CrimA 3417/99

Margalit Har-Shefi

v.

State of Israel,

The Supreme Court sitting as the Court of Criminal Appeal
[21 February 2001]
Before Justice M. Cheshin, J. Turkel, E. Rivlin

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

Appeal by leave on the judgment of the District Court in Tel-Aviv-Jaffa (Justices D. Berliner, A. Bayzer, Z. Hammer) dated 25 April 1999 in CrimA 4253/98 in which the appeal on the judgment of the Magistrate's Court in Tel-Aviv-Jaffa (Justice N. Lidski) from 14 June 1998 in CrimC 1135/97 was dismissed.

Facts: The appellant Margalit Har-Shefi was tried before the Magistrate's Court in Tel-Aviv-Jaffa and convicted of the offense of neglect to prevent a felony (and of another offense, of which she was acquitted). It was held that although the appellant knew that a man named Yigal Amir was plotting to murder the Prime Minister of Israel, Yitzhak Rabin, she did not take reasonable means to prevent the commission of the felony. The conviction was appealed to the District Court and the appeal was upheld by a majority of judges. Leave was given to appeal the District's Court's decision. The appellant appealed the conviction and alternatively the sentence.

Held: The appeal of the conviction was dismissed unanimously, and by a majority of opinions, against the dissenting opinion of Justice J. Turkel, the appeal as to the sentence was dismissed.

Basic laws cited:

Basic Law: Human Dignity and Liberty**,** ss. 3, 8, 10.

Legislation cited:

Penal Law 5737-1977 ss. 18, 19, 20, 20(a), 20(c), 20(c)(1), 24, 34V(a), 90A, 90A(3), 95, 95(a), 262, 300(a)(2), 322, 362, chapter 5, chapter B.

Penal Law Ordinance, 1936, s. 33.

Mandatory Education Law, 5719-1949, s. 4(b).

Though Shalt Not Stand Idly by the Blood of Another Law 5758-1998, s. 1(a).

Penal Law (Amendment no. 39) (Introductory Part and General Part) 5754-1994.

Penal Law (Amendment no. 43) (Adapting the Penal Laws to the Introductory Part and General Part) 5755-1995.

Interpretation Law 5751-1981, s. 1.
Torts Ordinance [New Version]
Evidence Ordinance [New Version] 5731-1971, s. 10A.
Unjust Enrichment Law 5739-1979.

Draft Law cited:

Draft Penal Law (Amendment no. 47) (Though Shalt Not Stand Idly by the Blood of Another) 5755-1995.

Israeli Supreme Court cases cited:

[1] CrimA 496/73 *Ploni v. State of Israel*, IsrSC 28(1) 714.
[2] CrimA 517/66 *Abu Kadra v. Attorney General*, IsrSC 21(1) 246.
[3] CrimA 312/73 *Mazrava v. State of Israel*, IsrSC 28(2) 805.
[4] HCJ 164/97 *Kontram Ltd. v. Treasury Ministry, Customs and V.A.T. Department*, IsrSC 52(1) 289.
[5] FHCrimA 2974/99 *Ohana v. State of Israel*, (unreported).
[6] CrimA 450/86 *Gila v. State of Israel*, IsrSC 40(4) 826.
[7] CrimA 136/51 *Frankel v. Attorney General*, IsrSC 5 1602.
[8] CrimA 89/78 *Affenger v. State of Israel*, IsrSC 33(3) 141.
[9] CrimA 2831/95 *Elba v. State of Israel*, IsrSC 50(5) 221.
[10] CA 3666/90 *Zukim Hotel Ltd. v. Municipality of Netanyah*, IsrSC 46(4) 45.
[11] CA 804/80 *Sidaar Tanker Corporation v. Eilat Ashkelon Pipeline Company Ltd*., IsrSC 39(1) 393.
[12] CrimA 4675/97 *Rehov v. State of Israel*, IsrSC 53(4) 337.
[13] CrimA 205/60 *Moskowitz v. State of Israel*, IsrSC 14 2455.
[14] CrimA 307/75 *Tvik v. State of Israel*, IsrSC (unreported).
[15] CrimA 461/92 *Zakai v. State of Israel*, IsrSC 47(2) 580.
[16] CrimA 728/84 *Hermon v. State of Israel*, IsrSC 41(3) 617.
[17] CrimA 437/82 *Abu v. State of Israel*, IsrSC 37(2) 85.
[18] CrimA 277/81 *Halevi v. State of Israel*, IsrSC 38(2) 369.
[19] CrimA 307/73 *Sultan v. State of Israel*, IsrSC 28(2) 794.
[20] CrimA 307/73 *Dasuki v. State of Israel*, IsrSC 28(2) 802.
[21] HCJ 243/62 *Filming Studios in Israel Ltd. v. Gary*, IsrSC 17 2407.
[22] CrimA 347/88 *Demajnuk v. State of Israel*, IsrSC 47(4) 221.

Israeli Magistrate Court cases cited:

[23] CrimMot (TA) 1135/97 *State of Israel v. Har-Shefi* PM 1997(4) 354.

English cases cited:

[24] *Sykes v. Director of Public Prosecutions [1961] 3 All E.R. 33 (H.L.).*
[25] *Edgington v. Fitzmaurice (1885) 29 Ch. 459.*

Israeli books cited:

[26] S.Z. Feller, *Foundations in Penal Laws* (Vol. A 1984) (Vol. B 1992).
[27] I. Levi, A. Lederman *Fundamentals in Criminal Liability* (1981).
[28] M. Cheshin, 'Sources for Tort Law in Israel', Tort Laws—General Tort Jurisprudence (G. Tedeschi, ed. 2nd edition, 1977) 33.

[29] A. Rubinstein, *Enforcing Morality in a Permissive Society* (1975).
[30] H.H. Cohen, *the Law* (2nd Edition, 1997)
[31] A. Parush, *Legal Determinations and Moral Considerations* (1986).
[32] E. Harnon, *Laws of Evidence* (Vol. A. 1970).
[33] J. Kedmi, *On Evidence* (Vol. B, 1991).

Israeli articles cited:

[34] M. Gur-Aryeh, 'The Legal Duty to Prevent a Felony—When is it Justified' (to be published in *Mehkarei Mishpat*).
[35] M. Kremnitzer, R. Segev, 'Omission in Criminal Law', *Tamir Book* (I. Tamir, A. Hirsch eds. 1960) 197.
[36] I. Kugler, 'As to the Requirement of Awareness as to the Circumstances in the new General Part of the Penal Law' *Plilim* 5 (1996-1997) 149.
[37] R. Kanai, 'Is it Indeed one Law for those who Suspect and those who Know?' *Mehkarei Mishpat* 12 (1995-1996) 274.
[38] R. Gavison, 'Enforcement of Morality and the Status of the Principle of Liberty', *Iyun* 27 (1976-1977) 274.
[39] A. Parush 'The Law as a Tool for Enforcing Morality' *Iyun* 26 (1975) 146.
[40] A. Gross 'In the Margins of the Case Law—the Demajnuk Judgment and the Pursuit of Truth' *Plilim* 4 (1994) 299.
[41] A. Gross, M. Orkavi, 'Beyond a Reasonable Doubt' *Kiryat Hamishpat* (1991) 229.

Foreign books cited:

[42] G. Williams *Criminal Law* (London, 2nd ed., 1961).

Foreign articles cited:

[43] S.J. Heyman 'Foundations of the Duty to Rescue' 47 Vand. L. Rev. (1994) 673.

Jewish law sources cited:

[44] *Kings* II, 25, verses 22, 25.
[45] *Jeremiah*, 41, 1-2; 18, 18.
[46] *Zachariah*, 7, 5; 8, verses 14-15, 19
[47] *Shabbat*, 31A.
[48] *Leviticus* 19, 18.
[49] *Deuteronomy* 19, 19.
[50] *Psalms*, 31, 14; 37, 12; 105, 9.
[51] *Samuel* I, 17, 7.
[52] *Mishlei*, 19, 21.
[53] *Amos*, 5, 19.
[54] *Sanhedrin*, 66A.
[55] *Baba Kama*, 55B; 56A.
[56] M. Zilberg, *So is the Way of the Talmud* (2nd Edition, 1964).

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For the respondent — Penina Guy Senior Appointee in the District Attorney's Office Tel-Aviv District (Criminal); Gali Hazav, Assistant to the District Attorney Tel-Aviv District (Criminal).

JUDGMENT

Justice M. Cheshin

On the night between the 11th and the 12th of *MarCheshvan* 5756, 4 November 1995, on Saturday night, soon after sunset, Yitzhak Rabin, the Prime Minister of Israel was assassinated.

For two thousand years there has not been such a vile act among the People of Israel. Over two thousand five hundred years ago, Gedaliah the son of Ahikam the son of Shafan, the man whom Nebuchadnezzar the King of Babel appointed to be governor of Judea after Jerusalem was conquered and the Temple was burnt, was murdered:

> And the people who were left in the Land of Judah which Nebuchadnezzar, the King of Babel left and he put Gedaliah son of Ahikam son of Shafan over them. . .
>
> And it was in the seventh month Ishmael son of Nethaniah son of Elishama from the lineage of kings came and ten men with him and they struck Gedaliah and he died as well as the Jews and the Kasdim who were with him in the Mitzpah.

So reports the book of Kings (*Kings* II, 25, verses 22, 25 [44]) and so reports Jeremiah (*Jeremiah*, 41, 1-2 [45]). Israel's Sages established the third day of the month of *Tishrei*—the first non-holy-day at the start of each year—as a day of fasting over the murder of Gedaliah. 'The fast of Gedaliah' is the name today—in the past it was called 'the Fast of the Seventh' (*Zachariah*, 7, 5; 8, 19 [46])—observant Jews do not eat or drink on this day. Gedaliah was murdered over two thousand five hundred years ago; the people of Israel remember him—and observant Jews fast in his memory—every year. Gedaliah was merely appointed over the remnant of the nation on behalf of *Nebuchadnezzar* the King of Babel. Yitzhak Rabin was chosen by the people.

2. Our matter deals with the days before the rupture, in the days when the majority of the nation could not imagine that a Jew in the land of Israel would harbor a malicious thought—a deranged thought—to raise a hand on the Prime Minister to murder him just for leading a nation and country in a manner that does not appeal to the murderer. The days of innocence and naiveté have passed, and we—all of us—think differently than we thought before that terrible night. However, as to our matter, we must enter a time machine, and take ourselves back to the days before that night, as only in this way will we be able to assess and judge thoughts and actions correctly.

Work Plan

3. And this will be the work plan in the following opinion: first we will describe as briefly as possible the proceedings which have taken place until now and the arguments which were raised before us in the appeal (both orally and in writing). After that we will move on to a detailed analysis of the law. Then we will discuss in (relative) detail the facts of the matter; we will apply the law to the facts, and we will address the claims that were brought before us. We will therefore open with a short description of the proceeding up until this point.

Key elements of the proceedings that have taken place until now

4. The appeal before us revolves around an offense called neglect to prevent a felony, which is an offense as defined in section 262 of the Penal Law, 5737-1977 (hereinafter we will call this law—'the Penal Law' or 'the Law'). The offense deals with a person who knows that a certain person is plotting to commit a felony and does not take all reasonable means to prevent the commission or completion of that felony. The punishment for such an offense is two years.

5. The appellant before us, Margalit Har-Shefi (hereinafter we will call her—'the Appellant'), was tried before the Magistrate's Court in Tel-Aviv-Jaffa for the offense of neglect to prevent a felony (and for another offense, of which she was acquitted). In the words of the indictment, the appellant knew that a man named Yigal Amir (hereinafter we will call him: 'Amir' or 'Yigal Amir') was plotting to murder the Prime Minister of Israel, Yitzhak Rabin, and despite this did not take reasonable means to prevent the commission of the felony. We all know that Amir carried out his plot, and we will never know if the heinous act would have been prevented had his vile intention been reported to the police. But we will not occupy ourselves with that. Our matter now is the events that occurred prior to the murder, and we will caution ourselves again and again not to confuse knowledge before the fact—that same knowledge that the prosecution sought and asks to attribute to the appellant—with wisdom after the fact.

6. The Magistrate's Court—by Justice N. Lidski—convicted the appellant and sentenced her to a prison term of twenty four months, of which nine months were to be served in fact and the remainder on probation. See CrimMot (TA) 1135/97 *State of Israel v. Har-Shefi* [23].

An appeal was filed on the conviction and on the sentence, and the District Court—by a majority vote—dismissed it. Justice A. Bayzer and Z. Hammer—for the majority – held that the conviction and the sentence are to be left standing, while Justice D. Berliner—in a minority view—was of the view that the Appellant should be acquitted based on the benefit of the doubt. Leave to appeal was sought on this decision, and when leave was granted the appeal before us was filed: an appeal of the conviction and alternatively, appeal of the sentence.

Fundamentals of the decisions

7. All agree that Yigal Amir plotted to murder the Prime Minister Yitzhak Rabin. There is also no debate that the Appellant did not take any reasonable means to prevent Yigal Amir from committing the act of murder he plotted. The primary debate between the parties revolved around the question whether the Appellant **knew** about Amir's vile thought, or not; in other words, did she come within the framework of the provision of section 262 of the Penal Law which refers to '**one who knows** that a certain person is plotting to commit a felony...' (Emphasis mine—M. C.). Since if the Appellant knew of Amir's malicious planning—she is to be convicted, and if she did not know—she is to be acquitted.

8. Justice Lidski wrote in her judgment that knowledge is an internal matter, and knowledge – like intent—can be deduced from a person's behavior. The Appellant, added Justice Lidski, clearly knew of Amir's plot to murder Yitzhak Rabin, and she based this determination on the cumulative weight of these twelve elements: (1) the Appellant knew about Amir's extreme views; she knew that he viewed Yitzhak Rabin as a traitor for whom the law of *Rodef* applies and knew that in Amir's view he should be killed; (2) the Appellant knew of Amir's desire to establish an underground for defense of Jewish settlements for when the IDF pulls out of the territories, and his desire to accumulate weapons for this purpose; (3) the Appellant knew of the organizational skills which Amir was blessed with; (4) the Appellant knew of Amir's determination; (5) the Appellant knew that Amir regularly carried a handgun on his person; (6) the Appellant knew from Amir that at a certain time he sought to kill Yitzhak Rabin at *Yad Vashem*; (7) the Appellant knew from Amir that he sought to kill Yitzhak Rabin at the *Kfar Shamryahu* intersection dedication ceremony; (8) Amir suggested the Appellant conduct surveillance in secular attire as preparation for assassinating Rabin; (9) the Appellant asked Rabbi Aviner if the law of *Rodef* applies to Yitzhak Rabin, and whether one who says that the law of *Rodef* applies to him should be turned in to the authorities; (10) the Appellant gave Amir—at his request—information on the location of the weapons depot in Bet-El, her place of residence, and before the identity of the murderer was publicized, the Appellant called Amir, Avishai Raviv and her friend, and said to her friend that she wants to hug Amir; (12) the Appellant was asked in her questioning if she would have called Amir if the murderer was a young man from Jerusalem, and she answered in the affirmative noting that she would have asked Amir how he felt after 'his work had been done for him'. As to these twelve elements, Justice Lidski, said (p. 418):

> Based on what is said in the twelve paragraphs above, it is possible in my view to draw only one logical conclusion, which passes the test of common sense and is compatible with the facts that were raised and revealed during the course of the trial and it is—that the defendant knew that Yigal Amir was plotting to commit a felony, meaning to murder the Prime Minister Yitzhak Rabin may his memory be a blessing—and I so determine.

9. The majority justices in the District Court were also of the view—as did the Magistrate's Court judge—that the accumulation of the various facts and different signs adds up to proof of the knowledge of the Appellant—at a level sufficient for a criminal conviction—as to Amir's vile plot. Justice Hammer further added and determined, that the decision of the Magistrate's Court was founded on findings of credibility, and once it was found that the Magistrate's Court did not believe the Appellant's version—who claimed that she did not take Amir's words seriously—in any event the appeal is to be dismissed.

The minority judge, Justice Berliner, held, as said, that the Appellant

is to be acquitted based on the benefit of the doubt. Justice Berliner in fact accepted most of the determinations of the Magistrate's Court, but in her view there was an error in the way they were processed; the Magistrate's Court ignored (among other things) a piece of evidence of decisive significance, namely, the conversation of the Appellant with an individual named Avishai Raviv, a conversation which took place after the murder and at the time that the Appellant was in prison. Moreover, Justice Berliner was of the view that the Appellant's closeness to Amir—her closeness and her friendship—necessarily created a distortion in her thought; in the view of the judge, the words of the Appellant are to be accepted that she was of the view that Amir was a 'braggart and fantasizer' and that for this reason she did not take his words seriously and did not believe that indeed he was plotting to murder Yitzhak Rabin. Justice Berliner further determined that those twelve signs on which Justice Lidski based the conclusion that the Appellant knew of the murder plot, are signs which are open to various interpretations, and in any event a conclusion is not to be based on them. Justice Berliner constructed her conclusion from all this that the Appellant is to be acquitted based on the benefit of the doubt.

10. The Appellant's primary argument is that she did not know of Amir's vile plot to murder the Prime Minister, as she did not take his words seriously; according to her version, she was of the view that Amir's words as to his intention to murder the Prime Minister were said by way of banter, supposedly to taunt her and tease her. She saw him as 'Macho' and a 'fantasizer', and did not believe that he seriously intended to carry out what he said. So claimed the Appellant—consistently—since she was arrested, and this was expressed in her conversation with Avishai Raviv, a conversation which was taped without her knowledge while she was in prison. The Appellant further claims that her ties of friendship with Amir distorted in her mind the reality and the manner in which she perceived and understood his words. If she had only known that Amir is one of those that practice what they preach, then she would have turned him in to the authorities, and she told him as much. The Appellant's counsel also raised before us many additional arguments—for interpreting and explaining the episode—and we will address the fundamentals of these below.

On the other hand the State claims that the lower courts properly and justly convicted the Appellant in the manner that she was convicted. The Appellant knew well Amir's intention and plan to murder Yitzhak Rabin, and when he told her the things he said she took his words seriously. If this is so in general, it was true all the more so when she heard from Amir as to his specific attempts to murder the Prime Minister, when she knew he carried a handgun. These facts and additional facts that were proven, lead to the unambiguous conclusion —that the Appellant knew of Amir's vile plot. As to all this: the Magistrate's Court—which is the court that saw and heard the Appellant – did not believe her words that she interpreted Amir's words as boasting, and the appeals court is not to substitute its discretion for the discretion of the court that conducted the

hearing as to these findings of credibility.

11. We must resolve these differences of opinion, and we will do what is required of us. However, before we have laid out the facts and analyzed them, let us address the law and do our best to interpret it and understand it.

The offense of non-prevention of a felony—general discussion

12. This opinion revolves around an offense called 'neglect to prevent a felony' and we are bound to conclude and decide whether the Appellant before us, Margalit Har-Shefi, has committed this crime or not. Further in our decision we will discuss this offense in detail, but until we do so we will say that laid and spread out before us is an article written by Professor M. Gur Aryeh titled 'The Legal Duty to Prevent a Felony—When is it Justified' [34]. This article is soon to be published in the periodical *Mehkarei Mishpat* of Bar-Ilan University, and Professor Gur Aryeh has kindly agreed to our request and made it available to us to read (parts of the article were presented as a lecture in honor of Professor Aharon Anker, in a conference that was dedicated to criminal law). In our opinion below we will rely more than once on things that Professor Gur Aryeh teaches us in this comprehensive and in-depth article, and in this way we can also be brief rather than lengthy.

13. And this is the language of the provision of section 262 of the Penal Law, which deals with the offense of neglect to prevent a felony:

Neglect to prevent a felony	262	One who knowing that a person designs to commit a felony, fails to use all reasonable means to prevent the commission or completion thereof, will be sentenced to—two years imprisonment.

This provision is a (binding) translation of section 33 of the Penal Law Ordinance, 1936, which provided as follows:

Neglect to prevent certain offences	33	Every person who, knowing that a person designs to commit a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour and is liable to imprisonment for two years.

This offense of neglect to prevent a felony is a unique and special offense. Consistent with its uniqueness are the many discussions regarding it widen and not a small amount of criticism has accumulated around it; see the article of Professor Gur Aryeh [34]. Withal, we must remember, that a judge unlike an academic—is like the creature of the field tied at the navel to the ground of the law. Unlike the academic who spreads his wings and soars high and to far distances, we judges have subordinated ourselves to the word of the law, which is what guides us on the path. Even if the word of the legislator makes our job harder, still '... as long as the legislator has not erased this section [the section of the offense of neglect to prevent a felony—M.C.] from the law books it is

our duty to interpret it in a straightforward manner and ensure the implementation of the law': Justice I. Kahan in CrimA 496/73 *Ploni v. State of Israel* [1] at p. 721.

We will further mention that the offense of neglect to prevent a felony has one bad sister and that is the offense called 'covering up an offense', an offense as per the provision of section 95 of the Penal Law. And as per the text of section 95(a): 'one who knows that a certain person plots to commit an offense or committed an offense according to this chapter for which the sentence is imprisonment of fifteen years or a more severe sentence, and did not act reasonably to prevent its commission, completion or outcomes, all according to the matter, his sentence is—seven years imprisonment'. This offense is similar to the offense of neglect to prevent a felony and at the same time they are not similar, however, in our opinion we will deal neither with the similarity nor with the difference, which is not our issue now. See further: CrimA 517/66 *Abu Kadra v. Attorney General* (the *Abu Kadra* case [2]); CrimA 312/73 *Mazrava v. State of Israel* [3]; Gur Aryeh in her article above [34], part III, section 1.

14. The neglect to prevent a felony offense is unlike other offenses, and its uniqueness is in its being a crime of omission. A person who knows that a certain person is plotting to commit a felony, the law imposes on him the burden to adopt all reasonable means to prevent the commission or completion of the act, and if he refrains and does not remove this burden of himself—does not take all reasonable means etc.—he will be criminally liable. Let us give thought to the fact that the offense revolves around only prevention of a felony, meaning the prevention of severe offenses and not the prevention of lesser offenses. We further learn that the subject of the offense is the prevention of the commission of a felony, and not in reporting the felony that was committed. The law places a burden on a person to adopt all reasonable means to prevent the commission of a felony, and it is superfluous to say that the most common and reasonable means will be—generally—reporting to the security forces who are in charge of maintaining public law and order. The central core of the offense is the element of knowledge ('one who knowing that'), and that is the foundation on which the duty to act is built. In our words below we will deal to no small degree with this element in the offense.

15. Criminal offenses generally, are offenses which revolve around an **action**; the prohibition of criminal law is a prohibition of thou shalt **not** do—though shalt not murder, thought shalt not steal, thou shalt not provide false witness against another—and one who does what is prohibited for him is liable in criminal law. Unlike offenses which revolve around an action, crimes of omission revolve around an omission to act – as their name implies – not fulfilling a duty imposed by law. These crimes of omission are few and unique, and each one is different. As to these offenses—these and crimes of commission – I stated in HCJ 164/97 *Kontram Ltd. v. Treasury Ministry, Customs and V.A.T. Department* (the *Kontram* case [4]) at p. 366:

> The key element of duties imposed on the individual in law are duties of thou shalt not do–thou shalt not murder, thought shalt not steal—and this is the minimal level required for the existence of a civilized society. At times the individual is obligated to legal duties of 'thou shalt do'; however these duties are established explicitly in the law, and they are few, for example: the duty to serve in the army; the duty to pay taxes... the duty to prevent a felony (section 262 of the Penal Law-5737-1977) and more.

And thus in the continuation (at p. 371-371):

> The criminal codex, for example is full and replete with negative duties, these are negative duties which are explicitly imposed in the law (be their text what it may be) and they are the minimum duties that make a society humane. These duties can limit the freedom of the individual that same freedom with which we began our journey. Alongside the negative duties lie the affirmative duties which the law imposes on the individual, an example of an affirmative duty is for example the duty to serve in the army and the duty to pay taxes. An additional example is to be found in the duties of parents to their children and the duties imposed on certain individuals as to wards and helpless individuals. It is unnecessary to state—and everyone knows this—that the affirmative duties are fewer in number than the negative duties. And this is so for a reason. If we give the matter thought, the negative duties encumber the individual—in principle—less than affirmative duties, meaning: the negative duties slide over into the area of individual freedom less than affirmative duties. In other words; in the spirit of liberal democracy and individual rights—and even otherwise—it is easier to impose on the individual negative duties than affirmative duties. We learn from here, that before we come to impose an affirmative duty on the individual we must weigh again and again in our minds whether we have gone too far in our decision, and whether we have deviated beyond the proper and permitted according to the basic views accepted in our society.

Negative duties—those whose violation brings on a criminal sanction—are meant to be the minimum duties for shared living in a civilized society. And as the elder Hillel said 'what you detest do not do to your friend' (*Shabbat*, 31A [47])—what you detest do not do to your friend. See further the *Kontram* case [4], **ibid** at pp. 359-360. These are not like the affirmative duties—those duties whose violation brings on penal sanction—for the establishment of an affirmative duty in penal law there must be a special reason, a particularly powerful reason, which supports it and reinforces it; each duty and its reason. Indeed, for the reason that a crime of omission —the same legal provision which directs

and orders that a certain action be taken, that if the action is not taken that person upon whom the burden of doing has been imposed and he did not do will be punished—violates individual freedom more than the prohibition on taking action, for this very reason a substantive and particularly important reason is required for the imposition of a duty in penal law. For the very same reason the law does its best to minimize crimes of omission. See and compare: Professor M. Kremnitzer, R. Segev 'Omission in Criminal Law', [35]; S.Z. Feller, *Foundations in Penal Laws* (Vol. A) [26] at pp. 396-398; (Vol. C) [26] at p. 168; I. Levi, A. Lederman *Fundamentals in Criminal Liability* [27] at pp. 160-161.

At times we will have no difficulty in explaining and fortifying a specific crime of omission. Thus for example is the crime of omission of a parent to supply food and vital life necessities to his small child, an offense as per the provision of section 362 of the Penal law ('Neglect of Children and other Wards'). Such is the crime of omission to provide the life necessities of a helpless individual in the hands of one who is responsible for that helpless individual (section 322 of the law). Such is the omission of parent to care for the education of their son (section 4(b) of the Mandatory Education Law 5709-1949).

16. The logic of an offense that deals with neglect to prevent a felony is self-derived. The role of the police is to protect public safety and security, and this includes preventing the commission of crimes. However, the police are not all-knowing—it is not present at every moment at each and every location—and naturally it does not have the power to prevent the commission of felonies that it does not know about in advance. Instead the individual is asked to help the security forces prevent the commission of felonies, if he only knows of a certain person who is designing a plot to commit a felony. What is required of the individual is not much, mostly providing information to the police, even if only in a phone call. Indeed, with (ostensibly) minimal effort the individual can prevent harm—occasionally very severe harm—to the individual and to society, harm whose measure is far greater than the effort that he is being asked to expend. Some see this duty of the individual—and similar duties—as derived of the social contract of shared life in society, however, we need not deal with this at length. See S.J. Heyman 'Foundations of the Duty to Rescue' [43].

17. Whereas crimes of omission generally raise difficulties, there are additional unique and special difficulties for offenses of non-prevention of crime. And we are not now speaking of interpretive difficulties—these are difficulties which await anyone required to interpret any penal offense—but to the general social circumstances which can justify the existence of the offense in the law books or the need to erase it from the law books. Indeed, there are few offenses which raise difficulties and emotional resistance to their very existence as does this unique and special offense of neglect to prevent a felony. It is no surprise therefore that the difficulty that the offense raises has brought about its non-recognition—in its Israeli formulation—in the United States and England. See said article of Professor Gur-Aryeh [34]. See also *Sykes v.*

Director of Public Prosecutions (1961) [24]. And indeed, it is difficult to ignore the uniqueness of the offense, a uniqueness which also makes it unique among its colleagues, the other crimes of omission.

18. As we have said, the offense of neglect to prevent a felony imposes a burden on the individual to take all reasonable means to prevent the commission or completion of a felony that a certain person is plotting to commit. A reasonable measure will generally be reporting to the police on things that the reporter knows about. And if the person refrains and does not report—he will be accused of an offense. This burden is not a light one. Thus, for example, it may be that Reuven hears from his close friend—or family member—that this friend or this family member is planning to commit a felony. It will not be easy for us to impose on Reuven a duty to report to the police—such that if he does not meet the burden he will be criminally indicted—as we all sense the tension that we are causing in his heart, a tension between personal loyalty and loyalty to the law.

Moreover, one who knows that a friend or family member is plotting to commit a felony will have difficulty digesting the knowledge, and against this backdrop it is possible that an emotional barrier will arise within him which will prevent the formation of such 'knowledge'. As though a defense mechanism will operate within a person—a mechanism of self deception—and this mechanism will push the 'knowledge' out of consciousness. This is so within a person's head.

So too, as well, in the relationship of the person to the outside world. Provision of information to the police as to a certain person who plots to commit a felony may be accepted in certain circles or in certain circumstances as an act of informing, and the stigma of the informant—who strikes with his tongue, as in the words of *Jeremiah* (18, 18 [45])—may attach to one who reports to the police things that came to his knowledge. It is not for no reason that observant Jews raise their eyes to G-d, and ask of him daily, three times a day, 'and the informants shall have no hope'. Justice H. Cohn said in the *Ploni* case [1] (**Ibid,** at p. 718):

> The people of Israel has ever and always hated informers like no others; and if this hatred grew against the background of life in exile, then also the Israeli sovereignty which we have been granted with the establishment of the State does not detract much from the aversion to those who hand over and informants to which we have become accustomed while we were still scattered among the nations. And as to this aversion we are not unique: It is the lot of all the nations of culture which believe in human dignity and liberty; only under totalitarian regimes, such as in Nazi Germany and Soviet Russia, was the duty of informing raised to the level of a civil and legal duty which is superior to all human relationships.

In addition, sometimes a person will hesitate to report to the police as to the planning of a felony, lest he be harmed when it becomes known,

and in particular when the circle of those who know of the planning, is a very limited group. And moreover, the natural tendency of an ordinary person is to pull back and distance himself from all that is related to criminal offenses, if only in order not to entangle himself in the affairs of others. The imposing of a duty on the individual in circumstances such as these—the duty of reporting to the police—harms the liberty of man. If all this is not enough, providing information to the authority is liable to create an atmosphere of suspicion and further to cause estrangement among relatives and friends. Additional reasons have been raised which were intended to trim the wings of the offense, but we will not discuss this at length. As to these factors—and additional factors, psychological factors and others—which are relevant to determining the proper scope of the offense, Professor Gur Aryeh has discussed at length, and one who wishes to read it should do so, open his mind, and become wiser.

The criticism that was expressed against the offense of neglect to prevent a felony was met with counter-criticism—criticism no less sharp than the original criticism itself—from those who support the existence of the offense and those who find justification for it in today's society. For example Justice I. Kahan has said in the *Ploni* case [1] in answering the criticism of H. Cohn (**ibid,** at p. 721):

> My esteemed colleague, Justice H. Cohn, has expressed in vigorous terms his critical attitude as to the provisions of said section 33. Even were I to share this approach, this would not be sufficient to change the result which should be reached in my view as to the appeal of the conviction, as long as the legislator did not erase this section from the law books, it is our duty to interpret it according to its plain meaning and to ensure the implementation of the statute… For myself I am not of the view that section 33 is an untouchable abomination. The legislator did not obligate the citizen in this section to provide information on offenses that were already committed but narrowed the duty to offenses that have not been committed yet and only to felonies. The prevention of severe offenses, that felons plot to commit, is a welcome purpose and intended to protect the public. It is the public duty of every citizen to contribute in this way to prevention of felonies and establishing a criminal sanction for violating this duty should not be ruled out. As Justice H. Cohn explained in his decision, this duty and informing have nothing in common, and therefore I see no need to examine whether the aversion toward the informant has a rational basis in a civilized country, which does not discriminate among its citizens.

And these were the words of Justice Asher (**ibid,** at p. 722):

> It is known to all that we have been 'blessed' with a wave of severe crimes, even more severe than those described by Sir Allen, and organized crime is also discussed in our newspapers. If we add to this the special security situation

> of our country and the activities of terrorist organizations that do not recoil from spectacular crimes whose like has yet to be seen in this world, then it will be clear that we cannot surrender any possible means of defense in the face of the dangers which lurk for the public living in this country, and the provisions of section 33 [section 262 of the Penal Law-M.C.] are included in this... The purpose of this section is the prevention of felonies, a purpose that the courts are not entitled to dismiss or ignore. I do not believe that we would do well if we try to reduce its effectiveness by interpreting 'by way of minimization and scrutiny' as per the suggestion of my esteemed colleague the head of the panel.

And so said Professor Feller in said book (Vol. A) [26] at p. 398: In this provision in section 262 of the Penal Law 'the society imposed on the individual the duty to work toward the prevention of commission of felonies…'

We will further add that the trend to speak favorably about the existence of the offense of neglect to prevent a felony enjoyed a certain boost from the legislation of the Thou Shalt not Stand Idly by the Blood of Another1998. This law turns the acts of 'the good Samaritan'—acts of extending help to people in need—to acts which are required by law, acts which if not carried out under appropriate circumstances, a sanction is imposed on the one who refrains and does not act. It may one day be established that the violation of the duty to save a person or offer him help in circumstances established by law will come within the tort of breach of statutory duty. See further: the article of Gur-Aryeh *supra* [34]; the words of President Barak in FHCrimA 2974/99 *Ohana v. State of Israel* [5].

19. After reading all we have read, we can say this in our matter: be the objections which were raised against the existence of the offense of neglect to prevent a felony what they may be, and even if we accept those objections (and we have not said so one way or another), all of the things that were written and expressed, do not outweigh the proper and justified burden that the law imposes on the individual—if only he knows something—to report to the police that a certain person is plotting to murder a person. Indeed, even Justice H. Cohn, who did not spare his words as to the offense of neglect to prevent a felony (see his words in the *Ploni* case [1], *supra*) also explained the duty of do not stand idly by the blood of another (*Leviticus* 19, 18 [48]), and he stated as follows in the *Ploni* case [1] (**ibid,** at p. 719):

> … the Israeli legislator saw fit to leave section 33 [today: section 262 of the Penal Law-M.C.] in force… Perhaps he intended, unknowingly, to fulfill the commandment written in the Torah: 'do not stand idly by the blood of another' (*Leviticus* 19, 18 [48]). Among the examples that the Sages of the Talmud gave for the applicability of this prohibition, we have found that when you see robbers approaching your friend, you must save him from their hands (Sanhedrin 63A;

> and see Maimonides, Law of a Murder and Protecting Life, A, 14). So too according to the law of the Torah a person must take reasonable means to prevent the danger of a crime—and the proof is that even when life is endangered you are not permitted to save the endangered person by killing his pursuer unless you cannot save him by another means (Maimonides, **ibid** , 13).

And further on (**ibid)**:

> When there is an immediate and real danger to national security, for example when contact is established between the agents of the enemy and a certain person who gives them secret information… or when there is real and present danger to the life of a person in that one who hates him with all his heart sets out to kill him, then no fastidiousness and delicacy can stand up against the need for an act of rescue.

20. A word on modes of interpretation: Justice H. Cohn announced to us in the *Ploni* case [1] (**ibid,** at p. 719), that 'section 33 [meaning the offense of neglect to prevent a felony—M.C.] is to interpreted by way of minimization and scrutiny, in order not to create an opening for a duty to inform from which the scent of totalitarian oppression wafts…'. Justice I. Kahan and Asher objected to this interpretive rule and we have brought their words above (see paragraph 18). In CrimA 450/86 *Gila v. State of Israel* the Gila case [6]) Justice D. Levin expressed something of an intermediate stance and in responding to the argument that the offense in our matter is to be interpreted in a narrow manner, wrote the following words (at p. 832): '… I will say, to the extent necessary for our matter, that this section [the offense section—M.C.] is valid and effective, and is to implemented in the proper case, and even when one seeks to give the section a narrow interpretation, and there is reason to do so, the interpretation does not and cannot be narrow, to the point where it is not possible for a logical and reasonable conclusion to pass through it.' For myself I would say that it is proper for us to do our best to interpret the statutory provision in a reasonable and appropriate manner, giving thought to its general and particular purpose. In this we have not said much, but it appears that we can make do with these words and we need not add more.

On the elements of the offense of neglect to prevent a felony

21. There are several components to the definition of the offense of neglect to prevent a felony, and they are as follows: one, a person who knows; two; that a person is plotting; three, to commit a felony; four, and does not undertake reasonable means to prevent the commission of the act or its completion (see further the Gila case *supra* [6] at p. 831). If all four of these come together in one place, the offense of neglect to prevent a felony is completed. For our matter, as we shall see in detail below, a debate surrounds the first two components. Further on we will discuss the four components, but we will examine at length the first two of them. We will open with the second component in the circle, which is

the element of plotting: 'one who knows that a certain person is **plotting** to commit a felony…' (Emphasis mine—M.C).

The plotter must commit a felony

22. The term plotter has its source in the Bible and carries within it at least two meanings: one meaning is—a meaning which has been abandoned in our day and apparently a meaning that also at its source was abandoned: to think and plan, whether to think and plan for good or think and plan for bad: 'as I plotted to do you ill… so I sat and plotted during these days to benefit Jerusalem and the house of Judah…' (*Zechariah*, 8, 14-15 [46]). The other meaning is, and this is the meaning that has the upper hand: thinking and planning to do evil things, planning plots to commit bad acts, intending to conspire, planning a felony, as it is written as to a false witness: 'and do to him as he plotted to do to his brother…' (*Deuteronomy* 19, 19 [49]) And further 'They plotted to take my life' (*Psalms*, 31, 14 [50]); 'the evil person plots against the righteous person…' (*Psalms*, 37, 12 [50]); 'G-d do not give an evil person his desire do not satisfy his plot…' (*Psalms*, 140, 9 [50]).

In the context of the provision of section 262 of the Penal Law—'A certain person plots to commit a felony'—there is not a shadow of a doubt that the meaning of 'one who plots' is to do ill. The Magistrate's Court interpreted the term, for our matter, as 'conceiving of an evil idea, planning it and intending to implement it', and the District Court adopted this interpretation. Justice Berliner emphasized the three components in the definition: conceiving the idea, planning it and intent of implementation, and Justice Hammer emphasized that it is not a matter of just thought—however evil the thought—and in quoting from the dictionary of Ben-Yehudah he further established that it must be '… thought **to do** something… **to do ill**'. In their arguments before us the counsel for the parties did not dispute the interpretation of 'one who plots', and we too follow those who went before us. Below we will go on and relate to plotting to do ill in the provision of section 262 of the Penal Law, and break it down into its components.

One who knows (that a certain person plots to commit a felony)

23. The heart of the offense of neglect to prevent a felony is in the element of knowledge; the knowledge that a certain person is plotting to commit a felony is the spark which creates a link between the person (the defendant) and the planned felony; it is what establishes a duty to act; that is the central element in it. Reuven 'knows' that a certain person is plotting to commit a felony and this 'knowledge' is what creates – as though *ex nihilo*—the burden imposed on Reuven to take reasonable means to prevent the felony or prevent its completion. Generally, a person will not be liable criminally for a failure to act. It is as though they say to a person: sit and do nothing—and the criminal law won't reach you. Not so here. Reuven, who receives information— even without paying attention and without realizing— that a certain person is plotting to commit a felony, is prohibited from simply sitting and not doing. There is a burden imposed on him to act, for if he does not act he

will be liable criminally. However, what is the meaning of the expression 'one who knows'?

24. In CrimA 136/51 *Frankel v. Attorney General* (the *Frankel* case [7]) the Court addressed the question whether the arrest of a citizen by another citizen was lawful, and on this matter the question was examined whether the arrest in the circumstances that were proven to the Court could be viewed as fulfillment of the duty to prevent a felony. In this context the Court related to the interpretation of section 33 of the Criminal Law Ordinance—the very section 262 of today in its original English formulation—and this is what Justice Agranat told us as to the interpretation of the concept of 'knowing':

> 'Knowing' means knowing in its simple sense; meaning it is not about simply a conclusion, which a person deduces logically from the circumstances. In the case before us the complainant had no clear or certain knowledge that the appellant was thinking of breaking into his yard and committing a theft there; at most—and we are not establishing this either—he had a reasonable suspicion as to such an intention on the part of the appellant and that is all. This being so, there is absolutely no room even for the application of said section 33 [today section 262 of the Penal Law—M.C.]
>
> (**Ibid** at p. 1607). See further CrimA 89/78 *Affenger v. State of Israel* [8] at p. 149.

And thus 'knowing' means knowing 'in its simple sense'. If you will: 'its sense is simple'. Is it indeed so?

The knowing that the provision of section 262 of the law addresses is a unique and special knowledge. It is knowledge revolving around the thoughts of another, his plans, the plots he harbors in his heart. How can I know what goes on in a person's heart, what plot he is hatching in his heart, what bad deed is he planning to do? How will I see into the heart and mind of man?

> … as not what man will see as man will see of the eyes and G-d will see of the heart (*Samuel* A 17, 7 [51])

And as the statement of the English Court in the fifteenth century in the words of Brian, C.J., on not knowing what man's thoughts are:

> The thought of man is not triable, for the devil himself knoweth not the thought of man (as brought in G. Williams Criminal Law [42], at p. 1).

If this is so generally, all the more so when we know that:

> Many are the thoughts in man's heart (*Mishlei*, 19; 21) [52].

Indeed as Bowen, L.J. said in the case of *Edgington v. Fitzmaurice* at p. 483 [25] (1885):

> ...the state of a man's mind is as much a fact as the state of his digestion.

The state of man's mind is as the state of his digestion, and yet, the

question remains: how can I know the state of a man's mind?

There is a difference between a person's knowledge of his own thoughts and plans and his knowledge as to the thoughts and plans of another. A person may know what his own thoughts and wishes are. When I want to stroll down the avenue, I know I want to stroll down the avenue. However, how can I know if **you** want to stroll down the avenue? Even if you say: I could know this from external manifestations of your wishes; for example, if you tell me that you wish to stroll down the avenue. Let us now presume that you told me that you wish to stroll down the avenue; then I would know that you **told** me that you wish to stroll down the avenue. However, do I 'know' that you want to stroll down the avenue? The question in our matter is therefore this: when are we entitled to say about a person that he 'knew' that a certain person is plotting to commit a felony?

25. Until an inventor invents a machine which reads minds, we will not know the thoughts racing around a person's mind—what schemes he hatches in his heart, what plans come pass through his head—unless those thoughts, plans, or schemes find external-objective expression (overt acts); for example: a person tells of their plans and thoughts; we observe the acts of preparation for implementing a certain plan; a certain person hears, willingly or not willingly, a conversation between the evil schemer and another etc. And the veritable truth be told—whether a certain person plots to commit a felony—only that person himself will know. Another person will not 'know' if a certain person is plotting to commit a felony other than as a deduction from external indications that were given in hatching the plot. Out of the accumulation of external expression generally we can conclude, as a common sense conclusion—that a certain person is hatching evil plans in his heart, however, even then it would only be a deduction—a deduction and not absolute knowledge. 'Absolute' knowledge can be as to past events or my own thoughts. 'Knowledge' as to another's thoughts—by nature—will never escape the realm of deduction. This being so, when we say that Reuven 'knows' that a certain person plots to commit a felony, we are referring to knowledge which is not knowledge in its simple sense, but to a deduction which is based on external manifestations of the existence of the thought, the wish, the plan. Deduction as to a negative phenomenon can also be termed 'suspicion'—in seeing certain things I 'suspect' that a certain person is plotting to commit a felony—but we will be careful with the use of this term for reasons which we will discuss shortly.

Criminal Intent—'Cognizance', 'Suspicion', 'Knowledge', 'Knowingly'

26. In the year 5754-1994—in Amendment no. 39 of the Penal Law (Penal Law (Amendment no. 39) (Introductory Part and General Part) 5755-1995)—as is known, the general part of the Penal Law was repealed and replaced with a new general part. In the year 5755-1995—in Amendment no. 43 of the Penal Law (Penal Law (Amendment no. 43) (Adapting the Penal Laws to the Introductory Part and General Part) 5755-1995—the legislator provided us coordinating provisions between

the penal law that preceded amendment no. 39 and the provisions of the new general part. These amendments in the penal law have sown no small amount of confusion in our matter and we have been given the assignment to disperse the fog. Even on this subject, as on other matters—chiefly the question of the conviction of the Appellant—differences of opinion between the judges in the lower court have arisen, and the time has come that we untie the knot and say our piece as to determination of the law.

27. And this is the upshot of things. Section 20 of the Penal Law (after the Amendment) concentrates on the intentional element of the crime—on criminal intent—and its core provision appears in the provision at the beginning of paragraph (a):

> *Criminal Intent*
>
> 20 (a) *Criminal Intent*—cognizance of the nature of the action, to the existence of the circumstances… which are included among the elements of the offense…

The key phrase for our matter is 'cognizance'. This is so with respect to crimes of conduct, and the offense of neglect to prevent a felony is a crime of conduct. The provision of section 20(c) of the statute broadens the concept of 'cognizance' beyond its core meaning:

> *Criminal Intent*
>
> 20. (a) …
>
> …
>
> (c) For purposes of this section—
>
> (1) A person who was suspicious as to the nature of the behavior or the possible existence of the circumstances is viewed as one who was cognizant of them, if he failed to look into them.

Putting two and two together, we see that 'cognizance' of the nature of the act and the existence of the circumstances includes in its meaning suspicion regarding the nature of the act and the existence of the circumstances; that is, if a person fails to look into them. A suspicion therefore—suspicion as to the quality of the act and the existence of the circumstances—is equated with 'cognizance', if you will **it is** cognizance *de jure*, unless the person looked into the matter and his inquiry revealed that the suspicion that arose was an empty suspicion. It is as though the law imposed on the individual—by implication—the burden of inquiring about the behavior and circumstances, and if he refrained and did not look into it—suspicion will be equated with 'cognizance', and an act that is done will be seen as an act accompanied by 'cognizance'. In other words, 'willful blindness' is equated to and is a substitute for 'cognizance'. Professor Feller has discussed the logical-moral foundation of this provision, a provision which is cognizance-broadening, in his book *supra* (Vol. A [26] at p. 519:

> Cognizance of the **possibility** of the existence of the circumstance, on which the offense depends, obligates the

> person to examine the situation, prior to committing the act, in all that relates to that circumstance, in order to refrain from the act, in case the existence of the circumstance is confirmed. If despite the suspicion, the person did not do so, whether because under every circumstance he was determined to commit the act, or whether it was more convenient for him not to know or for any other consideration, this means that he has reconciled himself to the existence of the circumstance.
>
> Therefore, disregard which is **cognizant** of the possibility of the existence of a set of circumstances is equated with **cognizance** of these circumstances; as this set of circumstances was before the person's eyes, but he did not take the effort to examine the situation and check it out. If it turns out in retrospect that the relevant circumstances indeed existed, the cognizance of the possibility of their existence out of suspicion is equated with cognizance of their very existence.

In applying this doctrine to our matter one could–ostensibly—say that the concept of 'knowledge' as provided in section 262 of the Penal Law ('one who knew') includes not only knowledge in its plain meaning but also suspicion, 'suspicion' as per the provision of section 20(c) of the Penal Law.

28. Our journey is not yet over. Amendment no. 43 of the Penal Law—which added section 90A of the Penal Law—establishes, as we noted above, coordinating provisions between the Penal Law that preceded the new general part of the law (as established in Amendment no. 39) and the new general part. It establishes 'Provisions for Adapting Penal Laws' in the language of the title to the chapter in which section 90A is found. Section 90A constitutes something a changing station for terms which deal with the intentional element of the offense, and it is dedicated to exchange of old terms with new terms. One of those terms of the intentional elements in offense is the concept 'knowingly'. The penal law which preceded Amendment no. 39 makes frequent use of the concept 'knowingly', and now section 90A (3) shows us how this concept will transition to a new era.

Interpretation of the law as to the intentional element in the offense	**90A** In any place in the statute which was legislated prior to the effective date of the Penal Law (Amendment no. 39) (Introductory Part and General Part) 5754-1994… and in which the intentional element of the offense finds expression in the term- (1)… … (3) 'Knowingly'or a term with a similar meaning—the term will be

interpreted as criminal intent as said in section 20(a);

Meaning: in the (chronological) border station between the Penal Law prior to Amendment no. 39 and the Penal Law after Amendment no. 39 stands the concept-exchanging border guard, and on his shop there is a sign on which it says 'interpretation of the law-section 90A'. Prior definitions of the penal offenses stand in line for that exchanger; the exchanger exchanges old terms with new terms, and after the exchange it allows them to continue in their way toward the modern Penal Law. And thus, prior offenses put in the hands of the exchanger the concept 'knowingly' which is part of their definition, and in exchange they receive the term criminal intent as said in section 20(a) of the Law; meaning, for our matter: the cognizance of the nature of the act and the existence of the circumstances which are counted among the components of the offense. Compare CrimA 2831/95 *Elba v. State of Israel* [9] at p. 262 (in the words of Justice Mazza). For critique of the exchanging provisions for our matter see I. Kugler, 'As to the Requirement of Awareness as to the Circumstances in the new General Part of the Penal Law' [36], at p. 175. And see further R. Kanai, 'Is it Indeed one Law for those who Suspect and those who Know?' [37] at pp. 437-440.

Since the provision of section 262 of the Penal Law—which is the statutory provision we have been circling all this time—was legislated prior to Amendment no. 39, the adapting provision is meant to apply to it, in text and spirit, and it is incumbent upon us to incorporate the adapting provision into the rest of the statutory provisions in our matter.

29. The blocks have piled up before us in a confused fashion and the time has come to arrange them in proper normative order. We will therefore weigh the matter and say as follows: the concept of knowledge in section 262 of the Penal Law (one who 'knew') is—as per the provision of section 90A(3) of the law–… a term of similar meaning…' to the term 'knowingly'; that same knowledge is to be interpreted therefore as criminal intent according to the provision of section 20(a) of the Law, and for our matter as cognizance; section 20(c) of the Law establishes that 'suspicion' – meaning: willful blindness – is equated to cognizance; ergo: the phrase 'one who **knew** that a certain person is plotting to commit a felony' (emphasis mine—M.C.) in section 262 of the Penal Law, is to be interpreted as also applying to a situation according to which: one who **suspects** that a certain person is plotting to commit a felony and refrains from looking into his suspicion. The knowledge in section 262 will not be interpreted in its simple meaning—not at all in its simple meaning—but will also apply to the mental state of willful blindness. Note: the concept 'suspicion' and 'willful blindness' serve in Jewish law and in the words of our sages as interchangeable, and in our discussion below we will also not distinguish.

30. This issue of interpretation also stood before the Magistrate's Court even prior to the District Court, but the manner of treatment by the judges was not uniform. Justice Lidski was of the view that 'willful blindness' is sufficient and the condition of knowledge in section 262

would be fulfilled; see the decision handed down in the Magistrate's Court, **ibid** [23] at p. 371. In the District Court the judges were all of the view that it is a condition of the offense that the defendant have actual 'knowledge', and that willful blindness is not sufficient. The Appellant's counsel argues that willful blindness is not sufficient while the State's counsel argues that willful blindness is sufficient, but that under the circumstances actual knowledge was proven.

31. Before we get to analysis of the matter itself, we will discuss briefly the reasoning of the District Court for its view that willful blindness is not sufficient, and we will express an opinion on what we have read. The mechanical arrangement of the blocks poses a difficulty for the approach of the District Court. Going heel to toe: from section 262 of the Penal Law to section 90A(3); from section 90A (3) to section 20(a); from section 20(a) to section 20(c); from section 20(c) back to section 262; this orderly and disciplined walk will lead us to the (mechanical) conclusion that the concept of 'knowledge' in section 262 of the Penal Law also includes willful blindness. This conclusion seemed difficult to the District Court (as we shall see later), and it should have found a way out of the difficulty. What is the way out?

The way out was found for the Court by classifying the knowledge in section 262 of the Penal Law as a circumstantial-factual element rather than an intentional element. Which means as follows: the path of the chain that we pointed out from the provision of section 262 of the Penal Law to other provisions in the law and back to the provision of section 262—depends on the classification of the concept of knowing in section 262 ('one who knew') as an intentional element distinguished from other elements which make up the definition of the offense (this based on the beginning of section 90A, which explicitly refers us only to the intentional element). And here, if we classify the knowledge component not as an intentional element but as another element of the offense, in any event we will not have to follow the full length of the chain, and we will not be obligated by the statutory text to interpret knowledge as also including willful blindness. This is the approach of the Judges of the District Court.

The minority opinion judge, Justice Berliner, determined (if we have understood her correctly) that knowledge is—generally—an intentional element of the offense, but for purposes of the offense in section 262 of the Penal Law, and in a departure from the norm, it constitutes a circumstantial element. Justice Hammer determined that it is a factual element of the offense, meaning one circumstance among many (Justice Bayzer did not address this classification). When they found thus, the judges of the District Court saw themselves freed of the chain of progression and from the conclusion that arises from following the chain. As to the matter itself the judges determined that the circumstantial element of 'knowledge' means its simple sense, meaning it does not include willful blindness. We agree with the conclusion of the Court; but we do not follow its path to the conclusion.

32. A criminal offense is divided into two primary elements: the

factual element and the intentional element. See section 19 of the Penal Law. The factual element of the offense is addressed in the provision of section 18 of the Penal Law, and it tells us as follows:

> The structure of the factual element
>
> 18 (a) 'component' as to offense—the action in accordance with its definition, and a circumstance or result that was caused by the act, where they are part of the definition of that offense.
>
> (b) 'an act'—including an omission, if not said otherwise.
>
> (c) 'omission'—refraining from doing that which is a duty according to any law or contract.

Section 20 of the Penal Law revolves around the intentional element in the offense, as to the criminal intent. Application of this classification to the provision of section 262 of the Penal Law means, in my view, that Reuven's cognizance that a certain person is plotting to commit a felony—alongside cognizance that he is not taking steps to prevent the commission of the act or its completion—is an intentional element of the crime, while the other elements (a certain person plots to commit a felony and failure to undertake the means to prevent the commission or completion of the act) are factual elements in the offense. Definitions of the concepts 'element' 'action' and 'omission' in section 18 of the Law clarify this. The knowledge (cognizance) that a certain person plots to commit a felony is not different in its classification—and it is not appropriate for it to be different—from cognizance in any other criminal offense. We are talking about the state of mind and the consciousness of the one committing the offense, we are dealing with the intentional element; in contrast, when we are talking about a state of mind and consciousness of another—the individual plotting to commit the felony, it is a matter of a circumstance, a factual element. Professor Gur-Aryeh addresses this question in chapter III, section 2.2 in her article above [34], and we agree with her words, including their fine manner of presentation.

Anecdotal evidence supporting our words is this: section 20(a) of the Penal Law instructs us that criminal intent includes awareness of the existence of the circumstances which are included in the elements of the offense. And thus, if we classify the knowledge in section 262 (as to another's plotting) as a circumstance, than we must say—joining these things together—that we require the cognizance of a person of his own knowledge of the plotting of another. This is a statement lacking meaning and devoid of logic, as it is obvious that a person is aware of his own knowledge.

33. We return to the high road and address the core of things. The departure-point for the interpretive journey is, as we have seen, that the concept of knowledge in section 262 of the Penal Law ('one who knew') deals with the intentional element of the offense, criminal intent. The

chain of progression dictates this (ostensibly), and I do not suggest that we deviate from this path. In taking this path, we reach the conclusion, a conclusion necessitated by law, as it were–that the concept of knowledge in section 262 of the Law also encompasses willful blindness, meaning: one who acts with willful blindness may be liable for the offense of neglect to prevent a felony, as willful blindness is equated with cognizance. This conclusion is difficult for us; we will go further: it is unacceptable, in our view, and the law also does not necessitate it. We will explain.

34. We will start from our conclusion and say: in our view, the offense of neglect to prevent a felony—by its very nature and character—excludes the possibility of interpreting the concept of 'knowledge' as including mere suspicion. The necessary conclusion of this is that the provision of section 20(c) of the Penal Law—which is a general statutory provision equating suspicion and cognizance—will be stopped on the threshold of the entrance of the provision of section 262—which is a special statutory provision—and will not enter that house. The general statutory provision will retreat before the special statutory provision.

35. This special crime of omission—the offense of neglect to prevent a felony—by its nature obligates us to act with extra caution in interpreting the concept of knowledge. The element of knowledge in the offense ('one who knew') is the foundation on which the offense is based, the formative element, it is the element that establishes a duty to take action and to take all reasonable means to prevent the commission or completion of a felony. This special status of the knowledge element, requires us, in our opinion, to limit it to knowledge only, simply and literally, as the legal rule that applied prior to Amendment no. 39 (see the *Frankel* case [7] *supra*). The knowledge of a certain person who is plotting to commit a felony, as we saw above, can never leave the realm of deduction which is based on external manifestations and expressions of evil thoughts and plots in an individual's heart. Only if a person seriously has the impression—on the basis of real evidence—that an individual is plotting to commit a felony, only then can we say that that person 'knows' of the other person's plot. If given this background we reduce the 'knowledge' requirement—simply and literally–and we make do with mere suspicion as to the plans and plotting of a certain person to commit a felony, it appears that we would be going very far, farther than is proper and desirable as to the inter-relationships of individuals in society, whether in relationships with strangers or relationships among those who are close to each other. As to broadening the areas of the knowledge in section 262—to also apply to willful blindness—we say that the sages do not approve; the broadening of the areas of knowledge imposes a burden on man to look into a suspicion that arises in his heart, and this burden is like a decree that most of the public cannot observe; it is a regulation that leads to mishap.

36. Knowledge as provided in section 262 of the Law means that facts accumulated in a person's head concerning external manifestations

of what goes on in an individual's heart and mind, to the point where their cumulative weight reaches a 'critical mass', meaning to the point of 'knowledge' that a certain person is plotting to commit a felony. This knowledge we should properly require that it be clean and clear. It is proper that it be far from mere suspicion (as per the provision) of section 20(c) of the Law).

Behold Reuven who suspects that a certain person plots to commit a felony; suspects but is not sure that his suspicion is a justified suspicion. Will we obligate him to look into the circumstances while taking on the risk that if he does not look into it—and later it turns out that his suspicion was justified—we will charge him with actual cognizance of the act and with the omission of failure to take reasonable means etc.? This result appears difficult to me.

37. The provision of section 20(c) of the Penal Law—a provision which deals with willful blindness—permits the defendant to escape the jaws of the doctrine of willful blindness, only if he properly looks into that which needs looking into, if he goes deeply into researching the suspicion he suspects; as if he does so and finds that the suspicion is an empty one, the willful blindness will disappear on its own. This is the word of the provision of section 20(c) of the Law, that suspicion as to the nature of activity or the possibility of the existence of circumstances is weighed against cognizance of these '… if [the defendant–M.C.] refrains from looking into them'. Applying these words to a crime of omission such as ours would mean that we are imposing on a person the burden to look into a suspicion that lurks in his heart; that if he does not look into it he will be seen as one who was cognizant of the circumstances while in fact he was not cognizant of them. The necessary conclusion from this is that the law imposes a burden on a person to look into a suspicion that arose in his heart, and if he did not look into it—or if he did not come up with anything from his inquiry—he must bear the burden imposed on him, meaning to take action, to take all reasonable means, etc. In other words we are imposing on a person the burden of action (for example to report to the police)—to prevent the commission or completion of a felony—even if he only **suspects** that a certain person is plotting to commit a felony and even if he has no actual knowledge of the plot. See and compare: Feller in his book *supra* (Vol. A) [26], at p. 519; Gur Aryeh in her article *supra* [34], Part II, section 1.2 H. Such a burden is a heavy and unreasonable one.

Professor Gur Aryeh says in her article *supra* [34] (in part II, section 9.2H) as to the crime of omission (including the offense of neglect to prevent a felony):

> … the concept of willful blindness enables attribution of knowledge also to one who suspects the existence of a state of things which may give his behavior a criminal character. The assumption is that before one looks into his suspicion, or as long as the suspicion has not been removed, he does not have to act. For one who does not want to invest the necessary resources for the inquiry, there is the option not to

> do the act. Making do with willful blindness in cases of omission is not self evident. If indeed willful blindness is also applied to omissions, the omitter is left with no choice but to look into his suspicion. The concept of willful blindness imposes on the omitter an additional burden—to determine whether the factual situation is such that obligates him to act. At least when the duty imposed on the omitter is a general duty, which does not stem from his special connection to the situation, it is not clear if indeed there is justification for the additional burden of inquiry as a precondition to the duty to act. This is true in general, and all the more so when it is an omission that is based on knowledge of the plots of another. It is not clear how one who suspects that another is plotting to commit a serious felony such as murder can look into his suspicions. And more importantly, it is doubtful if we would want one to try and look into the suspicion; an inquiry which may spur one to stalk the one who is plotting to commit a felony. Society has no interest in encouraging individuals to stalk one other with the goal of collecting information as to the plans of others, even if these are malevolent plots, just the opposite.

See further Gur Aryeh's detailed and convincing analysis, **ibid** . In the same vein Kanai wrote in her article *supra* [37] as follows:

> Section 262 of the law is the well-known section of neglect to prevent a felony. The section refers to one who knows that a certain person is plotting to commit a felony. Will we indeed obligate a person to go to the police and notify it in every case in which he harbors even a slight though real suspicion that his neighbor is plotting to commit a felony? There are considerations of legal policy that would limit this duty to cases of knowledge or suspicion at a very high level.

And in footnote 33, **ibid** , Dr. Kanai brings examples of such policy considerations:

> Such as maintaining good neighborly relations, concern of retribution to neighbors, concerns of flooding the police with complaints and more.

38. Regarding offenses which revolve around taking action, one can understand and justify the application of the concept of knowledge to willful blindness as well; we say to one who wants to take action: don't take action—until you look into a suspicion that you have; stop—hold back—until you are sure and know that the action which you are about to take is not a criminal action. Not so with crimes of omission, where it is as though we are ordering the person: act: investigate and inquire; for if you do not act, if you do not investigate, do not inquire—you will be viewed in our eyes as one who was aware of the circumstances that in truth you were not aware of. There is no need for a wild imagination to understand and know that from an intentional standpoint—in fact from any standpoint—it is more difficult to take action to inquire as to the

truth of a suspicion than to refrain and not take action with an -offense of commission. The duty of reporting to the police as instructed in the provision of section 262, is a difficult duty in and of itself, a duty which is not free of problems; all the more so when we say that this duty is imposed on a person—in criminal law no less—where he suspects that another person is planning to commit a felony. What will such a person do? Will he stalk and follow the person? Ask him about his plans? See further Gur Aryeh in her article *supra* [34] Part II, section 1.2 H.

39. As an interim conclusion in this chapter, we will say as follows: we are gripped by the following question—does the concept of knowledge in section 262 of the Penal Law limit itself to knowledge—in its simple sense—or does it spread out to include willful blindness as well. We have examined the question from its various aspects and have concluded as follows: if we classify this knowledge as criminal intent—meaning, we will follow the chain—we will be forced to apply the knowledge in section 262 to willful blindness as well. This conclusion is difficult for us. We will go further and say: this conclusion is not acceptable to us at all. At the same time, if we classify the knowledge in section 262 as a circumstance—as distinguished from criminal intent—then we will betray basic tenets of the law.

We are caught therefore—ostensibly—between the Scylla and Charybdis, and we are in distress. Woe is me from my creator and woe is me from my heart. And as the Prophet Amos said: 'just as a man flees from the lion and the bear attacks him and he reaches the house and leans his hand on the wall and the snake bites him'. What can we do therefore to extract ourselves from this distress into which we have fallen? What password can we utter to gain us our freedom?

40. In our view, as we already noted above, the proper path is to narrow the effect of the chain of progression, meaning: to narrow the application of the provision of section 20(c) of the Penal Law on the offense of neglect to prevent a felony. Following the chain of progression—mechanically—indeed leads us to the conclusion that the concept of knowledge in the provision of section 262 of the Law also includes willful blindness. However, having reached the **substantive** conclusion—after examining the innards of the offense of neglect to prevent a felony—that it utterly excludes—in interpreting of the concept of knowledge—criminal intent that involves only willful blindness, we are obligated to stop in our tracks; to stop and reflect. These reflections will teach us that there is no escape from the conclusion that narrowing the application of the offense—according to its definition—obligates us not to apply to it the directive of the general statutory provision which establishes that the concept of cognizance spreads over willful blindness as well. And in our words, in the language of legal theory we would say: defining the offense of neglect to prevent a felony is a special law (*lex specialis*), while the provision in section 20(c) of the law is a general law (*lex generalis*), and it is a well-known principle that a special law overrides a general law: *lex specialis derogat generalis.* The provision of section 20(c) will stay as is, but in setting out to modify various

offenses, when reaching the provision of section 262 it will retreat and will not apply to this offense of neglect to prevent a felony. As to this matter we can do no more than repeat the words of Professor Gur Aryeh in her important article [34] (in Part III, section 2.2D)—to review these words and adopt them as they are written:

> If we want to deny the application of willful blindness in the framework of the offense of neglect to prevent a felony, it is proper to do so by establishing a limitation to the provisions of section 90A(3) and 20(c) of the Penal Law. The interpretive argument will be that these provisions are general provisions which belong to the general part of the Penal Law. General provisions may be disregarded when it is a matter of a special offense, in cases in which the uniqueness of the offense justifies disregarding the general provisions. And the uniqueness which justifies disregarding the general provision which establishes that willful blindness is a substitute for knowing the circumstances is rooted in the reasons brought by the judges of the District Court themselves [in the *Har Shefi* case—M.C.]: the offense in section 262 is a crime of omission which imposes a duty to act based on the plots of another. The plots themselves by nature are dynamic and changing, it is doubtful if one can determine the seriousness of the plots, and there is no public interest in encouraging him to try and inquire as to these plots by stalking the plotter.

And indeed, this is—in general–the relationship between the general definitions and doctrines which cut across the law lengthwise and widthwise, and specific statutory provisions. General definitions and doctrines will attach themselves to all statutory provisions and laws they wish to apply to. But where a certain specific statutory provision seeks to expel from within its bounds the general definition or doctrine—and this expulsion is derived by way of 'interpretation', in the broad sense of the concept of interpretation, including from the basic tenets of the system: logic, justice, first principles, social doctrines, etc.— the specific statutory provision prevails, while the general definition and doctrine will retreat. The general definition and doctrine will apply, as per the language of the Interpretation Law 5741-1981 in section 1, '… if there is no other provision as to the said matter, and if there is nothing in the said matter or its context which cannot be reconciled with…' the general definition or doctrine.

41. Elsewhere I raised the theory that the term 'tort' in the Torts Ordinance [New Version] is not limited only to those torts listed in the Ordinance. I opined that the concept 'tort' is a conceptual term, and from this I concluded that there are 'torts' outside of the Torts Ordinance [New Version]. Against this background I further asked myself, what is the relationship between the doctrines that were established in the Torts Ordinance [New Version] and those unspecified torts. I answered the question by saying that an unspecified tort will not 'be controlled

mechanically by the doctrines established by the Ordinance.' And that the doctrines in the Ordinance will apply to unspecified torts only '… if the application of a certain doctrine from the Ordinance is consistent with the foundations, essence, and structure of the tort at issue, and with the framework in which it is found': M. Cheshin, 'Sources for Tort Law in Israel', Tort Laws—General Tort Jurisprudence [28] at p. 81 s. 60. See further CA 3666/90 *Zukim Hotel Ltd. v. Municipality of Netanyah* [10] at p. 73 ; CA 804/80 *Sidaar Tanker Corporation v. Eilat Ashkelon Pipeline Company Ltd*.; [11] at p. 440.

Doctrines, classifications, and definitions, we have created these for our own use; they were intended to serve us; we will control them and not allow them to control us; the power is in our hands, and we will now allow our own creations to rise up against us. Indeed, we will find it difficult to develop thoughts and law without doctrines, definitions and classifications. The classification of offenses according to their elements—carries great analytical and practical importance; determination of characteristics common to different offenses makes it easier to analyze them precisely according to a general and predetermined formula, and can advance modes of thought and development of ideas. See Feller in his book *supra* (Vol. A) [26], at p. 130):

> … defining the offense according to a general structure is a necessary tool for methodical and precise examination of the requirements for the formulation of each specific type of criminal offense and for determining for each concrete event the corresponding type of offense. Definition is a tool which serves the theory, and is also essential for legal practice. Definition is also the link connecting between the law which defines the types of specific offenses, and the concrete events which have the hallmarks of a criminal offense in order to examine the correspondence between the event and the law. This is the model to be examined.
>
> Definition is also the model for studying the offense and its substantive content.

All these are appropriate things, as long as we don't find ourselves bowing to the doctrines, definitions and classifications; praying to them, bowing to them and paying tribute to them. I discussed this in CrimA 4675/97 *Rehov v. State of Israel* [12] at p. 377:

> Classification in the law… we know is not done purely as an intellectual exercise. Classification is intended at its core to serve as a tool in our hands, it is meant to serve us, to make order of hylic principles, to advance understanding of topics which we deal with, assist in advancing those topics. Aesthetics is also a factor in legal thinking, but the key is functionality and efficiency…
>
> … it is incumbent upon us to take care lest we turn the classification into our mistress, a mistress who will dictate to us what to do and what not do to. On the contrary. We

are the mistress and the classification serve us.

See also the citations **ibid**.

42. In our view when we seek to find a way to reconcile the provision of section 262 with the provision of section 20(c) of the Penal Law, it is proper that section 20(c) retreat before section 262. In other words, the concept of cognizance in the provision of section 262 of the Penal Law ('one who knew') will not include willful blindness and suspicion. Cognizance is cognizance—to the degree that cognizance of the state of mind of another can be called cognizance—and in the provision of section 262 there is no 'cognizance' which is less than actual cognizance.

43. In chasing willful blindness out of our house, we have established what **is not** in the house; the time has come to look around us and learn what is in it.

Cognizance and actual cognizance—when does suspiciontTurn to cognizance?

On the content of cognizance; 'one who knew'—what did he know?

44. As we have seen, the concept of cognizance in section 262 of the Penal Law ('one who knew') is a somewhat complex concept. It revolves around the thoughts and plans of another ('one who knew that a certain person is plotting to commit a felony'), and we know that one does not 'know' of the thoughts and plans of another other than by external manifestations which are detected by the five senses and by the processing of these manifestations in one's mind. 'Cognizance' as to the thoughts and plans of another is—in theory and in fact—a deduction deduced from external manifestations and expressions of those thoughts and plans.

This raises the question: **how many** external manifestations and expressions are required, and what **quality** should they have, such that we can say that a person 'knows' that a certain person is plotting to commit a felony? We will not find a single answer to this question; the circumstances of each case and incident will decisive, and provide us the answer. The test of evidence will be the test of the reasonable man—meaning, the Court—and it is the test of reasonableness and common sense. The question that the Court will ask itself will be if the information that was gathered by the accused—the **quantity** of the information and the **quality** of the information—if this information reached such a level that it is possible to categorize it—by the rules of logic and common sense—as 'knowledge'; if the information reached the 'critical mass', if the cup is full to the brim. The court will apply this evidence test to the accused standing before it, and it is superfluous to say that the accused can try to convince the Court that for one reason or another the reasonable person standard will not be satisfied by the specific circumstances of the matter.

45. However, this is not enough. The answer to the question whether cognizance has been achieved or not, is analytically derived not only from the quantity and quality of information that accumulated in a person's mind (the reasonable person). In addition—and perhaps first

and foremost—it is derived from the purpose of the law and from the balance two counter-forces; the balance between the force pulling toward the creation of the offense and the force that is repelled from its creation, and once it has been created seeks to narrow its boundaries as much as possible. These are, for example, the same factors which seek to narrow the range of applicability of the offense: the revulsion from informing; the fear of disputes within the family, among friends or relatives; the fear of revenge if a person is in contact with the police; the inclination of a person not to get himself tangled up in things that are not his business. These factors—and others— tell us that a fairly high degree of confidence in the correctness of the information is needed before it reaches the level of 'knowledge'. On the other side are those factors which tend to broaden the bounds of the offense—chiefly the pressing need to prevent felonies, particularly severe felonies—and those factors whisper in our ears that we should make do with information which is not at such a high level and agree to see it coalescing to the point of being 'knowledge'. These forces pull one way, those forces pull the other way, and standing in between we will determine the proper quantity of information required to create knowledge.

46. Where it is a matter of a process which takes place over time; where pieces of information accumulate one on top of the other over a certain period; the decisive moment is the time of transition from information which creates only a 'suspicion' to information and suspicion which develop and coalesce into 'knowledge', and from that point on a person bears the burden that section 262 of the law imposes on him. 'Suspicion' is like a fetus in its mother's womb, a creature that is unable to sustain itself independently. Compare to the words of Justice Agranat in *Frankel* case [7], paragraph 24 above. And see CrimA 205/60 *Moskowitz v. State of Israel* [13], at p. 2456. Thus, for example, it is possible that certain information will come to a person and will create no more than a suspicion (meaning, a suspicion that a certain person is about to commit a felony), and it is possible that later further information will fall into the hands of that person and the suspicion will turn into knowledge. As to this process we can say, that the suspicion developed until it became a creature that could sustain itself, and it is like a fetus whose navel was disconnected from its mother. It is even possible that 'knowledge' will be created at once, without going through the early suspicion phase. Each case will depend on its circumstances, and the question in each case will be a question of deduction from the accumulation of information that in the hands of that person. The primary thing is that the knowledge be 'real' knowledge and not just knowledge which relies on bits of rumors and speculations. Information must be real information for us to agree to view it as 'knowledge' in the framework of section 262 of the Law, and this interpretation of the Law strikes a balance between the social need to prevent actions which disturb the peace and harm man—at times harm human life—and the important need—and we have discussed above some of the reasons for this need—not to broaden beyond the proper degree the bounds of the

offense. Compare, for example: the *Ploni* case *supra* [1] at p. 719 in the words of Justice H. Cohn ('the duty to take action to prevent a felony exists only when the danger of the felony is immediate and real'); Gur Aryeh in her article *supra* [34], part II, Conclusion, see further below:

The knowledge that a certain person is plotting to commit a felony

47. The provision of section 262 of the Penal Law only applies to a case where a certain person plots to commit a felony. Justice Berinson asked and answered: '... what does the accused need to know in order to fulfil this requirement? Does he need to know the substance of the offense that was committed, its various legal elements, and the sentence the one committing it is to expect? I think not': the *Abu Kadra* case [2] at p. 250. But what yes?

> ... what requires proving in this case is that the accused knew the facts, from which one can legally deduce the offense that was plotted or committed, but he himself is not required to know in fact the exact substance of the offense.
>
> ...
>
> ... the accused must know the facts which constitute the offense and not necessarily the exact nature of the offense from a legal standpoint, but as a reasonable law-abiding person he should have understood that he needs to take action in order to prevent its commission or its consequences, if it has already been committed. (**ibid**, pp. 251-252).

The law's presumption is, as reason suggests, that a felony, any felony, is considered a *malum in se*, and it is a presumption as to every person here that he knows what a felony is—if not its exact legal definition, then its nature as an action which is opposed to an extreme degree to the good of the public and the individual. In our matter, where we are speaking of plans to murder a person, this question does not come up at all.

'A certain person plots to commit a felony'—the realness of the danger and the immediacy of the danger

48. The knowledge that a certain person plots to commit a felony sometime in the future, without setting a specific date for this—does this constitute knowledge for the purpose of section 262 of the Law? The knowledge that a certain person is plotting to commit a felony in three months, four months, eight months—is this 'knowledge' as the offense is defined in section 262? Justice H. Cohn has shown us that 'the duty to take action to prevent a felony exists only when the danger of the felony is immediate and real' (the *Ploni* case [1] at p. 719; emphasis mine—M.C.) This guidance that Justice H. Cohn has provided us is derived from his overall perspective that the offense of neglect to prevent a felony is to be interpreted 'by way of narrowing and strictness, in order not to create an opening for the duty of informing from which the scent of totalitarian oppression wafts… or when there is immediate and real danger to the life of a person in that one who hates him with all his heart

sets out to kill him, then the fastidious and delicate ones oppose the need for an act of rescue.' (**ibid**).

We will agree to the requirement that the knowledge that is referenced must revolve around the 'real' danger of the commission of a felony, as in this way a proper balance would be achieved between the counter-forces. This, it appears, is also the view of Professor Gur Aryeh (see in her article *supra* [34], part III section 2.2D). In our survey above, (see paragraph 37) we spoke of the need that 'knowledge' must be real knowledge—we were of the view that knowledge that is not real will not be treated as knowledge—and what we have said there as to 'realness' will apply here as well (with the necessary changes). A danger that is not 'real' is not a danger within the bounds of the offense, and knowledge about that danger-that-is-not-real is not knowledge as per the provision of section 262 of the Penal Law. We emphasize that it is sufficient in our view, that the danger be 'real' and it would not be wrong or inappropriate if we characterize the required danger in neglect to prevent a felony as a danger that is 'near certain' to occur or a likely danger. Realness is sufficient and it is not proper to resort to a more stringent standard. This is the balance that fits the offense and is appropriate to it. Just as it would not be right to expand the bounds of the offense, so too it would not be right to narrow its bounds excessively.

All this–as to the realness of the danger.

49. As to the 'immediacy' of the danger: we have difficulty knowing what is 'immediate' and what is not 'immediate'. Some felonies require a long time to plan. Could it be that, just due to the delay required for planning, the knowledge as to the felony will not come within the bounds of the necessary immediacy? In CrimA 307/75 *Tvik v. State of Israel* [14] a certain person asked the defendant (according to the defendant's statement to police) 'how to burn down the club... because the club owner reported him to the police.' The defendant did not report this to the police, and when he was convicted of the offense of neglect to prevent a felony and appealed to the Supreme Court, his appeal was unanimously dismissed (according to Justice H. Cohn). As arises from the description of the facts, the danger of burning down the club was not immediate (although it was a felony which in the view of the Court 'the planning of its implementation was already at the time of the discussion... ripe for action'), and the appellant was convicted although he did not know the date and the means by which that person intended to burn down the club.

50. The Magistrate's Court in our matter adopted the 'immediacy' rule of Justice H. Cohn (**ibid** [23] at pp. 362-363), while in the District Court the views were split. Justice Berliner determined that the immediacy and realness are 'additional measures of the 'strength' of the knowledge that is referred to'. Justice Hammer had reservations about the immediacy and realness requirement—determining that this is not the legal rule—while Justice Bayzer mentions the words of Justice H. Cohn and states that 'positive, difficult, 'immediate and real' knowledge was proven as per the words of the hon. Justice Haim Cohn'.

51. My view is that the 'immediacy' of the danger—as such—is not a constitutive element in the knowledge that the provision of section 262 of the Law is built on. Indeed, until information becomes knowledge, the information must revolve around a 'real' danger, as only then will the knowledge be knowledge as per the provision of section 262. 'Realness' of the danger is a constitutive element in 'knowledge', and danger that is not 'real' will not create knowledge as per its meaning in section 262. However, the 'immediacy' of the danger is not like the 'realness' of the danger, though it can push into one of the corners of 'realness'. Therefore if a man who hears one person speaking with another as to a bank robbery which the two are planning to commit that night – a robbery the danger of which is 'immediate' – the very closeness in time contributes to strengthening the realness of the danger. Suppose now, for example, that a person hears another person talking with a stranger about a bank robbery. He hears the entire planning of the robbery—in all of its details—but the robbery is planned to take place three months later. Does the absence of immediacy itself—if that is considered absence of immediacy—detract from the realness of the danger? I am of the view that the answer to this is in the negative. Indeed, when we examine the substance of the interest that the offense was intended to protect, we will have no trouble understanding that the question of 'immediacy' is none other than secondary to and supportive of the element of 'realness'.

This is so as to the immediacy of the danger, and the same applies to the suspected site of the intended felony, as it too is not a constitutive element in the offense.

52. An analogy to our matter can be learned from the offense of conspiracy. Conspiring does not require the same specificity required for the forming of a contract. As to this it was said (CrimA 461/92 *Zakai v. State of Israel* [15], at p. 588):

> ... these matters will be learned from themselves, that for the existence of criminal conspiracy we will not require the same fastidiousness that civil law instructs us as to the specificity of a contract: the risk of committing the offense of conspiracy will exist even if the conspirators did not agree amongst themselves as to those details required in a civil contract, and it is not the custom of conspirators to be scrupulous with details like the attorneys who draft contracts for their clients. Thus, for example, if the conspirators agreed between them that on a certain night they will go out to break into a store, the two would be charged with conspiracy even if they did not decide which store to break into, even if the civil law holds—due to lack of specificity—that a binding contact was not formed between them.

Indeed so: the need to prevent the commission of a felony is a pressing need, even if the commission of the felony is not planned for the near future or if it was planned for some future date—a date which will arrive only after the removal of a hindrance to the commission or after

completion of plans for its commission. The same is true if the person with the knowledge does not know the date of commission, the place of commission or the manner of commission.

'Who knew'—knew and believed

53. The concept of knowledge that a certain person is plotting to commit a felony includes within it the element of **recognition** that the person actually intends to do what he is plotting. In other words it is not sufficient that the level of information reached a 'critical mass', meaning that the information reached a point of 'knowledge' in an objective manner; the person with whom the information collected is also supposed to **believe** that the person indeed is plotting to commit a felony. If Reuven was touched by the 'knowledge' that indeed a certain person is plotting to commit a felony but at the same time does not believe —in good faith—that the person is indeed serious in his intentions to carry out the plan, it cannot be said of him that he 'knew' of the intentions of that person in the sense of the concept 'knew' in section 262 of the Law. Consider a boy who peeps through the keyhole and sees four people sitting around a table; on the table there are maps and drawings and on the wall a board with a drawing as well; on one side of the table are masks and weapons, and those around the table are discussing a bank robbery. Ostensibly in this scene the condition established in section 262 according to which 'one who knew that a certain person is plotting to commit a felony...' has been met. But this is not necessarily so. It is possible, for example, that the boy will confuse what he saw with pictures he has seen on television, and in his mind—the mind of a child—he will translate the scene into entertainment. The child will not believe that the intention of the four is a serious intention to rob a bank. In these circumstances we cannot say—and indeed we will not say—that the condition established in section 262 was met by that child. This is only an illustration but the lesson is self-understood.

Moreover, this requirement, that the person with knowledge also believes, is consistent with the social necessity not to multiply false complaints about the danger of the commission of the felony, and with the nature of the offense as an offense which depends on actions that were not yet committed and may never be committed at all. See further Gur-Aryeh, in her article *supra* [34] part II, section 1.2 A to E and more. The author even directs our attention to the psychological phenomenon of 'self-deception', a phenomenon of self-convincing or suppression, according to which we are not willing to accept, from a psychological standpoint, that people close to us will commit an offense, all the more so a severe felony. And we recall that at times—too often for my taste—we hear after the commission of a felony, from family members, friends, and acquaintances: so and so committed the felony? I do not believe it, he is such a quiet man, quiet and nice, quiet and keeps to himself. Thus we know that, the statement that Reuven 'knows' that a certain person is plotting to commit a felony, does not deal only with the information that Reuven holds; for the commission of the offense of neglect to commit a felony it is also necessary that Reuven **believe** that that certain person

indeed intends to commit a felony.

The general way of things

54. We have so far discussed the legal principles, and we know that one essential question requires an answer. The question is: did the Appellant Margalit Har Shefi know about Yigal Amir's plot to murder Prime Minister Yitzhak Rabin. 'Knew'—as per the legal meaning of the concept in the provision of section 262 of the Penal Law. We will now move to the factual framework, and we will try to learn from the evidence that was laid before the Court whether the Appellant came within the bounds of the offense of neglect to commit a felony or not. In sum; we have discussed the law. We now go to the facts.

Did Margalit Har Shefi know that Yigal Amir was plotting to murder Yitzhak Rabin?

55. Having drawn the boundaries within which we are meant to move, and having discussed the foundations of the offense of neglect to prevent a felony, it is incumbent upon us to examine and determine whether in our matter the elements have been established for the commission of the offense. The burden is imposed upon us to resolve the differences in opinion between the parties, namely: whether the Appellant 'knew'—'knew': as per the meaning of the concept of knowledge in section 262 of the Penal Law—that Yigal Amir was plotting to murder the Prime Minister—knew and did not take all reasonable means to prevent commission of this felony?

56. We preface our discussion as follows: the decisions of the lower courts spread over many printed pages. The decision of the Magistrate's Court runs (the official publication) sixty five pages, while the decision of the District Court runs (in the original Judgment) one hundred and five pages. Since those who preceded us wrote at length—and justifiably so, we will try to be briefer, even if we have—unfortunately—only been partially successful.

57. An additional opening comment: the judge of the Magistrate's Court thought that 'wilful blindness' is sufficient—a suspicion that was not investigated—to establish the element of knowledge ('one who knew') in the offense of neglect to prevent a felony. This interpretation of the law is not acceptable to us, like the District Court, and our reasons for our theory we explained above. Nevertheless it seems that despite this interpretation of the law, the judge of the Magistrate's Court established as a factual finding, that the Appellant knew of Amir's plot—'knowledge': in its simple sense, knowledge as distinct from wilful blindness—and she based her conviction of the Appellant on this knowledge. See for example, **ibid** [23], at p. 410 near the margin letter B and E, at p. 414 near the margin letters A and E and more. However, we will examine the factual framework in an independent manner, while assuming that a person does not commit an offense of neglect to commit a felony unless he knows of the plotting of another to commit a felony; 'knows'—to the exclusion of one who is wilfully blind to seeing. This is what the judges of the District Court did and this is what we will do.

Indeed, if the credible evidence that came before the Court is sufficient to support the knowledge argument—in the limited meaning of the concept of knowledge—there will be nothing to prevent the drawing of necessary conclusions from the body of evidence. As to conclusions from the body of evidence that is not disputed, the power of an appellate court is the same as the power of the court of first instance, and we will act as per our strength and wisdom.

58. We thus return to the question before us for determination: did the Appellant at any time prior to the fourth of November 1995 know—know and believe—that Amir was plotting to murder the Prime Minister? Did Appellant think that the words that Amir was saying to her as to his intention to murder the Prime Minister, were serious words, or did she think—as she claims before us—that his words were bragging and bluster, words expressed by a 'fantasizer'. We will recall yet again: 'knowledge' for our matter here must be knowledge in its simple sense (in the sense we discussed above)—knowledge as distinct from 'wilful blindness'; knowledge must be real knowledge; the defendant (the Appellant before us) must believe that the plotter was intending to accomplish his plot; that the projected danger on the part of the plotter was a real danger, although not necessarily an immediate danger. At the same time there is no need for the defendant to know of the details of the plot: not in terms of timing, not in terms of place and not in terms of the details of commission.

59. The parties are not in dispute as to the majority of the facts of the case. The primary debate between them is as to the **significance** to be given to those facts, the significance of the facts and the conclusions that arise from them. Thus for example, the parties are divided as to the level of familiarity between the Appellant and Amir; as to the significance of Amir's reports to the Appellant about his attempts to murder Yitzhak Rabin; the significance of the Appellant's consultation with Rabbi Aviner (as we shall see later) and more. We need only discuss the key elements of what happened and try to draw conclusions from them as much as possible and as much as necessary.

60. And further as to the matter of the evidence brought before the Court: in the Magistrate's Court a mini-trial was held as to the memos prepared in the general security service and as to the statements taken by police, at the end the judge decided to accept all this evidence as admissible. However, the judge also decided that some of the memos that were prepared by the security service will have full weight, while other memos—due to their excessive brevity—will only have weight inasmuch as they are supported by the words of the Appellant herself. As to the one statement taken by police (Q/41)—and which the Appellant was not permitted to revise—the Magistrate's Court judge decided to give full weight to that portion of the statement (the first two pages) which the Appellant signed; as to the other pages of the statement—which were corroborated in other places—these too would be given full weight. As to what was said in the pages which Appellant did not sign and which contradict statements she made in other statements or

in her court testimony—their weight will be according to the matter. So decided the Magistrate's Court judge; the District Court followed in her footsteps, and we will follow them both.

61. In describing the facts at hand and in their analysis we will proceed in the following order: after a brief introduction our words will divide into two parts which are meant to blend together: first we will discuss the core of the evidence, that evidence which should directly answer the question whether or not the Appellant knew, what murder plots Amir was plotting in his heart. After that we will move on and address the evidence which surrounds the core evidence, that atmospheric evidence in which the core evidence moves, evidence which can reflect on the interpretation and significance of the core evidence.

The Connection between the Appellant and Amir—the law of Rodef

62. The Appellant met Amir at Bar-Ilan University. The two were students in the faculty of law. After they got to know each other, they became friends and met often. Together they went to 'support Sabbaths' that were organized in various settlements in the territories, and they participated together in protest demonstrations against the government and its policy. In their meetings and conversations Amir shared with the Appellant his views, experiences, and even his personal life, he told her about his past, his family and his future plans. The two discussed many and varied topics, including Psychology, Mysticism, Philosophy, Science and more. The Appellant describes Amir as possessing great knowledge and original thought. However the primary matter for our purposes is found in the law of *Rodef*, a topic that came up again and again in the discussions of the Appellant and Amir.

63. The concept of 'the law of *Rodef*' carries special significance, and it is something of a code word for difficult and serious content. When one says that the law of *Rodef* applies to a person, you know that the speaker seeks to let us know and inform us: such and such a person deserves to die. And in the words of Rabbi Aviner during his examination in Court: 'she [the Appellant—M.C.] said to me... that is it spoken about, people are speaking about it, that the law of *Rodef* applies to the Prime Minister, meaning he deserves to die' (at p. 755 of the transcript). It saddens me, saddens and pains, that it was such. Our sages spoke of one who saw an act and was reminded of the rule in Jewish law (*Sanhedrin*, 66, A [53]) and here in our matter it has been turned upside down: he saw the rule in Jewish law (ostensibly) and the action followed the rule in Jewish law (ostensibly).

64. From the evidence that was brought before the Court it clearly arises that the Appellant and Amir involved themselves with the law of *Rodef*, and primarily with the question whether the law of *Rodef* applied to Yitzhak Rabin. Indeed, the question whether the law of *Rodef* applied to Yitzhak Rabin was discussed in many conversations between the Appellant and Amir, and the impression that is created is that Amir did not miss any opportunity to explain to the Appellant why the law of *Rodef* applied to Yitzhak Rabin. The Appellant indeed tried to minimize

those conversations, but the Magistrate's Court judge rejected this attempt, in her words:

> Despite the fact that the Appellant attempted to minimize the number of conversations whose topic was the law of *Rodef*, something different can be seen from her testimony. I deduce from her testimony that there were many conversations between her and Yigal Amir, that there were many arguments that she desperately tried to change the views he was preaching to her... (**Ibid** [23], at p. 412).

We agree with this determination.

The Appellant knew well that in Amir's opinion Yitzhak Rabin was to be killed as one to whom the law of *Rodef* applies. Amir expressed this many times, in the presence of others and alone with the Appellant, even though the Appellant disagreed with him and tried to convince him to back down from this view. Thus, for example, on the bus on the way back from 'Yad Vashem', a place where they wished to demonstrate but were prevented from doing so—Amir said to those present that the law of *Rodef* applied to Yitzhak Rabin that he is dangerous to the State and is to be killed. Those present conducted a noisy argument on this topic until they became discouraged and withdrew. Not so the Appellant, who alone continued to argue with Amir until the end of the ride.

Moreover, in her examination the Appellant said, several times, that Amir told her that not only does the law of *Rodef* apply to Yitzhak Rabin and he is to be killed, but that he himself—Amir—wants to implement the law. For example:

... she repeatedly notes that Yigal expressed several times before her his intention to murder Rabin and according to her she did not take this seriously... (Q/39)

The subject related that she indeed had several discussions with Yigal Amir and he expressed in front of her his desire and intentions to murder Yitzhak Rabin... (Q/32)

She repeatedly noted that Yigal wants to murder Rabin in a great many conversations and she was very angry with him and told him that she would turn him in to the authorities if he continued to speak about it. (V/31)

And further (at p. 636 of the transcript):

> Q: He did not speak about whom? You never heard from him that he was saying: I want to kill him?
>
> A: In those connotations of Yad Vashem and Kfar Shmaryahu I heard that if and if and if and if—he would want, this...
>
> Q: Not that he would want, he would kill him, not want, let's be precise.
>
> A: He would want; I don't know if he would kill.
>
> Q: Not want, would kill, let's make the distinction first of all.

A: To me he would say he would want to kill him.

Q: What does that mean, want?

A: Want.

Q: If he would get there he would kill him is that what he said to you.

A: If he would get there—I don't know what would happen, he has security people, he has things, he wants. It's like if a person says to you—I want to meet...

And later (at p. 669):

Q: Whether outside—the law of *Rodef* does not interest me. Did he tell you that he wants to murder Rabin? Once, three times, many, a few, never.

A: Could be.

Q: What does it mean could be?

A: Could be, but not often, certainly.

The Appellant also said in her examination, that in the settlement of Ma'aleh Yisrael near Barkan—one day in June or July of 1995—she spoke with Yigal Amir and his brother Hagai Amir, as to the intention of Yigal Amir to murder Rabin (V/33). Hagai Amir confirmed these things in his statement to the police. In answering the question whether the Appellant knew of Amir's and his intention to do harm to Yitzhak Rabin, Hagai Amir said: 'Yes, she knew about my and Yigal's ideas to harm Rabin' (Statement of Hagai Amir was accepted into evidence as admissible according to the provision of section 10A of the Evidence Ordinance [New Version] 5731-1971). There is no doubt therefore that Yigal Amir told the Appellant—not once or twice—as to his intentions to murder Yitzhak Rabin with his own hands. The necessary conclusion of all this is that the Appellant knew well that in the opinion of Yigal Amir the law of *Rodef* applied to Rabin—meaning: that Yitzhak Rabin in Yigal Amir's opinion, deserved to die– and moreover, that Yigal Amir intended to murder Rabin himself.

65. In her testimony in Court the Appellant tried to diminish the severe significance of these words, describing Amir's expressions as to his desire to murder Rabin as few, vague and qualified. Thus, for example, the Appellant denied in her testimony in court that Amir said to her that he intends to kill the Prime Minister, claiming that he only said to her that he needs to be killed—in the abstract—or that he, Amir, wants him to be killed. At the same time she admits elsewhere in her testimony that Amir told her that he himself wants to murder Rabin, although she tries to minimize the number of such expressions. Thus, for example, the Appellant said in her testimony (at p. 668 of the transcript):

A: ... I said that he said, said, many times, that the law of *Rodef* applies to Rabin. It could be that sometimes he also said that he wants.

Q: Wants to murder him? What is wants? Wants what?

A: Yes.

And elsewhere (at p. 677):

> ... [ ] there were between us many discussions as to the law of *Rodef*, and it could be that he would mention that he would at times say the wanting, I don't remember the day...

And in another place (at p. 671):

> Q: ... if he ever says to you, not only that the law of *Rodef* applies to Rabin but that he wants to murder him, yes or no?
>
> A: I did say.
>
> Q: You said.
>
> A: It could be—that yes, but definitely not often.

And again, (at p. 671):

> Q: ... you said to him that you would turn him in, to Yigal Amir?
>
> A: Yes, if I knew that he was serious.
>
> Q: That... he intends to do it?
>
> A: Yes.
>
> Q: That he spoke of the fact that he intends, otherwise you didn't need to think that he is serious or not, and to explain.
>
> A: No, also because, not also because he spoke of it often, but no, I did not know then... one second.

Despite the attempts of the Appellant to detract from and to minimize the things that Amir said to her, a clear picture emerges from her own testimony, that Amir said to her many times that the law of *Rodef* applies to Prime Minister Yitzhak Rabin; and that he is to be killed and he himself, Amir, intends to do the act.

66. From our end we will add the following: it is not a daily event—and it is not the custom in the world—that friends meet frequently, and in those meetings one of the two will say to the other that such and such a person deserves to die and that he is to be murdered. And not only that such and such a person is to die, but that he himself the friend, seeks to do the act. It is difficult to fathom that a person will say as much to a friend, and the friend, although he rebukes the inciter–will continue to be this person's friend as though nothing has happened. Moreover, we are not dealing with a group of felons, where one felon tries to convince another felon that a third felon is to be murdered, a rival from the underworld. We are talking about a person from the community—intelligent people, educated people. Such people, it is not their way to speak among themselves about murder as though it is a routine daily matter. And if despite this they acted so, the Appellant and Amir, we know for ourselves that it will not be proper if we characterize those conversations—as the Appellant claims—as the routine conversation of a 'fantasizer', of a 'macho', of a braggart.

From theory to action

67. The evidence brought before the Court has shown us that Amir twice tried to accomplish what he said he would—to carry out his plan to murder Rabin and the Appellant knew about this after the fact. Once was

at 'Yad Vashem' and the second time at the dedication ceremony for the Kfar Shamryahu intersection.

68. As for the 'Yad Vashem' event: in January 1995 Amir, the Appellant and other students drove to a protest in 'Yad VaShem'. Yitzhak Rabin who was supposed to take part in the ceremony dedicating a train car–did not make it because of a terrorist attack that occurred that day at the Bet Lid intersection. The students were chased away and the protest did not take place. On their return in the bus Amir said to those present that Rabin is dangerous to the nation, and that the law of *Rodef* applies to him and that he is to be killed. Following these words, the people on the bus argued among themselves.

About four months later, in May 1995, Amir told the Appellant that he had meant to kill Rabin at 'Yad VaShem'. And in her words:

> ... in the month of *Iyar* or near then, Yigal Amir told me that when we were in Yad Vashem at the protest he wanted to kill Rabin... probably he told me he had a gun but I cannot say specifically that I remember.

So too in her examination in Court (at pp. 584-585):

> ... then he said to me—then, you know, when we were at Yad Va'Shem—if Rabin would have gotten there, you remember that protest? If Rabin would have gotten there—I would have wanted to kill him.

The Appellant in her testimony describes these words of Amir as 'some mixed up fantasy of making an impression of someone Macho or something like that'.

In another place (V/33) the Appellant said that she knew that Amir had a handgun in his possession and that he wanted to kill Rabin. The Appellant knew—perhaps we should say: understood—that Amir planned to carry out the murder by shooting a gun. And in the language of V/33:

> She relates that around the month of *Iyar* when she spoke with Yigal Amir the latter told her that when they went on the day of the terrorist attack in Bet Lid to the protest at Yad Vashem he had a handgun in his possession and he wanted to kill Rabin who was meant to be at the place but due to the attack the planning failed as Rabin never arrived there.

As to Amir's expressions in the matter of 'Yad Vashem' Justice Berliner said (at pp. 65-66) of her judgment):

> ... Yigal's statements as to the law of *Rodef*, and as to the necessity to kill Rabin, were said repeatedly but the very repetition was nothing special. The fact that four month later Yigal refers to the protest that they were both at and says he would have wanted to kill Rabin at that protest has no more substance, than his other statements as to the law of *Rodef* and the necessity to kill Rabin... I agree on this point with the hon. Judge from the lower court that there did not need to be knowledge of the specific planning of the manner

> of execution of the felony, and that is not the test for the Appellant's knowledge. However, the knowledge, as said, must be real knowledge and a statement four months after the fact that at the time he had meant to do this, does not create real knowledge regarding the future.

I am sorry, but I have difficulty accepting these things. My opinion is, that this specific and concrete expression of Amir as to the fact that he indeed intended to murder Rabin at a specific time and specific place—in particular against the background of his expressions that the law of *Rodef* applies to Rabin—is a real and specific expression as to his decision to act to carry out his plan and implement it in fact. The future grows out of the past and the present, and a person does not change in one day. The knowledge of an event from the past has decisive impact on the future, all the more so where the report that Amir made to the Appellant is to be seen and understood against the general background of his viewpoint that the law of *Rodef* applied to Rabin. Amir's statement to the Appellant as to what he planned to do at 'Yad Vashem'—planned even if he was not able to accomplish it—clarifies that the Appellant knew about Amir's concrete and substantive desire—a decision that had ripened in his heart—to murder the Prime Minister.

69. **As to the incident at the K'far Shmaryahu intersection**: one day in September 1995 Amir told the Appellant that the day before he had gone to the dedication ceremony of the K'far Shmaryahu intersection with the goal of killing Rabin, but when he arrived he didn't find anyone there (V/42, V/33). This report of Amir's to the Appellant as to his specific intention to kill the Prime Minister at a specific place and at a specific event constitutes a very strong indication that the Appellant knew—and from close up—as to Amir's plan and as to the realness of his intentions to murder the Prime Minister. Thus, Amir is not just saying empty words, and his words are not just like the whistling wind which is soon gone. He seriously means to carry out his plot, the intentions are real intentions.

Justice Berliner thought otherwise. In her view, the information that was given to the Appellant by Amir is to be compared to the real information as to the planning of the murder in that location, and once we make this comparison we learn, in her view, that Amir's report does not teach us of her knowledge as to his intention to murder Yitzhak Rabin. In this matter Justice Berliner references the indictment filed against the conspirators—Amir and his brother, Hagai Amir—in which the details of the plan to murder Rabin at the K'far Shmaryahu intersection are described. Justice Berliner summarizes the comparison, as follows (at p. 68 of the decision):

> Thus: compared to the specific planning and conspiracy between the two defendants, which included references to the flyer concerning the visit that the Prime Minister was about to make to that location, early departure that morning to that location, drawing a diagram of the place and surveying access points, all that was claimed as to the

> Appellant was a statement after the fact by Yigal that he had intended to murder the Prime Minister, but that he arrived too late.
>
> Why is there in these words, which on their surface reflect incompetence (as one would not think that one who is planning to carry out a murder would not ascertain in advance, what time the ceremony was to end) something to grant a dimension of realism to Yigal's repeated statements as to the need to kill the Prime Minister, when the things are said after the fact? If this statement is detached from the diagram, the plan, the gathering of information in advance, it does not even have a kernel of 'hard' knowledge, not even 'hard' knowledge that is created by willful blindness.

I am taking the liberty of disagreeing with the words of Justice Berliner. As for our matter we are assuming that Amir planned to murder Yitzhak Rabin at the Kfar Shmaryahu intersection dedication ceremony. From this we know that Amir's report to the Appellant as to the event of the prior day—that he sought to murder Rabin then—was a true report. If that was Amir's report what reason is there to accept that the Appellant understood it differently than it was said? And why wouldn't we see in this knowledge a 'hard' knowledge (in the words of Justice Berliner)? Moreover, against the background of the planning that **occurred**, what does incompetence have to do with anything? The fact that the Appellant did not know the small details of the murder plan—unlike Hagai Amir, Amir's brother—does not detract from the necessary conclusion, that the Appellant 'knew'—in a real and specific manner—that Amir was plotting to murder the Prime Minister. Indeed, as we said in the chapter on law and justice, in order to complete the offense of neglect to prevent a felony there is no need for knowledge of the details of the execution of the felony. It is also no wonder that Amir did not report to the Appellant the details of the plan for the murder, as she was not as close to him as his brother.

Moreover, the indictment Justice Berliner quotes from speaks of early planning that conspirators planned among themselves to implement the act of murder. This early planning is described in detail in the indictment, as required. In our matter, on the other hand, Amir reported to the Appellant that he intended to murder Yitzhak Rabin the day before. What point would there be to report to her the details of the advance planning? Indeed, my view is that if the report that Amir made to the Appellant is not 'knowledge' as per its meaning in section 262 of the Penal Law, than I don't know what 'knowledge' is.

Let us not forget, that the event of the Kfar Shmaryahu intersection was about four months after Amir reported to the Appellant about the non-incident at 'Yad VaShem'. It is presumed that the Appellant, as an intelligent person—although young—knew how to and indeed did tie the one to the other, and concluded from them the one and only conclusion that can be drawn from them, that Amir intended to murder the Prime Minister and that he was very serious in his intentions. Against this

background we cannot, of course, accept the theory of the Appellant that she thought in good faith that Amir's expressions were 'rubbish' and 'tall tales'.

70. Indeed, Amir's report to the Appellant as to the events of the Kfar Shmaryahu incident, when added to the report as to 'Yad Vashem' endowed the Appellant with the knowledge—clearly—that Amir had deeply penetrated into the world of action, and that he intended to join action to thought. The Appellant knew earlier that Amir was plotting to murder the Prime Minister; and now he assisted her and showed her that his words were not just meaningless words, floating words, in the world of theory; that his desire was real and concrete; that his plans were real plans. We cannot accept the Appellant's explanation that she thought that Amir's statements were all figments belonging to a world of fantasy and imagination. Twice Amir intended to murder the Prime Minister and for technical reasons he was unable to. Amir reported this to the Appellant—on two separate occasions and over a span of several months—and we find it difficult to accept that these reports did not sink in to her heart and did not bring her to 'knowledge'. Is it an everyday event that Reuven tells his friend Shimon, that he intended to murder Levi at a certain time and certain place (the day before)? All the more so that Reuven's report to Shimon came against the background of prior conversations that took place between the two, conversations in which Reuven said to Shimon—over and over—that Levi is deserving of the death penalty. Even if we were to say that until the reports of 'Yad Vashem' and Kfar Shmaryahu it was all theoretical and uncertain—and we have not said so—then these specific reports changed the theoretical and uncertain to concrete, clear and known: Amir is about to murder the Prime Minister; he wants to; he intends to carry out his intention; here he is going to actually carry out the murder.

71. To complete what we have said to this point we will further add that Amir held a (Baretta) handgun in his possession. The Appellant knew of this, and at a certain opportunity she even held it and cocked it. As to the event at 'Yad Vashem' the Appellant said (in her questioning at the Security Services) that Amir said to her that he had a handgun with him at that place, and that he sought to kill Rabin (V/33). In her questioning at the police (V/42) the Appellant said as follows:

> When we were then at Yad Vashem at the protest he wanted to kill Rabin... Yigal probably said to me that he had a handgun but I cannot say specifically that I remember.

And at Court she commented as to 'Yad VaShem':

> ... this person would always carry a handgun, so it could be that he also went there with a handgun.

We thus know: Amir had a handgun; the Appellant knew about it, and at a minimum she connected between Amir's expressions as to his desire to kill Rabin and the handgun that he held in his possession.

The Approach to Rav Aviner

72. About a month before the murder—and after she spoke with

Amir on the topic of the law of *Rodef*—the Appellant approached Rav Aviner, the Rabbi of the settlement of Beit-El, a settlement in which she lives, and asked him about the law of *Rodef* in general, and in particular whether the law of *Rodef* applies to Yitzhak Rabin. The Appellant further asked Rav Aviner, if 'in this case' she must report to the authorities as to a person who claims that the law of *Rodef* applies to Yitzhak Rabin, as 'he wants to carry something out and thereby becomes a *Rodef* himself'. The rabbi responded negatively to the two questions, meaning: the law of *Rodef* does not apply to Yitzhak Rabin, and there is no need to report to the authorities as to a person who claims that the law of *Rodef* applies to Yitzhak Rabin. (V/16).

The fact that Appellant approached Rav Aviner and the specific questions that the Appellant presented before the Rabbi, prove that the Appellant was seriously apprehensive that Amir might carry out his plot and murder the Prime Minister. Let us remember that this approach to the Rabbi took place after the many discussions that took place between the Appellant and Amir: as to the application of the law of *Rodef* to Yitzhak Rabin; as to the desire of Amir to murder Rabin and after Amir reported to the Appellant on the non-events of 'Yad Vashem' and the Kfar Shmaryahu intersection dedication ceremony—places where he intended to murder Yitzhak Rabin. When questioned as to her approaching Rav Aviner, the Appellant understood well that her going to the Rabbi put her in a difficult situation, and therefore she tried to extricate herself from the corner she was trapped in.

Thus, for example, the Appellant claimed that her approaching the Rabbi was intended to provide her with theoretical arguments for debates with Amir, and in any event that the approach does not teach us that she thought that Amir was serious in his intentions. When asked why she asked the Rabbi whether she had to report to the authorities someone who claims that the law of *Rodef* applies to Rabin, she responded 'so that they will know that there are people who are speaking this way'. This answer is an empty vessel and should be dismissed; on the contrary, the approach to the Rabbi not only refutes the Appellant's version, but it testifies that the Appellant knew of the Appellant's plot; that she believed that he might carry out his plot, and she was apprehensive, to the point that she asked the Rabbi if she should report to the authorities as to that person who 'wants to carry something out and thus becomes a *Rodef* himself.' There is no debate that in asking the Rabbi what she asked the Appellant was referring to Amir—even though she did not give away his name—and hence we know what her suspicion was and what she knew about Amir's plots.

Understanding how incriminating this discussion of hers with Rav Aviner was, the Appellant tried to distance the date of the conversation from the date of the murder. And so, when questioned she claimed that she spoke with the Rabbi about a year before the murder, but at the end of her examination she recanted and sought to note that the conversation took place 'recently'. In her testimony in Court the Appellant claimed that she did not remember the date of the conversation, and later in her

testimony she said that the conversation took place after the month of *Iyar* but before the months of June-July. In his cross examination Rav Aviner responded to the question and answered that the conversation between him and the Appellant took place about a month before the murder.

Rav Aviner testified before the Court as a witness for the defense, and according to him (in the primary examination) he understood that it was none other than an academic-ideological discussion. In cross-examination the Rabbi admitted that he did not remember the details of the specific conversation with the Appellant and that his words constituted mere speculation. Be the Rabbi's theory what it may be, we know the real background for the Appellant's discussion with him—even if the Rabbi did not know—and the necessary conclusion from that conversation is clear to us: the Appellant knew that Amir was serious in his intentions and in his plans to murder Yitzhak Rabin, and in distress she approached a clergyman and asked for his help.

And More

73. One day in the month of June or the month of July 1995, Yigal Amir, his brother Hagai Amir and the Appellant were at the settlement of Ma'aleh Yisrael, and at that time Yigal Amir suggested to his brother Hagai—in the presence of the Appellant—that the Appellant 'keep watch' on Yitzhak Rabin, and in order not to arouse suspicion she should dress in 'non-religious clothing'. In her testimony in Court the Appellant added that the suggestion came after Yigal Amir said that the law of *Rodef* applies to Rabin and that he should be killed. Hagai Amir responded to his brother Yigal Amir 'c'mon c'mon forget your stupidities already.... it is not practical'. The Appellant said she laughed at Yigal Amir's suggestion and that 'even Yigal said it half kiddingly' (V/42). According to her 'everyone there laughed after that, I was not the only one who laughed, he said it as a dig at me, it was not...' and in explaining the reason for the laughter she added 'I always argue with him about it, so that I would get up and keep watch, and in non-religious clothing no less?'

I am willing to agree that the suggestion of keeping watch in 'non-religious clothing' was said partly in jest; not so the statement of Yigal Amir—a statement which joined many more statements—that Rabin should be killed, and that ways need to be found to get to him.

74. In the end, immediately after she heard about the murder on the radio, the Appellant called the home of Amir and as to this phone call she says (V/19):

> … I called to discuss this with Yigal and I did have a small concern because they said it was a short young man from Herzeliyah and Yigal did say in the past that Rabin should be killed...

This phone conversation—against the background of the events until that point—reinforces the conclusion that the Appellant knew as to the serious intention of Amir to murder Rabin. In her testimony in Court the

Appellant tried to minimize the significance of this conversation, and in so doing sought to give various explanations—including explanations which contradict each other—for the reason for the conversation. I do not intend to go through these explanations, as against the background of the events that took place up to the day of the murder this conversation makes sense: when she heard about the murder the thought went through her mind that Amir is the murderer—as he himself told her that he wants to kill Rabin—and therefore she called him to check into this. Moreover, when the Appellant was asked whether she would have called Amir if he knew the murderer was from Jerusalem, she responded on the spot (V/41):

> Yes, I would have asked him 'so how do you feel that your work was done for you'? Cynical questions like that.

The Appellant confirmed this statement in her examination in Court (at p. 712 of the transcript) and here we have an additional aspect of her knowledge of Amir's malicious thoughts. Indeed, the Appellant would have asked Amir a question in her words—a rhetorical question—knowing that others '[]did [his] work for him'. There is no need to expand on the meaning of that 'work'.

The Appellant's version—the shock version

75. The Appellant stuck to one version from the day she was arrested until the conclusion of the proceedings in her trial: she did not believe Amir's words; she did not take what he said seriously; she considered him a 'fantasizer' and braggart; it did not occur to her even for a minute that Amir intended what he said seriously, that one day he would get up and murder the Prime Minister. In the words of the Appellant:

> ... I did not for a moment think that this person would really do something, that he really wants to do something. If he said wants or wanted it is like, as though—yes, he wants to meet President Clinton, I never once thought that he really, that he really would do it, it is not, like, he really intended, he even did not... never spoke to me of any plan, any planning, nothing, like it was always an argument... (At p. 576 of the transcript).

The Appellant's counsel further provides the psychological background to these words of the Appellant: the friendship that was formed between her and Amir blinded her from seeing the reality as it was; she experienced self deception, repression and self-convincing, that the person close to her—Yigal Amir—does not seriously intend to carry out the felony he is constantly talking about.

Justice Lidski dismissed the version that the Appellant did not believe Amir, that she saw him as a 'fantasizer' and that his expressions were in her opinion only boasting.

76. Against the background of the chain of events that we described above, our opinion is the same as the opinion of Justice Lidski. Indeed the accumulation of events one upon the other does not leave a reasonable possibility other than this version, that the Appellant knew

that Amir was planning to commit a felony; meaning, to murder the Prime Minister Yitzhak Rabin. We dismiss the Appellant's version as unreasonable, a version that has no real basis in the evidentiary material. All of the indications—the many conversations as to the law of *Rodef* and the need to kill the Prime Minister; explicit declarations by Amir that he will murder the Prime Minister; Amir's report as to his intentions to murder the Prime Minister on two specific occasions; the approach to Rav Aviner about a month before the murder—all these indications—these and more—leave no room for reasonable doubt as to the Appellant's knowledge as to Amir's plot. The Appellant believed Amir, she was not dismissive of him, she did not see his words as boasting. Justice Lidski establishes in the decision that she did not believe the explanations, or should we say excuses—of the Appellant as to why she did not 'know' as to Amir's malicious intention. After analyzing the facts of the case—detached from Justice Lidski's determination that she did not believe the Appellant's words—we accept what she said.

Indeed, closeness to a person can blur reality and at the same time build an imaginary reality, however, all this in proportion, in accordance with the evidentiary material brought before the Court. The indications as to Amir's intention to murder the Prime Minister were so numerous and so weighty, that even the close friendship the Appellant claims, does not have the power to blind a person's eyes, make him deaf and close his heart.

Interim comment

77. As we said in the beginning of the analysis of the facts, we will first address the core facts—the facts which prove that the Appellant knew of Amir's evil plot. This we have done. We will now discuss some peripheral subjects, which are subjects that do not touch directly on Amir's plot to murder the Prime Minister, but they help portray Amir's extreme personality and strengthen the necessary conclusion from the core evidence that the Appellant knew of Amir's plot, took his words seriously—just as she related seriously to the words we will relate below—and did not see him either as a 'fantasizer' or a mere braggart. The Appellant saw Amir as one who seriously intends the things he says and as a man of action.

The Appellant knew of Amir's extreme views; she knew up close his plans and his plots, and even confronted him during many arguments they had between them. The Appellant knew of all this and was concerned about his extremism and the actions that he was capable of.

The underground

78. Amir proposed to the Appellant to join an underground he sought to set up—an underground whose purpose would be to provide means of defense to Jewish settlements in the territories in the event of an IDF pullback—but the Appellant refused. The reason for the refusal, in her words: '[she] hesitated to join him, as he was far more extreme than her and her views were not violent and she would not agree to activity of the type he wanted to carry out' (V/33). And elsewhere (V/42):

> I said to Yigal that I am willing to join the underground on the condition that the underground would undertake non-violent activity only and I said that I don't rely on him (Yigal) and I told him that I would not set up an underground with him in any case as his views are much more extreme than mine and I told him that I wouldn't want that if we belong to the same group and I do my non-violent things and he without my knowledge does much more violent things then even if I do non-violent things I will not agree that my name be attached to extreme activity...

And the Appellant said further (**ibid**) 'I don't rely on him because Yigal can do things I don't agree with'.

Let us think: the Appellant does not agree to join Amir in setting up an underground **not** because he is not serious in his plan and not because she does not believe him: quite the opposite, she is concerned about the activity Amir will undertake in this framework. Amir is not a 'fantasizer' or a braggart; Amir is a dangerous man, and the Appellant is concerned that he will do things that should not be done. That is how the Appellant relates to Amir as to the underground, and there is no good reason to think that she saw his plan to murder Prime Minister Rabin otherwise.

The Appellant thus knew of Amir's extreme views, and because she attributed to them realness and seriousness she was concerned lest he give these opinions concrete expression.

The armory

79. Amir told the Appellant about the plan to steal weapons from armories; to exchange weapons among various settlements and all in order to impair the ability of the authorities to locate weapons that residents of the settlements could use when the need arose, in response to attack by Arabs. The Appellant understood that Amir intended to store weapons in his possession. To create that stash Amir asked the Appellant where the armory was in Beit-El—where she lived—and according to her testimony in court she purposely told him the wrong location for the armory. She also lied to him as to the manner of guarding of the armory. In her testimony she explained that she lied to Amir:

> So he wouldn't bug me, simply in order to get him away from me I told him the repository was near the gate... I told him this just in order to get him away from me, to get him to leave me alone with his craziness, it was clear he had no intention.

Indeed so? The Appellant's explanation does not hold up. If indeed Amir was weaving dreams and fantasies; if indeed he was being carried on wings of imagination; if indeed he did not intend what he says; why deceive him, he is at any rate not a person whose actions will cause danger? Rather one must say: the Appellant well knew that Amir seriously intended to carry out his plans, that he was a person who knew

how to join action to thought. This lie that she lied to him constitutes strong evidence that the Appellant related seriously to Amir's intentions. Providing false information—intentionally—makes perfectly clear that the Appellant believed that Amir was indeed about to carry out his plans, and out of concern lest he join action to thought, she misled him as to the location of the armory in Beit-El. It is superfluous to explain how this factor impacts our matter—and directly.

Preparation of bombs

80. In the framework of the organizational activity we discussed, in May 1995, Amir approached the Appellant with the question if she knows anyone who specializes in the sciences; when the Appellant responded that she knows Dr. Bachrach, Amir asked that she approach Dr. Bachrach with the request that he assist in preparation of bombs. The Appellant refused, told Amir to approach him himself, if he wants to, and added that she wants no 'connection to his dealings' (V/33; V/42). In her testimony in court (at p. 605 of the protocol) the Appellant said that she was angry with Amir:

> That he set me up like this... in this matter of like you come and ask me something, something like that, like, do I know any scientists, and suddenly he tells me—I want, I want you to approach him to prepare bombs. To help me make bombs. Suddenly I understood what he was thinking about when he said underground, and I told him—like... me, leave me alone, leave me alone with this nonsense, I am not... what are you even talking about?

Even if in the beginning the Appellant did not know why Amir wanted to contact a man of science, soon thereafter she knew why he needed one, meaning to prepare bombs: 'suddenly I understood what he was thinking about when he said underground...' This was in May 1995, and then the Appellant already knew where Amir was headed.

This knowledge as to his desire to prepare bombs plus the knowledge of his desire to set up an underground and her refusal to help him due to her apprehension as to his actions; her misleading of Amir as to the location of the armory in Beit-El—all these run counter to the Appellant's version that she saw Amir as a braggart and that she was supposedly dismissive of his plans.

81. Justice Berliner writes that these three—the matter of setting up the underground, the episode of the armory, and the approach of Dr. Bachrach—do not have reflect on the issue of the murder. And she says as follows in her judgment:

> ... the matter of the underground and the desire to collect weapons has no direct ramification on the matter of the murder. At most, it can perhaps be deduced from this as to the seriousness of Yigal's intentions in general but not necessarily the specific plan to murder the Prime Minister.

And these are the words of the Appellant's counsel (at p. 78 of the summations):

> Even if it were possible to learn from these as to Margalit's knowledge of the seriousness of Yigal Amir's intentions, this was seriousness as to the establishment of an underground whose purpose was defense against Arab hooligans. It is clear that there is no connection between this plan of an underground whose purpose was protection of settlements and the plan to murder in cold bold the elected Prime Minister. Meaning that even if Margalit had attributed to the weapon stealing plan of Yigal Amir a dimension of seriousness, it could not be learned from this as to her attitude to his views as to Prime Minister Rabin, may his memory be a blessing.

From a narrow perspective on the matter—in examining the plan to murder the Prime Minister—there is no doubt that Justice Berliner was correct and the Appellant's counsel is correct in his arguments. However, our matter now is not Amir's plans—as such—but the personal attitude of the Appellant to him and the question how she thought of him. Her response to these three plans of Amir, clearly teaches that the Appellant did not see Amir as a 'fantasizer' and braggart; she believed his plans; she related seriously to the ideas he brought before her. Why would we say that she related seriously to one plan—for example: the bombs plan—but not to another plan—the murder plan? Indeed, these plans were indeed different from one another, however, not to the point that she would believe one without reservation and without doubt and the other she would see as the boasting of a braggart. We have no difficulty noticing that the other plans are also extreme plans—setting up an underground, stealing weapons, preparing bombs—plans that entail violence and breaking the law. Indeed, the Appellant herself admits that she saw Amir as a man extreme in his views, an extreme person working to advance his plans, and for this reason she even tried to dissuade him—again and again—from thoughts of killing the Prime Minister. Against this background, it is difficult to accept her explanations that as to the malicious plan to murder the Prime Minister, here suddenly she saw it as empty words. In any case, we are not speaking now of anything other than general background to the plan to kill Rabin, and this background fits together well with the plan, in drawing a picture of a man extreme in his views, a man who is not deterred from conceiving law breaking thoughts and from taking real steps to achieve his goals.

The discussion with Avishai Raviv

82. On 7 November 1995, three days after the murder and the day after she was arrested, Avishai Raviv was put–as someone supposedly under arrest—into the room where the Appellant was held with the goal of encouraging her to speak. The conversation between the two was taped and transcribed (V/24; N/8). This conversation is not mentioned at all in the judgment of the Magistrate's Court, and Justices Berliner and Hammer commented on this in the District Court—and they rightfully commented—that this absence is to be regarded as a serious defect in the

judgment. The Appellant's counsel also discusses this at length in his arguments before us, and it is therefore our duty to relate to this conversation and explain it.

83. Reading the transcript of the conversation between the Appellant and Raviv—so claims the Appellant's counsel—clearly proves that the Appellant knew nothing of Amir's plot to murder Rabin, and that the act of murder shocked her. That same claim was made in the court of first instance, and the argument was accepted by Justice Berliner. According to Justice Berliner, the Appellant's words in that conversation are words that are characteristic of a person who hears that someone whom they know committed murder.

Justice Berliner writes: 'the matter of the shock can still be reconciled in that, knowledge of planning is not the same as knowledge of the action' (p. 47). However other statements of the Appellant point clearly, in the opinion of Justice Berliner, to surprise as to the carrying out of the murder. Thus, for example, the Appellant's statement that the Amir of before Saturday night is not the same Amir after Saturday night shows that the Appellant did not take Amir's words seriously, and is not consistent with statements that we would expect to hear from someone who clearly knew that her friend is planning to commit a murder.

Justice Hammer and Bayzer thought otherwise. Justice Bayzer establishes that the shock expressed by the Appellant in her words is not the shock of one who did not know; the shock is of one who knew, but now must deal with the act of murder as an established fact. '...knowledge itself does not preclude surprise' in the judge's words. And later (at pp. 83-84):

> What was in the realm of a plan, plot, conspiracy, and wish... suddenly becomes a flesh and blood victim, a wave of arrests in her immediate surroundings, a murderer and a murdered and tangible death. Just as at times, in cases of severe illnesses, the knowledge of the impending death does not detract from the shock which strikes upon its arrival, so too the knowledge as to an expected taking of life, does not reduce the surprise that comes with the commission.

Justice Hammer was also of the view that the Appellant's shock is to be understood against the background of her objection to his opinions and her difficulty in digesting the reality. In the opinion of the judge, the commission of the plot triggered within the Appellant—after the fact—an emotional mechanism of repression and self-persuasion, and this mechanism caused her to think that she did not believe Amir, from the very beginning, when he told her of his desire to kill Rabin. In the words of Justice Hammer (at pp. 102-103 of the judgment):

> ... as I understand her statements, she activated an emotional mechanism of repression, when the awful action that devastated the country was carried out.
>
> ...
>
> ... her desire to defend herself is understandable, even by

> retroactive self-persuasion, that indeed she heard but did not believe; heard but thought he was a fantasizer and not serious.

84. During the course of the discussion between Raviv and the Appellant, the Appellant said, *inter alia*, the following:

> ... we are in shock, his friends is in shock...
>
> ... that we would argue like why would I need to think he would go and do such a thing we sat like even many times, it is true, like it is not Yigal it is not one who I always took all these incidents with limited trust… not just cynicism but like moments of how should I say this like exaggerations all the words were like just to make you think like an actor.
>
> I didn't recognize him like suddenly there is a disconnect Yigal until Saturday night Yigal Saturday Night not like it still isn't absorbed by the mind… it's not Yigal like it's not… I don't want to speak because there are enough people who know him and such.
>
> But what there is to break me like what… they say like Yigal said that I knew of his attempt and the like, do me a favor.
>
> That is it you know if it was somebody else then it would all be so clear for me and all but it is like your friend is the one who did it, it is a shock it is not… not you understand then because if we say that it was my friend I don't know if like I don't know what I would say about it like because it is my friend that means that truly… You understand but like this I know that I would relate to the whole incident completely differently if it was somebody else, then it is simple.

The Appellant's counsel relied on these words with the full weight of his arguments. According to him these statements are evidence of the shock that overtook the Appellant and these statements contain resounding proof that she did not know that Amir was plotting to murder the Prime Minister. The Appellant—so argues attorney Weinroth—spoke freely with Raviv and honestly revealed what was in her heart. Her words are to be accepted at face value, and the necessary conclusion is that she did not know of Amir's plot.

85. Reading the transcript on its own—detached from rest of the body of evidence—indeed may lead the reader to the general conclusion that the Appellant was in shock. However, the question in our matter is, how should we **interpret** this shock, and whether we accept the argument of the Appellant's counsel that the shock points—if only by way of doubt—to the fact that the Appellant did not believe that Amir seriously intended to carry out his malevolent plot. My view is that that conversation between Raviv and the Appellant is not sufficient to erode the large amount of evidence—very large—immense, heavy and solid which demonstrates clearly that the Appellant knew well of Amir's plot and believed that he intended to carry out his evil plot.

The Appellant's counsel is correct in his argument that where the body of evidence is subject to one interpretation—an incriminating and inculpatory interpretation—and is also subject to other interpretations—alleviative and exculpatory—one does not convict a person criminally on the basis of the one interpretation. However, in our matter, the interpretation of the shock as evidence that the Appellant did not at all imagine that a terrible and horrible incident such as this incident would occur is a clearly unreasonable interpretation when it is held up against the evidence—very weighty evidence—which we discussed above. We agree with Justice Bayzer—and in our view that is the reasonable interpretation of the Appellant statements in her conversation with Raviv—that the Appellant was in shock when in front of her eyes words became reality and an evil plot that a person plotted in his heart became a horrible reality. The Appellant knew of the evil plot, but went into shock when she discovered how words lost control and empty words became harsh reality. As Justice Bayzer wrote: even the death of someone close to us after a severe illness, a death that is expected and known in advance—when it arrives we are shocked and numbed. Here too, the hope that Amir would not carry out his evil plot ran through the Appellant's mind, and when the rupture came—the frustrating her expectation—the Appellant went into shock. However, that hope—if it existed—was not sufficient to minimize the knowledge that the Appellant was touched with.

86. There is an additional possibility—a possibility reasonable on its own—for interpreting the Appellant's statements in her conversation with Raviv. Review of the evidence raises the possibility that the Appellant suspected that Raviv was cooperating with the Security Services and in thinking so she presented him with a picture different than the truth. Interpreting things in this way is not unrealistic.

In her interrogation at the Security Services the Appellant mentioned the rumor that she heard that Raviv was cooperating with the Security Service. And in the language of the memo that was prepared after the conversation with her (V/39):

> During the course of the interrogation the person being interrogated noted that she suspects Avishai Raviv that he is connected with the Security Services. In her words she said she does not believe this but Yigal thinks so and that is being whispered in Kiryat Arba.

In her examination in court (at p. 746) the Appellant repeated that someone from Kiryat Arba told her that Raviv is an agent of the Security Services. She did not remember when it was said to her, but she did not believe this. The Appellant repeated this suspicion that Raviv was an agent of the Security Services in her examination in court, and in her words:

> I did not believe it… when they brought him into the room I did not think about it, and the conversation went on and on, and then I said in the last stages of the conversation, maybe, and I still did not believe it… (At p. 745 of the transcript).

The Appellant further stated as to her conversation with Raviv: 'while I was sitting [under arrest], only then did the shadow of suspicion arise in me, but even then I did not believe it at all'. The Appellant was asked in her examination in court whether she suspected Raviv, and to this she answered (at p. 747 of the transcript):

> Not at the beginning of the conversation. I am saying toward the end they did not arrive and did not arrive, and I said, oh brother, again, but it doesn't matter, I didn't believe it at all. I started to suspect but I didn't believe it. It seemed so illogical e, and it really isn't logical and I believed her, and suddenly after the conversation, straight after the conversation, they brought him to me crying, that really is suspicious.

When asked again about her suspicion of Raviv, she answered as follows:

> In the last months yes, but again, it did not reach the level of belief that I really believed it. I believed it only when they suddenly brought him to me crying…

From all this we can conclude that the Appellant knew that some suspected that Raviv was an agent of the Security Services and it seems that this thought did not leave her. Indeed, according to her, she did not believe the rumors she heard, however, it is reasonable to presume that somewhere in her mind there was some suspicion. This suspicion was sufficient to put her on her guard not to reveal to Raviv the true feelings in her heart. And indeed, reading the transcript of the conversation that took place between her and Raviv will clearly teach us that the Appellant did not reveal to her interlocutor all of the knowledge she had collected in her heart; thus, for example, she did not tell him about the non-incident of 'Yad Vashem' nor about the non-incident of the Kfar Shmaryahu intersection. Not about these non-incidents and not about the many times that Amir told her he intended to murder Rabin with his own hands.

87. Either way: the evidence that was brought as to the ties between the Appellant and Amir—particularly in their cumulative weight—are unequivocal in their direction and meaning. They point clearly to the fact that the Appellant knew—knew well—about Amir's plot to murder Yitzhak Rabin, and the Appellant shock upon hearing about the murder does not diminish the value and weight of that incriminating evidence.

Additional arguments raised by the appellant

88. Alongside the Appellant's version that she did not believe that Amir indeed intended to carry out his plot, her counsel attorney Weinroth raised additional claims on her behalf, and we will discuss these briefly.

The Appellant did not Report to the Authorities as to Amir because she did not Know

89. The Appellant claimed in her questioning–at the Security Services, in the Police and in Court—that were she to seriously think that Amir intended to carry out his plot, then she would have reported this to

the authorities. Moreover, she even said this to Amir on several occasions. Thus, for example, in response to Amir's proposal that she join the underground organization:

> … and I told him that it should be clear to him that I will turn him in if he does something extreme. I am going to fix it if I know that he is about to do something extreme (V/42).

This is also how she reacted to Amir's proposal to keep watch in non-religious clothing:

> … I always objected to his view and I brought him all the possible reasons and I told him that if I would know that he is going to kill Rabin I would turn him in… (V/42).

The Appellant said similar things in court (for example at p. 574 of the transcript). The necessary conclusion is, according to the claim of attorney Weinroth: if she believed the words of Amir the Appellant would have reported Amir to the authorities, a sign and proof that she did not believe his words.

This argument turns things a bit on their heads. The evidence, as we have seen, points clearly to the fact that the Appellant knew of Amir's plot, and hence her words—that she would report him to the police— are to be interpreted as words from a friend to a friend or father to son. In other words, that same threat—that turned out to be an empty threat—can be reasonably assumed to have always been an empty threat, and the supposed threat was not made other than in order to dissuade Amir from carrying out his plot. There is nothing therefore in that threat to point to the fact that the Appellant did not know of Amir's plot; it is even possible that the opposite is true. How so? The very threat that she would turn him in to the authorities testifies better than one hundred witnesses that the Appellant took seriously Amir's words as to his malicious plot. As if he was just a 'fantasizer' why would she threaten him? Moreover: the Appellant claims—and we accept what she says—that she warned Amir repeatedly about his malicious plot. And, according to her statement to the police (V/41):

> I always told him it was prohibited, prohibited to do such a thing… a thousand people heard him speak this way, who thought that that is what he was going to do… I told him not to do this.

As we have shown in our words above, it is not correct to say that 'a thousand people heard [Amir] speak this way', meaning: it is not correct that a thousand people heard Amir speak as he spoke personally to the Appellant. However, the very fact that the Appellant saw fit to warn Amir in the way that she warned him, teaches that she feared him; that she saw him as expressing serious thoughts; that she 'knew' that he means the things he says. Since if she did not fear him, if she did not see him as a serious person—why did she warn him? Moreover, non-reporting is not evidence of lack of knowledge. A person has to overcome difficult emotional barriers before he turns a person close to him in to the authorities. And also, if the Appellant seriously meant her

words as to turning him in, then her legs did not take her to that place to which she needed to go.

The public aspect

90. The Appellant's counsel goes on to argue: Amir revealed his extreme views in public and did not keep them concealed, and as it is not normal for a person to inform the general public of a murder plot he is plotting—it is presumed that one who plans a murder will take care to do so secretly and quietly—it is no wonder that the Appellant interpreted his words as expressing, indeed, his extreme views but not a true planning of murder. Moreover, so attorney Weinroth adds, it is incumbent upon us to remember that in those days the atmosphere was saturated with statements similar to the statements that Amir expressed, and therefore it is reasonable to presume that his words were not absorbed in the consciousness of the Appellant as words of substance.

This argument is dismissed, if only because it ignores the large gap between what the Appellant heard and knew and what others heard and knew. Indeed, Amir did not hide from the general public that the law of *Rodef* applies to Rabin and he is to be killed, however, the Appellant knew much more than this: she knew—and the greater public did not know—that Amir, he himself, sought to murder Rabin, and she knew—and the greater public did not know—of the incidents of 'Yad Vashem' and the Kfar Shmaryahu intersection. To the contrary, because he trusted her—her and not all those who surrounded him—Amir revealed his deepest secrets to the Appellant, and for that reason specifically the Appellant could have concluded that his statements were serious and they reflected his real intention. Attorney Weinroth's argument is correct, as Amir's partners to the malicious plot—his brother Hagai Amir and Dror Adani—knew minute details about the murder plan while the Appellant did not know of the plot except in a general way. However, the fact that the other conspirators knew more—this fact per se—does not detract from what the Appellant knew of the plot, and she well knew of the plot to murder the Prime Minister.

The statement that after the 'Oslo II Agreement' Rabin's death will not help

91. In the month of October 1995 a demonstration was held against the 'Oslo II Agreement' and according to Appellant Amir said to her then:

> That is it, now even if Rabin dies, it's already not… this will already not help, meaning—the things were determined, and there is no longer, in terms of… is not, this, it terms of this, there is nothing that will help (at p. 579 of the transcript).

And elsewhere (at p. 722 of the transcript):

> … in June he told me I am fed up of arguing with you, and we stopped arguing on the topic, and even in this demonstration against the Oslo II Agreement, I don't know from what, it could be from despair that he said to me like,

> this is it now, even if he dies it won't help. He told me this unequivocally.

Amir therefore abandoned his plot, so argued attorney Weinroth; what therefore was the Appellant to report to the authorities?

This argument does not persuade us. Even if we believe these words, meaning: that since the demonstration that took place in the month of October the Appellant was of the view that Amir abandoned the murder idea—and we have not said so—even so this does not rescue her. The Appellant knew of the murder plan before that date; she heard Amir tell her that he was planning to murder Rabin; she knew of the incidents of 'Yad Vashem' and Kfar Shmaryahu, and in her great confusion—apparently in the month of October 1995—turned to ask the advice of Rav Aviner. From all this we know that at that time the Appellant believed what Amir whispered in her ears as to the plot to murder Yitzhak Rabin; she knew and believed and nonetheless did not report to the authorities.

We will further comment in this context, that we take issue with Justice Berliner's theory that it is incumbent upon us to determine precisely the date in which the 'knowledge' took shape in the mind of the Appellant. Not so. The Appellant's 'knowledge' as to Amir's plot—the 'knowledge' and the fact that she believed that he is plotting to murder the Prime Minister—developed gradually as a result of her acquaintance with Amir, and there is no doubt that somewhere in the period beginning in July of 1995, the Appellant was aware of the intention of murder that nested in Amir's heart.

The appellant's young age

92. At the time these events took place the Appellant was approximately nineteen years old. Attorney Weinroth argues, that her young age—together with her lack of experience—reflect on the ability of the Appellant to know and understand the true situation and deduce from that situation what an adult person might have concluded. This argument is true, in principle: age and experience affect understanding, knowledge and the ability to draw conclusions. However, in our matter, the Appellant's young age did not prevent her from understanding what needed to be understood. Justice Lidski, who saw the Appellant and received a direct impression of her, noted the qualities of maturity which the Appellant had, and wrote about her as follows (**ibid** [23], at p. 409):

> A picture is forming of a young woman, with firm ideas, smart and intelligent—and aware of these qualities of hers, who knows how to stand up for her rights, does not lose her wits…

Indeed, the young age of the Appellant may be a proper consideration, but that is for the determination of the sentence. And indeed as Justice Lidski noted in the sentence, she incorporated in her considerations the young age of the Appellant, as otherwise she would have sentenced her to a more severe sentence than the one she sentenced her too.

Amir's non-testimony

93. Yigal Amir was not called to testify by any of the parties. Attorney Weinroth argues that Amir's not testifying on behalf of the prosecution strengthens the defense's version. On the other hand the prosecution argues the opposite: Amir's not testifying on behalf of the defense strengthens the prosecution's version. I say: neither is true. Indeed, it is possible that the non-testimony of a witness may speak—at times cry out—against the version of that party that could have brought a certain person to testify, could have—and refrained from doing so. See for example CrimA 728/84 *Hermon v. State of Israel* [16] at p. 625; CrimA 437/82 *Abu v. State of Israel* [17] at pp. 97-98. Not so in our matter, where each of the parties could have thought in good faith that Amir's testimony could not contribute to clarifying the questions that are in dispute.

The words of the Court in CrimA 277/81 *Halevi v. State of Israel* [18] on which the counsel for the Appellant relies do not affect our matter, in my view. In that matter the Court, in the words of Justice D. Levin, said the following (at pp. 386-387):

> … the core approach is that the accused, who seeks to save himself from criminal prosecution, may, within proper boundaries, choose a tactic for himself in conducting the trial, which will not assist in his incrimination and will not advance his conviction. Not so, in my view, when speaking of the prosecution; the latter asks the court to determine that a certain person violated the law… this being so, the court expects the prosecution which represents the State, not to trip him up in hiding evidence that is important to the matter, and not hold back from revealing to the court all the relevant body of evidence, which came into its hands following the investigation, whether it supports its version or whether it weakens it.
>
> … in this matter, Talit's evidence not only was important but could have been determinative. The prosecution's refraining from calling Talit to testimony raises questions, and it weakens the prosecution's version… it is not an answer to say, that the defense could invite Talit to testify, if it appeared to her that she could be assisted by his testimony, as… there is a fundamental difference between what is imposed on the prosecution in presenting evidence before the court and what is imposed on the accused.

The court hints—possibly more than hints—that the prosecution unlawfully refrained from bringing an important piece of evidence to the Court, and it relies on this in saying what he says. Not so in our matter. As said, we are not of the view that the non-testimony of Amir points in favor of either one of the parties.

As to friendship and trust

94. In his oral summations before us, but mainly in the written

summations that he submitted to the Court, attorney Weinroth discusses in great detail—and depth—the qualities of a person—as a person—about man and the relationship of one person to another person: on friendship and trust, morality and friendship, integrity naiveté and deception, love and values, on the scales of liability and scales of credit, about informers and informants, and about good and virtuous people. Attorney Weinroth discusses all these and plants stakes in the writings of learned and wise men—from the Western world and the Jewish world over the generations. I agree with everything that attorney Weinroth told us; I agree—and could add more to them. But after all this I rise and ask: if Margalit Har Shefi knew—knew in the simple and essential meaning of the concept—that Yigal Amir sought to murder; if she knew this and refrained—indeed do all of those wise words justify her failure to act or her refraining from speaking? To act, to speak, if only the slightest amount—in order to save a life, to save the life of Yitzhak Rabin? The question is a question and the answer is there. So we say: once we have reached the conclusion—despite the sharp arguments of attorney Weinroth—that Margalit Har Shefi knew and failed to act, it is but law and justice that she be convicted.

In general

95. The accumulation of evidence that collected in the Court case, the amount and nature of the evidence, all these dictate the conclusion—beyond a reasonable doubt—that the Appellant knew that Yigal Amir was the theorist-planner, planning and intending to carry out an evil-thought to murder the Prime Minister; she knew—and did nothing; she did not report to the authorities what she knew and did not take any other reasonable means to prevent the carrying out of the act. The Appellant knew that Yigal Amir was serious in his intentions; her knowledge was real knowledge, clear knowledge; she believed that Yigal Amir indeed intended to carry out the evil thought that he thought up. That is the conclusion that arises from the evidence brought before the Court, and all that is needed to complete the offense of neglect to prevent a felony. Not just one piece of information penetrated the Appellant's consciousness as to Amir's malicious thought. The pieces of information—some of them big pieces and some of them huge pieces—came frequently, one after the other; one following behind the other. The hammer struck and struck. More information and more information and more information—until the creation of the 'critical mass' until the creation of 'knowledge'. Moreover, the accumulation of pieces of information, one upon the other, not only was enough to rule out coincidence and possible alternative interpretations for each one of those pieces of information on its own—innocent possible interpretations —but that accumulation of information also created a synergetic effect. All the signs point to one place and all paths lead to that same place, and when we arrive at that place, we know that there is no escape from one conclusion, one and only conclusion: the Appellant knew, explicitly knew, as to Amir's intention and evil plan to murder Yitzhak Rabin.

96. We are deciding therefore to dismiss the Appellant's appeal of

her conviction for the offense of neglect to prevent a felony.

97. As to the sentence to which the Appellant was sentenced—nine months imprisonment and fifteen months suspended sentence: we have not found that the Magistrate's Court —or the District Court—have been strict with the Appellant in a disproportionate manner. The Magistrate's Court– and the District Court —have properly weighed all the considerations related to the matter, and we have not found that the Appellant has been able to point to abuse of discretion which would entitle her to a reduction of the sentence. We have not found good reasons to reduce the sentence, and we also dismiss the Appellant's appeal as to the severity of the sentence.

Conclusion

98. We will never ever know how the matter would have turned out if the Appellant had done what she was required to do—report to the authorities Yigal Amir's malicious plot to murder Prime Minister Yitzhak Rabin. If she had only done the little she could have done, it is possible Yitzhak Rabin would be with us today. One phone call, even anonymously, and Yitzhak Rabin's life may have been saved. However, the Appellant did not do the little that it could have been expected and hoped she would do. It appears she preferred the friendship that formed between her and Amir over the danger that loomed for Yitzhak Rabin and therefore she refrained and did not report. In this omission she transgressed the commandment of 'do not stand idly by the blood of your fellow' and one who fails in this way is to receive a punishment.

We dismiss the Appellant's appeal both as to her conviction and as to the sentence which she received.

Justice J. Türkel

1. On 4 November 1995 the Prime Minister of Israel Yitzhak Rabin was shot to death. Yigal Amir (hereinafter: 'Amir') was convicted of murder according to section 300(a)(2) of the Penal Law (hereinafter: 'the law'). An indictment was handed down against Margalit Har-Shefi (hereinafter: 'the Appellant') that attributed the offense of neglect to prevent a felony to her according to section 262 of the law (hereinafter: 'the section'). So too an additional offense was attributed to her from which she was acquitted and is not our concern. According to what was claimed in the indictment, the appellant knew that Amir was plotting the act of murder and did not take all reasonable means to prevent its carrying out. The Magistrates Court in Tel-Aviv-Jaffa (Justice Lidski) convicted the appellant of the offense of Neglect to prevent a felony. The District Court – by the opinion of the majority of judges, Justices Bayzer and Hammer – dismissed the appellant's appeal of her conviction. Justice Berliner – in a minority opinion – was of the view that she is to be acquitted by way of doubt. After being granted leave, the appellant appealed before us the District Court's decision. In the first part of my discussion I will discuss some of my doubts whether the moral duty at the basis of the section is to be enforced with a criminal sanction. I will also discuss the question as to what the proper scope of the section is. In the second part of the discussion we will check whether the foundations of the offense according to the section have been fulfilled by the appellant.

The offense of neglect to prevent a felony – the doubts

2. According to the directive of the section, which in its former incarnation was section 33 of the Penal Law Ordinance: 'one who knew that a certain person is plotting to commit a felony and did not take all reasonable means to prevent its commission and completion – is subject – to two years imprisonment.'

There are very few people that have stood trial in Israel for the offense of Neglect to prevent a felony according to the section, or the similar offense of covering up an offense according to section 95 of the law. Therefore, there are also very few judgments in which the Courts have turned to the section and its interpretation (review Gur Aryeh's article [34] in part III, section 2.1). Not only that, but the case law of this Court speaks in various voices: some detest the section and some see it favorably.

According to the approach of Justice H. Cohn, the section is to be interpreted 'by way of minimization and scrutiny', and this in order '… not to create an opening for a duty of informing from which stems the scent of totalitarian oppression'. From hence that the duty of a person to act to prevent a felony arises only when it is a matter of a 'specific' and 'one-time' felony, as opposed to a 'continuing offense', and only 'when the danger of the felony is immediate and real' (CrimAp 496/73 (hereinafter: 'the *Ploni* case' [1]), pp. 719-720. As to this view he also discussed in CrimA 307/73 *Sultan v. State of Israel* [19] CrimA 312/73

Mazrava v. State of Israel [3] and CrimA 307/73 *Dasuki v. State of Israel* [20]). Justice I. Cohen did not hold the same and said that: 'as long as the legislator did not erase this section from the law books, it is our duty to interpret it simply and take care to carry out the law.' In his view this section is not 'untouchable due to being an abomination'. So too, 'prevention of serious offenses, which felons plot to commit, is a blessed goal directed to protect the public. It is the public duty of every citizen to assist in this way to prevent felonies, and establishing a criminal sanction for violating this duty is not to be ruled out' (the *Ploni* case [1] at p. 721). From the words of Justice Asher, who also sat at the trial in the *Ploni* case [1], there appears to be inferred an approach which views the section as an unavoidable necessity. According to his approach, in light of the security situation and the wave of serious crime one is not 'to give up on any means of possible defense from the dangers that lurk for the public…' and therefore one is not 'to detract from the utility [of the section – Y.T.] by interpretation 'by way of minimization'…' (the *Ploni* case [1], at p. 722). About twelve years after these judgments were handed down the Court went back and dealt with this issue. In his judgment in the case before him Justice D. Levin saw the reasoning in the approach of Justice H. Cohn and said: '… this section is alive and well, and is to be used in the appropriate case, **even when one seeks to give a section a limited meaning, and there is reason to do so**, the interpretation does not and cannot be narrow, to the point where it is not possible for a logical and reasonable conclusion to pass through it' (CrimA 450/86 *Gila v. State of Israel* [6] at p. 832); emphasis mine – Y.T.).

3. My path to the interpretation of the section is different than my predecessors'. According to my view, one is to distinguish, and distinguish well, between the **moral duty** of a person to undertake reasonable means in order to prevent the commission of a felony, and his **legal duty**. In my view, there is not the slightest doubt that from the moral aspect the dust of doubt in a person's heart that a person is about to commit a felony – and all the more so to take a life – is sufficient to obligate him to be concerned and to save. However it is a big and difficult question, and thinkers and jurists have struggled with it over the generations, whether a moral norm is to be enforced by dressing it in the garb of a legal norm. In other words, it is proper for a moral norm to stay within its own four corners and not leave its realm, such that one who violates it will be 'exempt from the laws of man and liable' – only – 'by laws of the heaven' (*Baba Kama*, 55, B; 56, A [L] and in other places). The discussion of the question does not require determination in the appeal before us and therefore I will make do with the key elements.

Some have seen in the overlap of realms of morality and law a coveted ideal. Justice Zilberg revealed his longing for this in his known words:

> 'The realms of the morality and the law are two concentric circles, they cover one another only partially – the more the line distinguishing between them retreats, so the territory

> and the moral content of the law will grow. The coveted ideal, would be that the two circles overlap each other in their entire scope – as water covers the ocean' (M. Zilberg *So is the Way of the Talmud* at p. 67).

I am concerned that this longing is not the property of all; its realization is also not suited to all the moral norms. Professor A. Rubinstein discussed this in saying:

> 'the reciprocity between the religious directives, moral rules and legal prohibitions has been dealt with and is dealt with by jurists, philosophers, and sociologists. The discussion is broad and included a row of interesting matter and sharp debates. The development of this reciprocity can be described in the gradual distancing of three circles from each other. At first there was one circle that included within it the directives of religion, morality and law ... the more human society advanced, so the three circles moved away from the center and created separate frameworks although, in part at least they touch and even overlap...
>
> The question is in other words: is society entitled to use its power – meaning, the power of the law and the mechanism of the enforcement of the law – to impose its views on the minds of those that don't act like it. The discussion of this question is not new and in fact there was no escape from it from the moment that a secular-democratic society arose. From the moment that the supreme power arose as the source of power, and the regime was no longer based on 'divine right', the question arose and came up: 'from where does the duty of the individual stem to surrender to the will of others like him?'
>
> This old debate as to the connection between morality and law has renewed in our day in greater force, against the background of legal reforms that occurred lately in the Western States and against the public debate, in these questions in Israel (E. Rubinstein, *Enforcing Morality in a Permissive Society* [29] at pp. 7-8).

Another difficulty in enforcing moral norms by force of law – a difficulty which is also connected to the questions which are discussed in the appeal before us – was discussed by Justice H. Cohen:

> 'And if the moral edicts in the Torah became legal norms, then in non-religious legal systems the moral norms cannot be legal norms, and that is because the mechanisms of the law cannot – and therefore are not interested in – reaching the secrets of a person's heart and what occurs within himself. Not so divine law: it adds to the moral directives the warning 'fear your g-d' (*Leviticus* 19, 14 and more), that he 'who knows your thoughts and everything that is given to the heart of man who makes him, and the other creatures do not recognize him (*Rashi*, **ibid**) will already know how to

collect from you.' (H.H. Cohn the Law [30] at p. 95.

(As to the enforcement of moral norms by force of the law see the known debate between Devlin and Hart the key elements of which were brought in Rubinstein's book *supra* [29] at pp. 43-62. The various aspects of the question were reflected in discussions which preceded the legislation of the Though Shalt Not Stand Idly by the Blood of Another Law 5758-1998; among other things see the explanatory notes to the Draft Penal Law (Amendment no. 47) (Though Shalt Not Stand Idly by the Blood of Another) 5755-1995, at p. 456. So too see, out of many sources: A. Parush, *Legal Determinations and Moral Considerations* [31], the chapter which deals with 'law, morality and the duty to help the other' at pp. 11-38; R. Gavison, 'Enforcement of Morality and the Status of the Principle of Liberty [38]; A. Parush 'The Law as a Tool for Enforcing Morality' [39]).

I will not respond here to the big and difficult question that I presented above, whether it is proper to enforce moral norms by force of the law. Nor the question which moral norms are to enforced in this way. It is sufficient for me to say that according to my approach there are moral norms that are proper to be enforced by the law and I will not identify them here. The principles at the basis of the Unjust Enrichment Law 5739-1979 are a clear example for such proper enforcement. Even the principles at the basis of the law Do Not Stand Idly by the Blood of Another are an example of this. As we shall see *supra*, the provision of the section is not such.

4. The echo of the aspiration to clothe a moral norm in the garb of a legal norm, also arises, it appears, from the section itself, and perhaps without its legislators meaning to do this. However there is also another facet to this noble aspiration, which is not so noble. I fear that the significance of the realization of the moral idea embodied in the section, may be, in certain cases, attribution – by way of conjecture and guesswork – of 'knowledge' to a person as to the **intentions of another person**, and in this the danger is hidden. I will clarify my words. It is not a matter here, as in a 'regular' offense, of exposing the knowledge and the intentions of a person as to **his actions himself**, but in exposing the knowledge of a person as to **the intentions of another person**. If the exposing of the first type, is, frequently, by way of drawing conclusions built on conjecture, then the exposing of the second type will be – probably, in most cases – by way of drawing conclusions built on **conjecture upon conjecture**. There is here, supposedly, 'a voice' of an idea that Justice Landau expressed in his known words:

> 'A regime which takes upon itself the permission to determine what is good for a citizen to know, in the end will also determine what is good for a citizen to think; and there is no greater contradiction than this to real democracy, which is not 'directed' from above.' HCJ 243/62 *Filming Studios in Israel Ltd. v. Gary* [21] at p. 2416).

To paraphrase things: in my view, the danger that lurks to our liberty from between the crevices of the section is in that the section does not

limit itself to a directive to the citizen as to what he must **do**, but it places upon the court to also determine what he **thought** – and also what in the opinion of the court is **reasonable** that he thought – as to **a certain person's thoughts**. Supposedly, revealing hidden thoughts as to hidden thoughts. For this the words of H. Cohen are suitable in his book *supra* [30], which were quoted above '… that the mechanisms of the law cannot – and therefore are not interested in – reaching the secrets of a person's heart and what occurs within himself' (at p. 95).

The apprehension of 'the duty to inform', which Justice H. Cohn discussed in the *Ploni* case [1], does not make the section 'untouchable due to being an abomination' in my view, as the moral duty to feel and save overcomes the moral defect that attaches in certain cases to informing. However, I would say – even if this is somewhat paradoxical – that the need to look into thoughts in order to realize the section is problematic such that it justifies removing the moral norm at its foundation from those that are appropriate for enforcement by the law. I will comment that the duty according to the section is distinct from the one according to the law of Thou Shalt Not Stand Idly by the Blood of Another 5758-1998, according to which a person must offer help 'to a person before him' (section 1(a) in particular). According to my view, it would be proper that the legal duty that the section imposes be erased from our law books; without this detracting in any way from the moral obligation. Despite this, as long as the section stands, we are forced by the language to fulfill it, however it is proper that its application be done with extra care and 'by way of minimization and meticulousness'. (The *Ploni* case [1] at p. 719).

A comment on the doubt

5. Here is the place for another general comment. In the discussion of the offense according to the section thought is to be given, and with greater intensity, as to the question whether the prosecution was able to convince the Court 'beyond a reasonable doubt' that the elements of the offense were fulfilled in the accused. In other words, it is to be thoroughly examined whether there is in the body of evidence anything that can raise reasonable doubt as to their guilt, as per the directive of section 34V(a) of the law: 'a person will not bear criminal liability for an offense unless it was proven beyond a reasonable doubt' (see, E. Harnon, *Laws of Evidence* (Volume A) [32] at p. 212; J. Kedmi, *On Evidence* (Vol. B) [33] at pp. 828-834).

The courts and the legal scholars have tired themselves in their attempts to define the substance of reasonable doubt and to translate it to a real standard, concrete and clear which can guide the Court (see, *inter alia*: the discussion in CrimA 347/88 *Demajnuk v. State of Israel* [22], at pp. 644-653; A. Gross 'In the Margins of the Case Law—the Demajnuk Judgment and the Pursuit of Truth' [40]; A. Gross, M. Orkavi, 'Beyond a Reasonable Doubt' *Kiryat Hamishpat* (1991) 229 [41] at pp. 233-238). I am of the view that due to the special character of the section, which obligates the Court as we have seen, to investigate and research the hidden – the thoughts and assessments in a person's heart as to the

intentions in a specific person's heart – a degree of extra care is to be taken and scrutinized well whether there is hidden in the body of evidence a kernel of such doubt.

From the norms in the law to the person on trial

6. At the heart of the discussion before us stands the question whether the appellant knew that Amir is plotting to commit the murder. I will precede and state that I accept the analysis by my esteemed colleague Justice M. Cheshin of the elements of the crime according to the section. Like him, I too am of the view that the knowledge that is required according to the section is part of the mental element of the crime. So too, I accept his conclusion – *inter alia*, for the reasons that were detailed *supra* – that for a conviction of the offense knowledge 'in its simple meaning' is required and willful blindness is not sufficient, meaning simple suspicion that was not looked into.

My road to a decision was a difficult and lengthy road of obstacles. Because of the difficulty built into the section, which I discussed above I examined and studied the evidence well, and in particular I went back and looked at the memos that were written from the words of the appellant soon after the murder as well as her testimony in Court. I also went back and watched the video tape in which her meeting with Avishai Raviv was recorded when they were in the arrest cell – in which Justice Berliner found a central element for her doubts – and I looked through the rest of the evidence. During the course of the hearing I found myself, more than once, deliberating the question whether it is a matter of an innocent young woman lacking experience who honestly and truly thought that Amir is a 'braggart and fantasizer', as per her version, and therefore she does not come within the bounds of 'one who knew that a certain person is plotting to commit a felony', or whether things were not so and therefore she does come within those bounds.

Indeed, the appellant's many conversations with Amir – despite the fact that they revolved around the issue of 'the law of *Rodef*' – could be seen, under duress – as consistent with her innocent version. Thus it could also be said – also under duress – that his words in her ears as to his intention to carry out the murder, and maybe also his words that on two occasions he was not successful in doing so, did not seem serious to her. And despite this, after I examined and weighed the totality of evidence, I have reached the conclusion that at a certain point in time the appellant came within the bounds of 'one who knew' that Amir is plotting to commit the felony. I was convinced of this primarily by the fact that about a month before the murder (p. 760 of the transcript) the appellant approached the Rav Shlomo Aviner, the Rabbi of the settlement of Beit El, and asked him as to 'the law of *Rodef*' and 'whether in such a case [she – J.T] must turn in one who claims that the law of *Rodef* exists as he wants to do something and thus becomes a *Rodef* himself' [V/16]. Even if we accept her version that during the course of her conversations with Amir she regarded him as a 'braggart and fantasizer', and did not take his words seriously, then her decision to approach the Rav Aviner with the question, whether she should turn

Amir in, is a signal which points to a turning point. She testifies as to this that at that time the recognition formed in her heart that Amir's words was not meaningless talk and that he is plotting to commit the murder. Thus, the appellant, at that stage came within the bounds of 'one who knew' according to the section.

Indeed, there is room for the theory that following the appellant's conversation with the Rav Aviner, her concerns were lessened (her testimony at p. 573, 658 of the transcript). However this is not sufficient in order to remove her from the realm of 'one who knew', according to the section. With her decision to approach the Rav Aviner with the question – and perhaps even at some point before then – she came out of the realm of one 'who perhaps knew' and came within the realm of 'one who knew'. In the period of time that passed from the date of the decision until the date of the conversation with the Rav Aviner – even if her concerns were weakened – she was bound by the directive of the section to undertake 'all reasonable means to prevent the commission' of the felony.

7. The minority opinion holder in the District Court Justice Berliner was of the view that the appellant's words in her conversation with Avishai Raviv in the arrest cell on 7 November 1995 which were recorded with a video recorder and written in a transcript (V/24, N/8) raise reasonable doubt as to her guilt. In that conversation the appellant states, *inter alia*:

> ... we are in shock his social group is in shock...
>
> ... why would I need to think he would go and do such a thing we sat like even many times, it is true, like it is not Yigal it is not one who I always took all these incidents with limited trust… not just cynicism but like moments of how should I say this exaggerations…
>
> I didn't recognize him as though suddenly there is a disconnect Yigal until Saturday night Yigal Saturday Night no as though it still isn't absorbed by the mind…'

I was taken up with the question whether what the appellant said as to the 'shock' that came over her and her impression that Amir's words are 'moments of … exaggeration' support her version and raise reasonable doubt as to her knowledge. However, after thinking about the matter I was convinced that they are not sufficient to raise a doubt. It is to be remembered that the appellant's words were said three days after the murder, and probably reflected the shock, her surprise and her distress at the same time. It is reasonable that the appellant had difficulty facing herself and admitting to herself that indeed she knew in advance as to Amir's plot and did not do anything to prevent it. There is in these things, it appears, an attempt to justify retroactively – first and foremost to herself – her omission. They cannot retroactively weaken the conclusion that at the time that she approached the Rav Aviner she was within the realm of 'one who knew'.

8. By force of these reasons I am also of the view, like my

esteemed colleague Justice M. Cheshin, that the appeal of the conviction is to be dismissed.

The sentence

9. The Magistrates Court sentenced the appellant to the maximum sentence established for the offense: imprisonment for a period of two years, including nine months actual imprisonment and the remainder suspended sentence. In my view, the sentence that was handed down cannot hold up. First of all because it is not necessary – for the public or for the appellant – to achieve the punitive goals accepted by us: deterrence, retribution, prevention and rehabilitation. It also does not hold up for additional reasons.

I discussed *supra* my doubts as to the section and as to the fact that it would be proper for it to be erased from our law books, without detracting from the validity of the moral duty at its foundation. In my view, this is to be taken into account in determining the sentence. It is further to be taken into account that, as said *supra*, there are very few people who have been brought to trial in Israel for an offense according to this section, and only very few have been brought to trial for this offense as a lone offense. There is particular importance to the fact that the appellant was not, in any shape or manner and also not indirectly, a party to the crime of murder of which Amir was convicted – as per the definition of parties to a crime in section B of chapter E of the law – and was not involved in it in any way, but was convicted of the special and separate offense of Neglect to prevent a felony, and in the special circumstances which I described. There are also two additional mitigating heavy weight considerations: her age at the time of the offense – about nineteen years – and her clean past. So too, it is not to be forgotten that since the offense of which she was convicted was committed a period of over five years has passed.

In light of these fundamental and personal reasons I would cancel the sentence that was imposed on the appellant and in its stead I would sentence her to a period of six months to be served in community service, joined with a six month suspended sentence, as stipulated in the sentence of the Magistrates Court.

Justice E. Rivlin

I join the views of my colleagues, Justice M. Cheshin and Justice Turkel, that the appeal of the conviction is to be dismissed. However, I wish to add several comments to this matter.

Indeed, the offense of Neglect to prevent a felony, as defined in section 262 of the Penal Law (hereinafter: 'the law') is a unique and special offense. It is an omission offense, and the omission is in the non-prevention of the commission of an offense by another. The offenses that order the punishment of a person for failing to perform an action, as opposed to ordering punishment for committing an improper act, are few. The choice to penalize an individual for not having the wisdom to prevent another from committing an offense has been met with criticism

from legal scholars, and there are systems that are unwilling to adopt it. Imposing a duty to act may damage the liberty of the individual more than punishment for a prohibited act. However, I am not of the view—as is my colleague Justice Turkel—that it would be proper for the legal duty imposed by the section to be erased from our law books and remain a moral duty alone. The offense that deals with Neglect to prevent a felony was not intended to enforce a moral outlook only because it is a prevalent moral outlook. It came to enforce a norm which deviates from the pure 'positivist' morality (based on the distinction proposed by Professor Hart) and it responds to the norm worthy of enforcement also based on the Millsian approach—as its violation may bring damage to others. Indeed, there is a difference between enforcing a prohibition and enforcement of the action, between punishment of an action and punishment of an omission; the latter—punishment of an omission—requires extra caution. The need to prevent a **severe** outcome to others may justify the punishment of the one who did not prevent it. On the other hand, it is difficult to justify the punishment of a person for not preventing the risk that a **negligible** outcome will be caused to others due to a person's prohibited action. This very balance was made by the Israeli legislator when he established the limits of the offense described in section 262 of the law. It does not deal with one who knew that a certain person is plotting to commit a felony, meaning an offense that is ranked in its severity at the top of the sentencing scale (section 24 of the law). Indeed, the felonies themselves vary among themselves in their severity—and the most severe is the action of one who causes with premeditation the death of a person (as to the possible ramification of the ranking of severity as to the felony that the other was about to commit—as to the interpretation of the foundations of the offense in section 262 I will comment *infra*). But every act classified as a felony is a serious act, whose prevention may justify the enforcement of said duty.

2. My colleague Justice M. Cheshin discusses the emotional barrier that arises for a person who finds out that his friend or relative is plotting to commit a felony, and he is required to make a report to the authorities or to undertake another way to prevent the commission of the act. This emotional difficulty, as he clarifies, may create for a person a mechanism of self deception which serves as a defense against his difficult vacillations- a mechanism that may suppress the knowledge and repress it in his consciousness. Indeed this is so, but in my view the concern is dwarfed when measured up against act of the wicked person who is committing the ultimate felony—taking a human life. And one who knows — shall not be silent and the only protective mechanism that will arise for him—is the protection of persons from one who comes to murder. That is the protection of the life force of society, and no restriction, aversion, or personal loyalty stands in the place where human life is in real danger. And for those who are fearful- there shall be no hope.

3. This interpretation of the level of severity of the offense that the offender is plotting to commit may ostensibly lead us to examine the

nature of the responsibility based on the severity of the plot. It would have been possible to hold that where the felony that one is obligated to prevent is a severe felony—and certainly where it is a matter of the most severe of all: taking a human life—the boundaries of the duty are broadened. One who 'knows' that another is plotting to carry out a murder, so it can be thought, will not be exempt of the duty to undertake means to prevent the action, even if the likelihood of carrying out the plot is low, as the expectancy of the felony remains high due to its severity. A possibility of such a distinction was not ruled out in the scholars' writings (see Kanai, in her article *supra* [37], at p. 438). And indeed, is it not proper to demand from the one suspecting—who does not 'know' with certainty—that he inquire as to the seriousness of the suspicion, where the felony, the subject of the suspicion, is severe? Can he wash his hands of it when he chooses not to examine his suspicion? The provision of section 20(c)(1) of the law—whether it speaks of 'willful blindness' or a lower level of criminal intent—is likely to ostensibly support the conclusion that he is not to be exempt from criminal liability. 'A person who suspected as to the nature of the behavior or the possibility of the existence of the circumstances is viewed as one who was aware of them, if he refrains from investigating them'—so instructs section 20(c)(1) of the law; 'refrains from investigating them' is likely to be interpreted such that there exists such a level of suspicion that it requires investigation (Kanai, **ibid**, p. 437), or—that the severity of the felony was such that it required investigation. Both of these are factors in the equation of the expectancy of the felony, and the question is if this provision also applies as to the matter of section 262 of the law.

4. My colleagues do not think so. Justice M. Cheshin emphasizes that the offense is an offense of knowledge, and the required knowledge is real knowledge; willful blindness and suspicion being insufficient. According to his view, a purposive interpretation of the offense described in section 262 causes the general provision in section 20(c) of the law to retreat before the provision of section 262. The nature of the offense—an omission offense—and the degree of its invasion into the sphere of activity of the individual require narrowing the mental element which is embedded in it and interpreting it narrowly.

Even when it is undeniable that the choice—to exempt from criminally liability the omitter who sits in inaction and prefers to ignore the suspicion which nests in his heart as to the intentions of the plotter to take human life—is a difficult choice, I also join it. A punitive outcome which changes from matter to matter according to the nature of the plot may undermine principles of legality in criminal law, as the foundation of knowledge itself will change its boundaries according to the expectancy of the outcome. I would support this outcome with the approach, which also found expression in the case law of the District Court in our matter, that the words 'one who knew' in the provision of section 262 has two facets; embedded in them is not only the **mental** element of cognizance but also the **factual** element of knowledge. This

last element by its nature does not withstand anything less than actual knowledge. In other words: even if it was possible to interpret the 'mental facet' in it as including 'willful blindness' or even 'suspicion', in any case the cumulative requirement of the two facets would be a requirement of real 'knowledge'.

5. 'One who **knew** that a certain person is plotting to commit a felony'—or one who knew and believed. The person for whom the information as to the plot accumulated in his possession must believe that a certain person indeed is plotting to commit a felony. And how will we now that indeed it was so? Here we move from the substantive realm to the evidentiary realm. While in the substantive realm the test is necessarily 'subjective', it is not so in the evidentiary realm. The presumption of cognizance can serve as an objective measure for examining the existence of such knowledge, as said. Where the circumstances teach us that an average person would know and believe that a felony is about to occur, there is a presumption that the accused, whose matter is being examined, also knew and believed. And in order to rebut this presumption—a duty arises for the accused to prove that circumstances exist which show that he himself did not know or did not believe.

At times we use an objective test and have no need for the presumption of cognizance. It is a matter of cases in which it is possible to learn of the knowledge of the omitter with subjective evidence. The objective test normally examines the behavior of the **plotter** and the conclusions that the ordinary person would draw from it as to his intentions, while the subjective test is required primarily for the behavior of the **omitter** and the conclusions which can be drawn from it as to the 'knowledge' of the omitter himself.

6. But there is no need to decide as to all this here. I too agree that the matter of the knowledge of the appellant that the murderer plotted to commit a felony has been proven, and that this knowledge is learned both from the external manifestations in the behavior of the committer of the felony and the external manifestation in her behavior.

His own behavior was expressed in things about which the appellant knew. The appellant knew from him as to his extreme views, the seriousness of his actions in all that relates to setting up an underground, his organizing capacity and his determination, the fact that he regularly carried a handgun, and his two attempts to murder Yitzhak Rabin, may his memory be a blessing.

As for her behavior—this was expressed when she revealed that she took the plotter's intentions seriously, and therefore chose to deceive him as to the location of the armory in Beit El. Her knowledge of the seriousness of his intentions also was expressed in the fact that after the matter of the murder was known publicly and even before the identity of the murderer was publicized, the appellant called the plotter and others, including her friend, and to this last one she said that when she found out about the act she wanted 'to hug' the plotter.

The appellant's behavior was expressed also in her approach of Rav

Aviner and the double question she posed to him, meaning whether the law of *Rodef* applies to the Prime Minister and whether a person who says that the law of *Rodef* applies to the Prime Minister is to be turned in to the authorities. This second question is what tells us that she 'knew' about the plot, and when she did not undertake the necessary steps to prevent it—she violated the offense described in section 262 of the law. Therefore I too am of the view that the appeal in all that relates to the conviction is to be dismissed.

7. As to the sentence which the appellant received—nine months imprisonment and fifteen months suspended sentence—it is not a sentence that is severe to an extent that justifies, in my view, our intervention. Even when we take into account as to the sentence, as mitigating, the young age of the appellant, her clean past and the time passed since the commission of the offense—there is no place to say that the Court was harsher with the appellant beyond what is appropriate. Therefore, I am of the view that the appeal is to be dismissed as to all of its parts.

It was decided unanimously to dismiss the appeal of the conviction, and by majority opinions, against the dissenting opinion of Justice Turkel, it was decided to also dismiss the appeal as to the sentence.

28 Shvat 5761
21 February 2001