of a milk tooth that was already loose in the child's mouth or not) complies with the elements of the offence under s. 368B(a) of the Penal Law, and at the very least with the aggravating circumstances for the offence of assault set out in s. 382(b) of the Penal Law. The appellant was fortunate in that she was convicted for this incident only of an offence of assault under s. 379 of the Penal Law, and not of one of these two more serious offences.

Corporal punishment administered by a parent to his child

20. Counsel for the appellant argued before us that the blows with which the appellant hit the children do not amount to a criminal offence, since they were corporal punishments that the appellant gave to her children as disciplinary measures, in order to teach them to improve their behaviour.

This argument, which was also made in the District Court, raises the question of the legitimacy of corporal punishment inflicted by a parent on his

child. The learned judge in the trial court rejected this argument out of hand, after a broad and comprehensive consideration of the subject of the legitimacy of corporal punishment given by parents to their children.

I agree with the conclusion that the judge reached, which she expressed as follows:

> 'The court that determines judicial and ethical norms must decry the violence of parents against their children, even when they are dressed up as "educational philosophy", and root out these phenomena once and for all.'

21. The question of the legitimacy of the corporal punishment of children by their parents is not uniquely ours, and many other countries are addressing it. A variety of approaches to this issue can be found, and the differences between these arise from ethical, social, educational and moral outlooks that have developed over the years in different societies.

One approach, which is the tradition of the English common law, is that the parent has a defence against criminal prosecution, if he gives his child 'reasonable' corporal punishment. This approach puts the emphasis on parental rights and authority. According to this approach, the right of parents to raise their children is expressed, *inter alia*, in their authority to decide the way in which they raise and educate them; within the framework of carrying out their duty to do what is best for their children, the parent may also adopt disciplinary measures, including the use of force. Therefore if a parent acts with a proper motive and thinks that corporal punishment is a proper disciplinary measure, there is no reason to intervene in his discretion, as long as the use of force against the child is not disproportionate and does not exceed what is required in order to achieve the educational goal. According to this approach, the advantage of the test as to the 'reasonableness' of the punishment is that it supplies the flexibility necessary to consider the circumstances of each case independently (see: D. Orentlicher, 'Spanking and Other Corporal Punishment of Children by Parents: Undervaluing Children, Overvaluing Pain', 35 *Hous. L. Rev.*, 1998, 147 [59]; S. A. Davidson, 'When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws', 34 *U. Louisville J. Fam. L.* [60] at pp. 405-407, 410,411; and cf. A. Barak, 'Immunity from Liability or Prosecution; Denying the Victim's Right or Denying his Claim', *The Law of Torts — the General Doctrine of Torts* [49], at p. 423).

Thus it was held in English common law as long ago as 1860 that a parent will not bear criminal liability if he gives his child 'reasonable and moderate' corporal punishment. In *R v. Hopley* (1860) [40], the court held, at p. 1026, that:

> '… a parent or a schoolmaster… may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to the life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life and limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.'

Over the years, English case-law has held that the 'reasonableness' of the punishment will be examined in accordance with all the circumstances of the case, taking into account the age of the child, his physical condition, his level of understanding and emotional maturity. The method of punishment will also be examined in accordance with the length of time during which it was used and the reason for which the force was applied (see: Lyon and de Cruz, *supra* [54], at p. 8; A. B. Wilkinson, K, Mck. Norrie, *The Law relating to Parents and Child in Scotland* [55], at pp. 179-180; P. M. Bromley, N.V. Lowe, *Family Law* [56], at p. 274).

The authority of a parent to punish his child with corporal punishments finds expression also in English legislation. Statute gave this status also to teachers, educators and guardians. Section 1 of the Children and Young Persons Act, 1933, which was amended in the children Act, 1989, prescribes an offence of cruel treatment of a child under the age of 16. Section 7(1) of the said Act provides:

> 'Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him.'

An attempt that was made in England to pass a law changing the common law ruling authorizing parents to administer corporal punishment to their

children was unsuccessful (see C. Barton, G. Douglas, *Law and Parenthood* [57], at p. 151); however, s. 47 of the Education Act, 1986, repealed the authority of teachers and educators in public schools and schools supported by the State to use corporal punishment against pupils. In this regard, see Lyon and de Cruz, *supra* [54], at pp. 242-243.

The American Model Penal Code, which is used as a basis for many criminal codes in the States of the United States, also provides a defence for a parent who uses force against his child for the purposes of education and discipline. It states:

> 'The use of force upon or toward the person of another is justifiable if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
>
> (a) The force is used for the purpose of safeguarding or promotion the welfare of the minor, including the prevention or punishment of his misconduct; and
>
> (b) The force used is not designed to cause or known to create substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or…' (Part I, Article 3, s. 3.08)

According to the American Model Penal Code, the criminal law of many of the States of the United States contains a defence that allows parents to administer 'reasonable' corporal punishment for educational purposes and imposing discipline. In these States it has been held that the court, in considering the 'reasonableness' of the punish inflicted on the child, will examine the personality of the child, the age and sex of the child, his physical and emotional state, the need to use force and its degree. It has also been held that corporal punishment that a parent inflicts on his child out of anger and loss of control does not serve any educational purpose, and therefore the parent will not be exempt from criminal liability (see, for example, *State v. Arnold* [36]).

Several States in the United States have determined a statutory definition for the 'reasonableness' of the corporal punishment that a parent may inflict on his child. Sometimes the definitions are broad. Thus, for example, the law in the State of Pennsylvania, like the Model Penal Code, provides that the

corporal punishment inflicted by a parent on a child will not lead to criminal liability if:

> 'the force used is not designed to cause or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation' (18 Pa.C.S.A. s. 509(1)(ii)).

In the State of North Dakota, corporal punishment inflicted by a parent on his child is not improper as long as it does not cause serious injury, which is defined in the language of the statute as 'serious physical harm or traumatic abuse' (see N.D.C.C. s. 50-15.1-02(2) (Supp. 1995); see also *Raboin v. North Dakota Dept. of Human Serv.* (1996) [37], in which it was held that the 'educational' hits of parents did not amount to child abuse, since no evidence had been found of such damage).

A small number of States in the United States grant parents an exemption from criminal liability for using 'reasonable force', as long as it is not proved that they acted with intent to harm the child. See the prosecuting guidelines in V. I. Vieth, 'When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force', 32 *AUG Prosecutor* 29. With regard to the different approaches of legislation in the various States of the United States, see K. K. Johnson, 'Crime or Punishment: The Parental Corporal Punishment Defense — Reasonable and Necessary or Excused Abuse?' [61].

In Canada, s. 43 of the Criminal Code, which has the title 'Correction of child by force', says the following:

> 'Every schoolmaster, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances' (R.S.C., 1985, vol. III, c. C-46, s. 43 (1985)).

This section has been included in the Criminal Code of Canada since 1892. Canadian case-law has held that the requirement in this section 43 that the use of force must be done in order to correct the behaviour and education of the child does not exist if the purpose of the use of force is to instil fear in the heart of the child (*R. v. Komick* (1995) [41], at para. 51), or if the parent used force against the child in an uncalculated way, out of anger and loss of control (*R. v. D. W.* (1995) [42], at para. 13); *R. v. D. H.* (1998) [43], at para. 31). The requirement that the use of force is 'reasonable' has also been interpreted narrowly. In *R. v. Dupperon* (1984) [44] it was held that when

considering the question of the reasonableness of the use of force by a parent against a child, the court shall take into account considerations such as the age of the child, the level of his understanding and the possible effect of using force against him, the degree of the force used, the circumstances of using it and also the nature of the damage caused to the child, if indeed any was caused.

The aforementioned section 43 has been interpreted and even applied in Canadian case-law, but the section has met with much criticism in the various courts there. The criticism points to the lack of clarity with regard to the definition of 'reasonable' force for the exemption from liability. The argument made is that parents who have used a little force have been put on trial and convicted whereas other parents who used excessive force have often been acquitted. Thus, for example, a complaint was made in one judgment that the condition as to the 'reasonableness' of the use of force has been interpreted and applied differently by different judges, and as a result inconsistency has arisen in applying the section in case-law. Criticism was also made that the criteria laid down in *R. v. Dupperon* [44] with regard to the 'reasonableness' of a parent using force against his child do not establish any clear boundaries between 'reasonable' use and 'excessive' use of force. Consequently, parents lack a clear guideline for distinguishing between proper and improper use of force. In that judgment the court pointed out that Canada is a signatory to the Convention on the Rights of the Child of 1989, and it said in this respect:

> '… the Convention stands in direct conflict with the state of the law. One wonders how section 43 can remain in the Criminal Code in the face of Canada's international commitment. To the extent this paradox might inform any discussion of the constitutionality of the defence, it is not a question likely to be tested by a court, because the party who would have to raise the question would be the crown itself…
>
> … The only personal view I will express is that I think this is an area that begs for legislative reform' (*R. v. James* (1998) [45]).

Similar criticism of the aforesaid section 43 was expressed in another judgment:

> 'I consequently hope that the law makers will see to establish clearer rules, so that parents will know with some degree of certainty when they are permitted to physically discipline their children; or alternatively, if Parliament determines that corporal punishment is no longer tolerable in our society, to then repeal Section 43 of the Code.
>
> The current state of uncertainty is inadequate to protect children, while simultaneously potentially placing otherwise law abiding parents at risk of obtaining a criminal record.' (*R. v. J. O. W.* (1996) [46]).

22. In contrast to the approach that gives the parent protection against criminal liability if he afflicts his child with 'reasonable' corporal punishment, there is an approach that denies the parent authority to inflict corporal punishment on his child. This approach places the emphasis on the child's right of dignity, bodily integrity and mental heath. According to this approach, corporal punishment as an educational method does not merely fail to achieve its goals, but it causes the child physical and emotional harm, which may leave its mark on him even when he becomes an adult. In various articles published recently in the United States, the authors discuss the gap between legal attitudes, which often are tolerant of reasonable corporal punishment intended for educational purposes, and the attitudes of professionals in the fields of medicine, education and psychology, who see no merit in it (see: Orentlicher, *supra* [59], and Johnson, *supra* [61]).

The approach of the education profession that disapproves of corporal punishment as an educational tool has found expression over the years in the legislation of several countries, including Sweden, Finland, Denmark, Norway and Austria, which have forbidden or severely curtailed the authority of parents to inflict corporal punishment on their children (see: Barton & Douglas, *supra* [57], at p. 151; Orentlicher, *supra* [59], at p. 166).

23. Let us turn from the various approaches to the appellant's defence case which relies on corporal punishment for educational purposes.

The appellant argues that she acted within the framework of her authority as a parent, and she inflicted on her children reasonable corporal punishments in order to educated them and discipline them to obey her, for this is what she understood was in their best interests. According to her counsel, this amounts to a justification in law for the appellant's behaviour, and exempts her from criminal liability. Is this the case?

I should point out from the outset that a defence argument based on reasonable corporal punishment cannot succeed with respect to acts of abuse. I have already discussed how an act of abuse is tainted by immorality. Therefore, there can never be a justification in law or a justification based on an accepted social norm for an act of abuse. Consequently, I am of the opinion that if the acts of the appellant were acts of abuse, she cannot invoke the defence of justification by claiming she gave reasonable punishment for educational purposes.

The argument of counsel for the defence is wider. He argues that the use of force imputed to his client does not constitute a criminal offence at all. In my opinion, the discussion of the defence that relies on justification of corporal punishment for educational purposes *is* relevant to the offence of assault of which the appellant was found guilty; this discussion is therefore relevant according to those who think that the acts done by the appellant to her children do not amount to 'acts of abuse', but are a series of acts of assault.

24. The argument of the defence counsel about the existence of justification in law for the behaviour of the appellant relies on the case-law of this court in CrimA 7/53 *Russey v. Attorney-General* [19]. In that case Justice S. Z. Cheshin held that:

> 'In the case before us, there is no serious dispute between counsel for the parties that a father and an educator may punish children under their authority, even by means of corporal punishment…
>
> …
>
> … Parents may inflict corporal punishment on their children in order to educated them properly and teach them discipline' (at pp. 793-794).

In the same case the court cited the English case-law rule on this subject, as held in *R v. Hopley* [40] *supra*.

The ruling of the late Justice S. Z. Cheshin in this matter relies on the reference to English common law, which was required at that time by section 46 of the Palestine Order in Council, 1922. His remarks formed the basis for several judgments in the lower courts for years afterwards (see, for example, CrimC (TA) 570/91 *State of Israel v. Asulin* [27], *per* Justice A. Strasnov).

A similar approach that also derives from English law is adopted by the Torts Ordinance [New Version], which provides a defence for parents and teachers against tortious liability for the torts of assault and false imprisonment. Section 24(7) of the Torts Ordinance [New Version] stated that in an action based on the tort of assault, the defendant shall have a defence if:

> 'The defendant is the parent or guardian or teacher of the plaintiff, or if his relationship to the plaintiff is similar to that of his parent or guardian or teacher, and he punished the plaintiff to an extent reasonably necessary to improve his behaviour.'

(A similar defence exists in section 27(6) of the Torts Ordinance [New Version], with regard to the tort of false imprisonment).

The aforesaid section 24(7) of the Torts Ordinance [New Version] has its origin in the English version of the Ordinance of 1944. This section reflects an outlook that is enshrined in the culture in which it arose. The ruling of Justice S. Z. Cheshin in *Russey v. Attorney-General* [19] was made in 1953. It is based on the English common-law rule, but the dependence on English law has since been repealed by the enactment of the Foundations of Justice Law, 5740-1980. With the passage of time the question has arisen whether the outlook embodied in section 24(7) of the Torts Ordinance [New Version] and *Russey v. Attorney-General* [19] reflects the outlook of Israeli criminal law today.

I should first point out that the defence in section 24(7) of the Torts Ordinance [New Version] does not exempt a parent from liability under criminal law. With regard to the relationship between the defence in the Torts Ordinance [New Version] and criminal liability, see S. Z. Feller, *Fundamentals of Criminal Law*, vol. 1 [48], at pp. 417-418, who thinks that the defences enshrined in the civil law do not add to the defences against criminal liability, and the expression 'unlawful' that appears as an element in some of the offences in the Penal Law does not refer to the defence, as distinct from a positive prohibition that exists in civil law. See also in this respect: *State of Israel v. Sedeh Or* [11], at p. 380-381, and also my opinion in CrimA 3779/94 *Hamdani v. State of Israel* [20], at pp. 417-419. As for me, I do not think that the defence in the Torts Ordinance [New Version] can affect the question of the liability of parents in criminal law with regard to the offences under consideration in this case. In any event, it may be assumed that even the interpretation given to the defence in the Torts Ordinance [New

Version] about the 'reasonable necessity' of the parent punishing his child will follow the developments in modern educational approaches.

25. Any decision on the legitimate question about inflicting corporal punishment on children is influenced to a large extent by social and ethical outlooks. These outlooks are naturally subject to change as a result of social and cultural developments; what appeared right and proper in the past may not appear so today (cf. *The Law of Torts — the General Doctrine of Torts* [49], at p. 424, note 13. See also *State of Israel v. Sedeh Or* [11], at pp. 381-383).

The case of *State of Israel v. Sedeh Or* [11] reflects the changes that have taken place in Israeli society in a field that is closely related to the case under discussion. Whereas in the ruling in *Russey v. Attorney-General* [19] in 1953 it was held that teachers and educators are authorized to inflict 'moderate and reasonable' corporal punishments (*ibid.* [19], at p. 795) on their pupils, in the ruling in *State of Israel v. Sedeh Or* [11] which was given not long ago, Justice Dorner, with the agreement of Justices Or and Englard, held as follows (at p. 381):

> 'Admittedly, in the first case that considered the question of corporal punishment in the educational establishment — CrimA 7/53 *Russey v. Attorney-General*, at pp. 794-795 — it was held that corporal punishment inflicted by teachers and headmasters is permitted. But since this judgment was given, forty-five years have passed, and the outlook reflected in it, allowing the use of violent measures for educational purposes, no longer conforms to our accepted social norms.'

And at p. 383:

> 'According to the educational approaches currently accepted, the use of force for educational purposes itself undermines the achievement of those purposes, in so far as we are concerned with education towards a tolerant society free of physical and verbal violence… For this purpose the severity of the corporal punishment inflicted on the child is irrelevant. As a rule, corporal punishment cannot be a legitimate measure to be applied by teachers, kindergarten teachers or other educators. An erroneous outlook on this issue endangers the welfare of children, and may undermine the basic values of our society — human dignity and bodily integrity.'

See also the remarks of President Barak in CrimA 4405/94 *State of Israel v. Algeny* [21], at p. 192:

> 'Physical violence towards a pupil is forbidden. Beatings, hitting and ear-pulling have no place in the school. The classroom is a place of education and not an arena for violence. The body and mind of the pupil are not unprotected. His dignity as a human being is harmed if his teachers inflict physical violence on him.'

26. These remarks, which were made with regard to teachers, kindergarten teachers and educators are, in my opinion, also apt with regard to parents, notwithstanding the difference in the status and rights of parents vis-à-vis their children, as compared with those of educators as stated.

Indeed, the right of parents to raise and educate their children is essentially a natural right. It reflects the natural relationship between parents and children. Israeli law naturally recognizes these parental rights (see CA 2266/93 *A (a minor) v. B* [22], at p. 235).

The right of parents vis-à-vis their children is not only a natural right; it is enshrined in law. Section 15 of the Legal Capacity and Guardianship Law, 5722-1962, states as follows:

'Roles of parents

> 15. The guardianship of parents includes the duty and the right to look after the needs of the child, including his education, studies, training for work and an occupation and his work, and also protecting, administering and developing his property; and it is accompanied by the permission to have custody of the child and determine his place of residence, and the authority to represent him.'

The Penal Law imposes criminal liability for failing to carry out parental duties within the framework of the parent's liability to the child, as stated in section 323 of the Penal Law:

'Duty of parent or person responsible for a minor

> 323. A parent or someone who has responsibility for a minor in his household who is younger than eighteen years is liable to provide him with what he requires for his sustenance, look after his health and prevent any abuse to him or injury to his person, and he shall be deemed to have caused the consequences that befell the

> life or health of the minor because he did not carry out his aforesaid liability.'

Parents are the persons who are initially and mainly responsible for their children, and the duties and rights granted to them in the law give them discretion as to how to raise and educate their children. The basic outlook, both from a legal viewpoint and from a psychological-educational viewpoint, is that in the normal case the discretion of the parents is what best signifies and formulates the proper decisions in raising their children. Notwithstanding, this discretion does not mean that the parents are completely autonomous in their decisions with regard to their children. The discretion of parents is limited, and it is also subject to the needs, welfare and rights of the child (see sections 14, 15, 17 and 22 of the Legal Capacity and Guardianship Law). The right of the parents towards their children inherently carries a duty — the general duty of parents to act in the best interests of the child and to make decisions that promote his welfare. In the words of Prof. P. Shifman, 'It is the right of parents that they — and not others — perform the duty of raising the child' (in P. Shifman, *Family Law in Israel*, vol. 2 [50], at p. 219).

Against this background, it is accepted that the rights of parents to raise and educated their children are not absolute rights. The relative nature of these is reflected in the duty of the parents to care for the child, his welfare and his rights (see CA 2266/93 *A (a minor) v. B* [22], at p. 237. See also CFH 7015/94 *Attorney-General v. A* [23], at p. 65, *per* Justice Dorner, and at p. 99, *per* Justice M. Cheshin).

The law imposes a duty on State authorities to intervene in the family circle and protect the child when needed, *inter alia* from his own parents. The basic approach of the law is that the child is not the property of his parents, and they may not do with him whatever they wish. When the parent does not carry out his duties properly or abuses the discretion or the parental authority in a way that endangers or harms the child, the State will intervene and protect the child. The power of the State to intervene in the family circle derives from its duty to protect those who are unable to protect themselves (see: section 27 of the Legal Capacity and Guardianship Law; section 3 of the Youth (Care and Supervision) Law, 5720-1960; the Protection of Dependents Law, 5726-1966; the Family Violence Prevention Law and the Adoption of Children Law, 5741-1981).

According to the aforesaid approach, the Penal Law imposes, as aforesaid, criminal liability on a parent for an assault on his child, for neglecting him or

for abusing him. The defences available to parents in certain circumstances against their children's claims in tort for exercising their parental authority (section 24(7) of the Torts Ordinance [New Version]), and section 22 of the Legal Guardian and Capacity Law) do not, in themselves, give an exemption from criminal liability where it has been proved that the elements of the offence imposing such liability on parents under the Penal Law are fulfilled.

27. Psychological and educational research shows that parental use of punishment that causes their children pain or humiliation is undesirable, and may even be harmful. The reasons for this are various: in many cases, 'minor' punishment sinks over time into more serious violence, since the parent feels he must increase the force of the punishment in order to communicate to his child the 'educational message' that he is interested in conveying; the research also shows that corporal punishment which is initially for disciplinary purposes sinks into systematic abuse, which endangers the welfare of the child. Punishment that causes pain or humiliation as an educational method may harm not only the body of the child but also his mind. Instead of encouraging the child to discipline himself, it is likely to cause him major psychological damage: the child will feel humiliated, his self-image will be harmed, and he may develop increased anxiety and anger; since the parent is a model for the child to emulate, the child is likely to adopt a violent form of behaviour, so that the cycle of violence will pursue him as he progresses throughout life, and from a victim of violence he may as an adult himself become a violent person (B. Bettelheim, *A Good Enough Parent* [51], at pp. 111-129; Orentlicher, *supra* [59], at pp. 155-160; see also the citations there of research in the field, *inter alia* the research of T. B. Brazelton, and the book of M. A. Straus & D. A. Donnelly, *Beating the Devil Out of Them: Corporal Punishment in American Families* [58]. See also the aforementioned article of Johnson [61], and the research which he cites).

The court cannot and may not turn a blind eye to the social developments and the lessons learned from educational and psychological research which have changed from one extreme to the other the attitude towards education that uses corporal methods of punishment.

28. Painful and humiliating punishment as an educational method not only fails to achieve its purposes and causes the child physical and emotional damage, but it also violates the basic right of children in our society to dignity and the integrity of body and mind.

The court in examining the normative aspect of a parent's behaviour to his child will take into account the current legal attitude to the status and rights of the child. This is the case in many countries around the world, and it is also the case in Israel after the enactment of the Basic Law: Human Dignity and Liberty, and in the era after Israel became a signatory to the Convention on the Rights of the Child.

Today it can be said that in a society such as ours the child is an autonomous person, with interests and independent rights of his own; society has the duty to protect him and his rights. In the words of Justice M. Cheshin:

> 'A minor is a person, a human being, a man — even if he is a man of small dimensions. A man, even a small man, is entitled to all of the rights of a large man' (CA 6106/92 *A v. Attorney-General* [24], at p. 836).

With regard to the rights of the child and the nature of these, see the remarks of President Shamgar in CA 2266/93 *A (a minor) v. B* [22]:

> '… The concept "rights of the child" tells us that the child has rights. The concept "rights of the child" in effect extends the canopy of constitutional protection over the child. It is expressed in a recognition of his rights and in that all of the rights are also a surety that guarantees his welfare' (at pp. 253-254).

(See also the remarks of *Justice Strasberg-Cohen* in that judgment, at p. 267. I will not comment with regard to the difference of opinion between my colleagues in the matter considered in that case, which does not directly reflect upon the case before us. See also CFH 7015/94 *Attorney-General v. A* [23], at p. 100, *per* Justice M. Cheshin).

The Basic Law: Human Dignity and Liberty, which elevated the status of human dignity to a super-legislative constitutional right, is also an important source for the case before us. It gives binding force to the dignity and protection that society must provide for its members who are weak and helpless, including children who fall victim to the violence of their parents. On the rights of the child under the Basic Law, President Barak said:

> 'At the centre of the Basic Law: Human Dignity and Liberty stands "man" — "as a man". Therefore the rights are extended to man the adult and man the child.' (A. Barak, *Interpretation in Law*, vol. 3, *Constitutional Interpretation* [52], at p. 435).

With regard to the influence of the Basic Law: Human Dignity and Liberty on the proper legal policy on the use of violence by parents against their children, the remarks of Justice H. H. Cohn in his article 'The Values of a Jewish and Democratic State — Studies in the Basic Law: Human Dignity and Freedom' [53], at pp. 30-31, are most apt:

> 'But I think that in the wake of the Basic Law the legislator would do well to take a fresh look at some of the dispensations currently to be found in the law, which are perhaps too broad. This is specially the case with regard to the right of parents and teachers to harm the body of their children or pupils "to an extent reasonably necessary to improve his (the victim's) behaviour"…
>
> … The right to protection of body which the Basic Law gives to every adult man must, *a fortiori*, be given to the child; not merely because the former is also capable of protecting his body on his own whereas the latter is unable to do so, but because the welfare and best interests of children is one of the highest values of the State — both as a Jewish State and as a democratic State.'

The approach that recognizes the rights of the child to protection of the integrity of his body and mind received its most obvious expression in the Convention on the Rights of the Child that was ratified in Israel on 4 August 1991, and came into force with regard to Israel on 2 November 1991. The Convention expressly prohibits the use of physical or mental violence towards children, and obliges the States to take measures to prevent violence to children. Article 19(1) of the Convention provides as follows:

> 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'

29. In accordance with all the aforesaid, it should be held that corporal punishment of children, or their humiliation and degradation by their parents as an educational method is totally improper, and it is a relic of a socio-educational outlook that is obsolete. The child is not the property of his parent; it is forbidden that he should serve as a punching bag which the parent may hit at will, even when the parent believes in good faith that he is exercising his duty and right to educate his child. The child is dependent upon his parent, needs his love, protection and gentle caress. Inflicting punishment that causes pain and humiliation does not contribute to the character of the child and his education, but violates his rights as a human being. It harms his body, his feelings, his dignity and his proper development. It distances us from our desire for a society that is free of violence. Consequently, we ought to know that the use by parents of corporal punishments or measures that humiliate and degrade the child as an educational method is now forbidden in our society.

Support for this view, with regard to the criminal liability of a parent who harms his child for 'educational' purposes, can be found in the fact that section 49(5) of the draft Penal Law (Preliminary Part and General Part), 5752-1992, was not passed. According to the draft of the aforesaid section 49, entitled 'Justification', a person would not bear criminal liability for an act that he did, if:

> '(5) He did it for the purpose of educating a minor under his authority, provided that he did not depart from what is reasonable.'

Between the first reading and the second and third readings of the draft law in the Knesset, the aforesaid section 49(5) was removed, and it did not form part of the amendment of the Penal Law that was passed. During the session in which the draft law had its second and third readings in the plenum, Knesset Member Yael Dayan explained her approach to this issue as follows:

> 'In our society, in which there is abuse of children, in which there is violence against the weak, in which there is violence against the helpless, in which there is violence by persons with authority, even in the family, and particularly in the family, sometimes we cannot rely on what is "reasonable". We do not know what is "reasonable"…
>
> … One person regards education as three slaps on the face, another regards it as burns with a iron or an instrument, and another regards it as imprisonment. It is totally forbidden to introduce here any intermediate norms, since this must be unambiguous — no violence shall be inflicted and no means of enforcement shall be used against a child or against someone who is under the authority or power or guardianship of someone else' (Knesset Proceedings 139 (1994), 9822, at pp. 9847-9848).

30. It may be argued that in this determination we are imposing on the public a standard that the public cannot reach, for among us there are many parents who exercise force that is not excessive towards their children (such as a light hit on the bottom or on the palm of the hand), in order to educate them and discipline them. Shall we say that these parents are criminals? (See the remarks of Knesset Member Dan Meridor in Knesset Proceedings 139, *supra*, at pp. 9842-9843, and also Feller, *supra*, vol. 2 [48], at pp. 497-498).

The proper answer is that in the legal, social and educational situation in which we find ourselves, we may not compromise by risking the welfare and safety of children. It must also be taken into account that we are living in a society in which violence is spreading like a disease; a dispensation for 'minor' violence is likely to sink into violence on a major scale. The welfare of a child's body and mind should not be endangered by any corporal punishment; the proper criterion must be clear and unambiguous, and the message is that there is no permitted corporal punishment.

Notwithstanding, it should not be forgotten that the parent has available the defences prescribed in the Penal Law, which provide for restrictions on criminal liability in certain circumstances, and which include all those cases of using force in order to protect the body of the child or of others. The restrictions that are recognized as providing exemptions from criminal liability are, in my opinion, sufficient in order to express the proper distinction between the use of force by parents for the purposes of 'educational punishment' which is improper and also forbidden, and the reasonable use of force which is intended to prevent harm to the child or to

others, or to allow minor physical contact, even if it is forceful, with the child's body to maintain order.

In addition, the criminal law has sufficient 'filters' to ensure that insignificant cases do not fall within its province. Thus, for example, the prosecution has discretion not to put someone on trial if there is no public interest (section 56 of the Criminal Procedure Law [Consolidated Version], 5742-1982); the criminal law also contains the defence of '*de minimis*' (section 34Q of the Penal Law), which can also prevent criminal liability being imposed for the insignificant use of force by a parent against a child.

Moreover, in general an act that a person of normal temperament would not complain about cannot form the basis for criminal liability. Thus, for example, not every everyday contact of one person with another leads to the imposition of criminal liability on the perpetrator, even if, *prima facie*, it complies with the formal elements of the offence of assault. Obviously parent-child relationships involve constant physical contact, and therefore normal physical contact between a parent and his child will not constitute a basis for a criminal offence.

In my opinion, it is possible to rely on the filters that I have mentioned, by means whereof criminal liability will not be imposed on a parent in insignificant cases that do not justify enforcement within the framework of the criminal law.

From the general to the specific

31. In the case before us, the appellant's hitting of her children was not an isolated hitting of minor significance that does not exceed the limits of *de minimis*, but a persistent pattern of behaviour, which created an atmosphere of tension and systematic violence in the house. The children were beaten with painful blows for insignificant matters, until the violence became an integral part of their lives. The marks of the appellant's deeds were made on the children's bodies and their young minds. I believe the appellant when she says that she loves here children, but this does not change the fact that the acts of violence that she inflicted on her children are improper and forbidden. Her claim that this was done for their benefit so that they should improve their behaviour conflicts with the basic values of our society with regard to human dignity and the welfare of the child's body and mind. Even the appellant's claim that the behaviour of her children is wild, and she raises them alone and is compelled to deal with the hardships of life on her own is insufficient to justify systematic violence against the children. For these

reasons the trial court was right to hold that there was no justification in law for the acts of the appellant that might exempt her from criminal liability.

Wherefore, and for all the reasons given above, the appeal against the conviction must be denied.

32. The appellant appealed, in the alternative, against the sentence that was given to her — a suspended sentence of twelve months' imprisonment, which she will serve if within three years from the date of the sentence she commits any offence of violence that constitutes a felony under the Penal Law, or the offence of which she was convicted in this case.

The judge in the trial court ordered, in the sentence, that the appellant should be placed on probation for eighteen months, and the probation officer should report to the court about the progress of the treatment once every three months.

At the hearing before us, the probation officer told us that the probation service applied to the District Court to cancel the probation, since at that stage the appellant was not cooperating, and the purpose of the probation was to improve her functioning as a parent.

From the declarations of the appellant during the hearing before us, a doubt arose as to whether she is able to comply with an undertaking to the probation service.

In such circumstances, it would appear that we should reconsider what is the effective punishment that can be given to the appellant. A long time has passed since the proceedings began, and ideally an updated picture of the appellant's position should be obtained for the purpose of deciding sentence.

Therefore, before adopting any attitude with regard to the appeal against the sentence imposed on the appellant, we would like to receive, within forty-five days, an updated report of the probation service concerning the possibilities of supervising the appellant.

Wherefore, we deny the appeal with regard to the appellant's conviction. Our judgment with regard to the sentencing will be given after we receive an updated report as stated.

President A. Barak

I agree.

Justice I. Englard

1. I agree with my colleague Justice Beinisch that the appellant was rightly convicted of assault on her children, an offence under s. 379 of the Penal Law. In the circumstances of this case, the violent methods of punishment inflicted by the mother on the children were not reasonable and were also not insignificant.

2. By contrast, I find the appellant's conviction on the offence of abuse, an offence under section 368C of the Penal Law, problematic. My colleague Justice Beinisch also discussed at length the problems that the term 'abuse' raises in the criminal context. She pointed out that the linguistic meaning, found in the dictionary, is 'harsh and cruel behaviour; inhuman treatment', but this does not necessarily reflect the legal meaning, and therefore the dictionary definition is not in itself sufficient. In her opinion, the legal meaning of the term should be derived from the purpose of the statute 'and by exercising judicial discretion'.

3. The fundamental concrete problem which my colleague discussed is what is the difference between the offence of abuse and the offence of assault, and where is the dividing line between them. To be more precise, the question is what are the additional elements, in a case of physical abuse, as distinct from emotional or sexual abuse, that are required in order to change an offence of assault on a minor or a helpless person into an offence of abuse under section 368B or 382(b) of the Penal Law.

4. After my colleague Justice Beinisch said that the answer to the said question is not simple, she went into great detail to characterize the special aspect of the offence of abuse. Within this framework, she began by saying that 'abuse, including physical abuse, refers to cases of a nature and type that our conscience and feelings cannot regard merely as acts of assault' (paragraph 13 of her opinion). She continued by stating that:

> 'Because abuse is behaviour that involves cruelty, intimidation or degradation — the nature of which we shall consider below — it acquires a stigma of immorality which does not necessarily accompany every criminal act that involves the use of force.'

Nonetheless, my colleague said that she did not presume to give a comprehensive definition and that she would confine herself to presenting the elements of the offence and the traits that characterize cases of physical abuse.

5. Among the characteristics is the use, directly or indirectly, of force or a physical measure against the body of the victim, which is done in a way and to a degree that is likely to cause physical or emotional damage or suffering, or both. With regard to this she said:

> 'Although causing actual damage is not one of the elements of the offence of abuse, it is obvious that proof of physical or emotional damage to a victim may serve as a probative tool to prove the existence of potential to cause suffering and damage, and the severity or the exceptional nature of the act that allegedly constitutes abuse.'

In this regard she said:

> '… the decisive attitude for the purpose of determining the existence of behaviour that amounts to an offence of abuse is that of the bystander, i.e., the objective viewpoint that examines the behaviour of the abuser to the victim.'

6. At this point my colleague went on to list the characteristics, even though these do not, in her opinion, amount to a closed or exhaustive list, which are: first, a continuing series of acts or omissions, in which it is possible that each act (or omission) in the chain of abuse is not of a cruel or degrading nature. Nonetheless, the accumulation of the acts or omissions and their continuation over time are what lead to the degree of severity, cruelty, degradation and humiliation or terror that constitute abuse. Second, these characteristics of cruelty, terror and intimidation, degradation and humiliation can exist even with regard to an isolated instance. Third, acts that are intended to impose authority, fear, punishment or extortion. Fourth, the fact that the abuser is in a position of power or authority with regard to his victim, in a way such that the victim is in a position of inferiority and helplessness without the ability to protect himself, i.e., a characteristic of unequal strength.

7. With regard to the emotional element, my colleague said that since the offence under section 368C is an offence of behaviour, the *mens rea* required, within the meaning of section 20(a) of the Penal Law, is awareness as to the nature of the behaviour and the existence of the relevant circumstances that are prescribed for the relevant offence.

8. After describing the characteristics of the *actus reus* of the offence of abuse, and after pointing out the *mens rea* of this offence, my colleague went on to the circumstances of the case before us. She said the following:

> 'As stated above, the children were hit by the appellant in the years 1994-5… on various parts of their bodies (head, neck, hands, bottom), sometimes with a sandal and sometime by throwing shoes. We are not talking of an isolated act, but of a pattern of violent and continuing behaviour. The children were hit by the appellant frequently and systematically, until the children, who were under her control, learned their "lesson" that there was a connection between their behaviour and violence being directed against them.'

And she continues:

> 'It is possible that each individual hit was not, in itself, cruel. Nonetheless, the methodical nature of the hitting, its continuation over a period of time and the frequency of the violence experienced by the children from their mother, being hit with an object such as a sandal and also the atmosphere of terror and harsh authority that prevailed in the home, where trivial matters were followed by a painful physical blow and outbursts of rage — all of these indicate that we are dealing with cruel behaviour of the mother to her children while humiliating them, regarding them as property that she can do with what she wishes.'

She also said:

> '… the violence directed by the appellant against the children had the potential to damage them; what is more, the kindergarten teachers noticed bruises on the bodies of H and N, and even testified about the recoiling and the fear that overcame the children when they approached one of them; the recoiling indicated their emotional state as battered children.'

9. Notwithstanding, my colleague's opinion notes that '… it is indeed possible that the appellant did not intend to cause harm to her children…'. But, in her opinion, the absence of an intent to cause harm on the part of the appellant is irrelevant for the purpose of committing the offence under section 368C of the Penal Law. Elsewhere my colleague held that she believed that the appellant felt love towards here children, '…but this does not change the fact that the acts of violence that she inflicted on her children are improper and forbidden…'.

10. Before I analyze in detail the approach of my colleague Justice Beinisch, I would like make some preliminary remarks on matters of principle. In my opinion, the principle of legality in criminal law, as stated in section 1 of the Penal Law, is of decisive importance. Another aspect of this principle is the rule of interpretation, prescribed in section 34U of the Penal Law, that 'if a law is capable of several reasonable interpretations in accordance with its purpose, the matter shall be decided in accordance with the most lenient interpretation from the viewpoint of a person who is supposed to bear criminal liability under that law'. According to the principle of legality, it is desirable that the *actus reus* of offences should be defined as clearly as possible, so that someone subject to criminal sanction may know in advance the bounds of what is forbidden and permitted. Therefore, in so far as possible, vague definitions, whose meaning is unclear, should be avoided.

11. It should be noted that in United States law the courts tend to disqualify provisions in criminal statutes because of their vagueness, for constitutional reasons of due process. With regard to the welfare of children see, for example, *State v. Gallegos* (1963) [38], in which the Supreme Court of the State of Wyoming held, after setting out the principles that require specificity in criminal statutes, the following:

> 'Section… a part of the Child Protection Act, declares it is a policy of the act to protect children from all types of abuse which jeopardize their health, welfare or morals. Without doubt, statutes directed to that end are essential for the safeguarding of youth and for the preservation of health and moral standards. However, criminal statutes cannot be couched in terms so vague and indefinite as to deny due process to an accused' (at p. 968).

12. The question of the legality of a criminal provision, which suffers from vagueness, has not arisen before us, and therefore I will not adopt any position thereon for Israeli law. I will concentrate on the interpretation of a provision of this kind. It is my opinion that one should adopt a method of interpretation which will cure the defect of vagueness in so far as it can. This principle of interpretation can be seen, in my opinion, both in the principle of legality prescribed in section 1 of the Penal Law and also in the principle of lenient interpretation prescribed in section 34U of the Penal Law. It should be noted that even in the United States there is a principle of interpretation of this kind, under the title 'Rule of Lenity'. See in this regard *In re S.K.* (1989) [39]:

> 'The statute under which the alleged [child] abuser is charged must sufficiently apprise him or her of what conduct is prohibited… If that statute is ambiguous, it is strictly construed, for the rule of lenity applies' (at p. 1388).

13. What is the essence of the term 'abuse'? It originates in the Bible, first in the book of Exodus 10 2 [62]: '… that I *acted harshly*[*] towards the Egyptians' (see Rabbi Avraham Ibn Ezra, *Commentary* on Exodus 10 2 [63]) 'and the Torah spoke in the language of men to say "I acted harshly" like a person who changes his nature to be avenged on another'); see also I Samuel 6 6 [64]: '… when he *acted harshly* towards them, did they not send them forth and they went'; Numbers 22 29 [65]: 'And Balaam said to the ass: "Because you have *treated* me *badly*, had I a sword in my hand, I would now have killed you";' Judges 19 25 [66]: 'And the people did not want to listen to him and the man took hold of his concubine and brought her out to them and they had intercourse with her and they *abused* her all night until the morning, and they sent her when dawn came'; I Samuel 31 4 [64]: 'And Saul said to his armour-bearer: "Draw your sword and pierce me, lest these uncircumcised people come and pierce me and *torture* me…'; see also 1 Chronicles 10 4 [67]; Jeremiah 38 19 [68]: 'And king Zedekiah said to Jeremiah: "I am afraid of the Jews who have fallen to the Chaldeans lest they give me up to them and they *torture* me'.

14. According to the Biblical commentators, 'abuse' is an act of ridicule, dishonour, humiliation, revenge, cruelty, trickery and degradation. According to Ben-Yehuda's dictionary, someone who abuses another 'does bad, harsh things to him with hatred, contempt'. In this spirit, Even-Shoshan's dictionary, which was quoted by my colleague Justice Beinisch, says that abuse is 'harsh and cruel behaviour; inhuman treatment'.

15. However, in my colleague's opinion, as stated, the linguistic meaning does not necessarily reflect the legal meaning. Therefore, she is not prepared to satisfy herself merely with the linguistic meaning in order to determine what is an act of abuse, and the concept should be construed, in her opinion, in accordance with the purpose of the statute while exercising judicial

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[*] Editor's note: the Hebrew word for the offence of abuse is התעללות; it is a form of this word used in Exodus 10 2 that I have translated here 'act harshly'. However, this word cannot be translated identically in all contexts. For this reason, in the Biblical sources quoted here, the translation of this word is italicized in each quote.

discretion. Her premise is that one should not give a general definition, but it is sufficient to show the elements of the offence and the characteristics that characterize the cases of physical abuse. In other words, it is possible to give meaning to the offence of abuse by progressing from case to case. According to her approach, the tools that will allow a distinction to be made between cases of mere assault and cases of abuse are the conscience and feelings of the person examining the acts. This premise is unacceptable to me. As stated, the principle of legality requires that the offence is defined *ab initio* with as general a definition as possible, and the idea that the conscience and the feelings will define, *ex post facto*, its criminal character is inconsistent with the rule that 'We may not punish unless we give warning' (Babylonian Talmud, Tractate *Sanhedrin* 56b [69]).

16. Notwithstanding, as stated above, my colleague points to certain characteristic indicators of behaviour that constitutes abuse, albeit while emphasizing that they do not constitute a comprehensive or closed list. The first of the characteristics of physical abuse is the existence of a continuing series of acts or omissions. It is possible that each, in itself, does not have a cruel or degrading nature. 'Notwithstanding, the accumulation of acts (or omissions) and their continuation over a period of time are what lead to a level of severity and cruelty, degradation and humiliation or intimidation that amount to abuse'. Assuming that the accumulation of acts and their continuation can indeed make the behaviour cruel and degrading, the question arises what is the degree of accumulation and continuation that turns the behaviour into abuse. In other words, what is the frequency required for this? This question indicates, again, a factor of uncertainty, which is undesirable within the framework of criminal law.

17. How has case-law dealt with the vagueness of the concept of abuse? The first use of the term 'abuse' was in the offence of exercising authority towards subordinates, an offence under regulation 87 of the Emergency (Court Martial Law 5708) Regulations, 5708-1948. This concerned the misuse of authority or rank of a soldier towards his subordinates, in which one of the aggravating circumstances is abuse of authority. In CMA 209/55 *Chief Military Prosecutor v. Corp. Nehmad* [28], the Appeals Court Martial referred to CMA 224/54 [29], in which it was said:

> 'For the purposes of determining whether the offence was accompanied by abuse or not, it is irrelevant whether the act of misuse of authority which was expressed in hitting a subordinate took the form of one single blow or several blows to the body of

> the subordinate. The proper test to be considered on this point is not the quantitative criterion of the hits or blows that the subordinate received but the circumstances, the manner and form of those blows.'

In CMA 4/52 *Chief Military Prosecutor v. Capt. Timor* [30], at p. 187, the Appeals Court Martial writes:

> 'We do not accept the argument of the prosecution that the act of the respondent was accompanied by abuse. It was not proved that the respondent acted to settle a personal score or in a manner that shows that he wished to humiliate Private L. before his comrades or to hurt him especially.'

The Emergency (Court Martial Law 5708) Regulations were replaced by the Court Martial Law, 5715-1955. The law contains an offence of abuse in section 65. This provision includes several sub-sections, one of which is the hitting of a soldier of lower rank. In CMA 152/78 *Aharon v. Chief Military Prosecutor* [31], the court held, at p. 203:

> 'Case-law has held that the third sub-section [of section 65(a) 'or otherwise abused them'] should not be restricted merely to a physical blow, and an offence of abuse is possible (under this sub-section) by injuring the soldier's dignity, humiliating him or degrading him. It has also been held that the test whether an act constitutes abuse or not is objective. This means that there is no need to prove that the officer intended to injure the dignity of his subordinate. It is sufficient that from an objective viewpoint his behaviour to the soldier may be interpreted in such a way' (square parentheses supplied).

The court goes on to say:

> 'In other judgments… it was held that abuse can be expressed in acts that are sufficient to "humiliate" the soldier or "were intended to hurt him".'

18. Study of military case-law shows that whereas the judges were of the opinion that an act of abuse, which is not defined as hitting a soldier of lower rank or a person in custody, must involve, from an objective viewpoint, an element of degradation, they differed with regard to the *mens rea*. Some judges held that it is necessary that there also exists an element of intent to humiliate. But the majority of judges thought that a degrading manner from an objective viewpoint is sufficient, and an element of intent is unnecessary.

See: CMA 190/58 *Chief Military Prosecutor v. Capt. Gad* [32], at p. 63; CMA 156/70 *Lieut. Meir v. Chief Military Prosecutor* [33], at p. 291; *Aharon v. Chief Military Prosecutor* [31] *supra*, at p. 203; by contrast, see: CMA 143/72 *Chief Military Prosecutor v. Capt. Yosef* [34], at p. 198; CMA 85/62 *Sgt. Brown v. Chief Military Prosecutor* [35], at p. 185.

19. I will now turn to the case-law of the civil courts on the question of abuse. I will first consider the elements of the *actus reus* of the offence of abuse under section 368C of the Penal Law, as they emerge from case-law.

The following was written in CrimA 295/94 *A v. State of Israel* [17]:

> 'There is no dispute that the appellant cut off the hair from the head of his youngest daughter, a child of 12 years of age, while using force on her during the cutting, and lacerating the tissue of her scalp…
>
> …
>
> This phenomenon may adopt the form of severe violence, it may be expressed in the confinement of the child and depriving him of his freedom and it may be shown by a wretched, humiliating and despicable act such as the act of the appellant.'

Justice Bach described acts of abuse in CrimA 3958/94 *A v. State of Israel* [25] as follows:

> 'We are dealing, *inter alia*, with the severe beating of children, sometimes with the use of devices such as a stick or a belt, biting them, pinching them, and banging their heads against a wall, and also imposing on them unreasonable punishments. The most severe act was when the appellant gave one of her children a severe injury in that she heated up a knife and while it was still hot she used it to cause burns on the backs of the child's hands.
>
> In addition, there was also various acts of emotional abuse…'.

In CrimA 7861/96 *A v. State of Israel* [14] the court said that:

> '… The appellant had the habit of putting his children in the living-room together, humiliating and insulting the mother in their presence, and threatening that if the mother would complain, he would murder her. The appellant used to lock the children in their room for a whole day. Once he went into the room of his daughter and spat on her. Another time he cut off the sidelocks of his son against his son's wishes. He also slapped

> his son and ridiculed him in the presence of other children and kicked him on his legs. He hit another of his sons on the face with a videotape and threw a shoe at him.'

My colleague Justice Kedmi held in CrimA 3754/97 *A v. State of Israel* [26] that:

> '… The blows which the father — mercilessly — inflicted on his daughters did not cause any of them broken bones or injuries to internal organs. However, the description of the manner of the blows and the physical marks that these left behind are sufficient to provide an expression of their force and severity; and the emotional scars — including the fears, anxieties and nightmares — that these left on the souls of the battered girls are of course incalculable.'

In CrimA 3783/98 *A v. State of Israel* [12] the court described the acts which led to the father being convicted of abuse:

> '… From time to time he hit one of the girls with a military belt which had iron buckles, or with a broom, or a clothes-hanger, and also with punches, kicks, etc.. From time to time they suffered injuries as a result of the attacks… he made the living-room in the apartment available to himself only…he deprived them of basic living requirements, including food and the use of electricity. He frequently cursed his wife and his daughters and called them humiliating names.'

20. From the case-law it can be seen that in cases where the courts convicted people of an offence of physical abuse there was an element of severe physical violence and cruelty towards the victim which also involved his humiliation. In my opinion, the *actus reus* of physical abuse should be defined along these lines, i.e., acts of severe violence and cruelty which humiliate and degrade the victim. This definition is consistent with the dictionary meaning of the term abuse, and I do not see any reason to depart from this meaning.

21. The requirement that in physical abuse there must be acts of particular severity, expressed in cruel and degrading violence, is also consistent with the outlook of the legislator as can be seen from the levels of penalties for the different offences relating to minors and helpless persons. Thus, in the provisions of section 368B of the Penal Law, someone who assaults a minor or a helpless person and causes him a real injury is liable to five years'

imprisonment. If the assailant was responsible for the child or the helpless person, he is liable to seven years' imprisonment. If they suffered severe injury and the assailant was responsible for them, he is liable to nine years' imprisonment. But we see that a person who commits an act of physical (or emotional or sexual) abuse on a minor or helpless person for whom he is responsible, is also liable to nine years' imprisonment. It follows that the legislator compared the abuser precisely to an assailant who causes a *severe injury*. Therefore, the context requires us to narrow the offence of physical abuse to acts that have particular severity, namely violence of a cruel and humiliating nature, which may cause the victim particular suffering.

22. This conclusion brings me to the question whether the offence of abuse is really merely an offence of behaviour — which is the opinion of my colleague Justice Beinisch and the opinion of other judges in this court — or whether it may be an offence of consequence. The answer to this question has clear implications for the *mens rea* required for this offence. The answer to this question is not at all simple. Abuse is defined by the provision of section 368C of the Penal Law as an act of physical, emotional or sexual abuse *of* a minor or *of* a helpless person. This wording implies to some extent the existence of a consequence of suffering for the victim of the abuse. Moreover, since physical abuse is an offence which is in essence and in concept closely related to the offence of causing an injury to minors and helpless persons — it is only logical that it too should be an offence of consequence. Likewise, in reality it is hard to conceive of a person being convicted of an act of physical abuse, without the victim being caused real suffering, but it should not be forgotten that in principle, criminal liability usually arises if a person behaves illegally, and this is accompanied by criminal intent of awareness of the nature of the act, and not necessarily of the consequences of his actions. Therefore, if there is no express provision in the statute that connects the liability with the causing of consequences, the assumption is that the offence is one of behaviour. It appears, therefore, that notwithstanding the fact that the offence of abuse is very closely associated with the causing of the consequence of suffering to the minor or the helpless person, in essence it remains an offence of behaviour. Therefore, the offence is not conditional upon proof of a harmful consequence to the victim of the abuse.

23. Assuming that we are concerned with an offence of behaviour, we still need to determine the *mens rea*, i.e., the criminal intent required for convicting someone of this offence. Under the provision of section 20(a), the

mens rea of an offence of behaviour is awareness of the nature of the act and the existence of the circumstances that are included among the details of the offence. In view of my conclusion that the nature of the *actus reus* of the offence of physical abuse is expressed in an act of severe and cruel violence which involves humiliation, a person who commits such an act must be aware of these circumstances.

24. I will now turn to apply these principles to the special circumstances of this case. I have studied the facts again and again and I have not been convinced that we are dealing with a case of abuse, which must be based, in my opinion, on a factual element of severe and cruel violence. I will mention once again that according to the structure of the offences that are intended to protect children and helpless persons, the offence of abuse is similar in essence — according to the severity of the penalty — to causing a severe injury. We see that in the circumstances of this case, the court decided to acquit the appellant of the offence of assault of a minor causing real injury under section 368B(a) of the Penal Law. No appeal was submitted with regard to this acquittal. Admittedly, the acquittal on this offence of assault does not mean that there is no possibility of convicting the appellant of abuse for any cruel acts that could have caused the child exceptional suffering, but not a real injury. However, as stated, I have not found that the behaviour of the appellant amounted to abuse. This conclusion with regard to the *actus reus* makes it unnecessary for me to consider the existence of *mens rea.*

25. In my opinion, it is not a proper legal policy to attribute acts of abuse to an accused unless the acts involve characteristics of unusual severity. Doing this as a matter of course may lead to the offence becoming morally insignificant. This will happen especially if the sentence given to the offender is relatively light, as happened in this case. In my opinion, in this case there was no need to add to the offence of assault under section 379 in the aggravated circumstances of section 382(b) of the Penal Law, for which the maximum sentence is four years' imprisonment, an offence of abuse for which the maximum sentence is nine years' imprisonment. The sentence — in which the appellant was placed on probation for eighteen months and given twelve months' suspended imprisonment — could have been justified completely and without any objective difficulty on the basis of offences of assault that the appellant committed against her children over a very long period. In my opinion, by defining these acts — which should not be underestimated — not only as acts of assault in aggravated circumstances, but also as acts of abuse, no additional social goal is achieved that is not achieved by convicting the appellant of assault.

Therefore, if my opinion were to be accepted, I would acquit the appellant of the offence of abuse.

18 Shevat 5760

25 January 2000.

Appeal against conviction on the offence of assault denied. Appeal against conviction on the offence of child abuse was denied by majority opinion, Justice I. Englard dissenting.