Crim. A. 242/63

MICHAEL KARITI

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal
[June 30. 1964]
Before Berinson J., Manny J., Halevi J.

Incorrect returns of capital and income by reason of omissions - Duplication alternative counts - Amendment of indictment - Implied admission of offence arising out of amendment - Evidence Ordinance, 1924, sec. 9.

The appellant was charged on five counts of incorrect capital and income returns over some three years. One count was struck out by mutual consent. He was convicted by the Magistrate's Court on two counts and acquitted of the remaining two. On appeal to the District Court he was acquitted of a further count. Affirmation of his conviction on the remaining count was vaguely attributed to one of two years or both of them and the charge was amended accordingly and in the result the struck out count was revived. The appellant pleaded on appeal that in convicting him the District Court exceeded its powers and that capital and income returns were not admissible in evidence under the law. not having been voluntarily made.

Held. In the circumstances, the District Court was not justified in amending the indictment without giving the accused the opportunity to be heard. A count which has been struck out by consent before trial cannot in any event be revived. Furthermore, conviction on separate alternative charges under one count cannot stand because of duplication and uncertainty since the accused cannot thereafter plead, if necessary, *autrefois convict* or *acquit*.

The requirement to make capital and income returns and other relevant information in accordance with the law does not render an admission involuntary. The confession rule must be distinguished from the

privilege against self-incrimination. The test of the former goes to the means in which it was obtained. The latter rests in the "inhumanity" of placing a person in the legal dilemma of being criminated for an offence already committed or perpetrating another offence by refusing.

Israel cases referred to:

(1) *Cr.A. 51/61-Attorney-General v Aharon Steinberg* (1961) 15 P.D.1602.

(2) *Cr.A. 114/52-Ezra Habara v Shoshanah Yeroham* (1953) 7 P.D.

(3) *Cr.A.* 20-21/*49-A1i Mahmad Hussein Abdul Ha'adi and others v Attorney-General* (1950) 3 P.D. 13.

(4) Cr.A. 307/60-*Jarboni and others v Attorney-General* (1963) 17 P.D. 1541.

(5) Tel Aviv S.C.C. *3/54-Attorney-General v Victor Mizan* (1956) 11 P.M. 140.

English cases referred to:

(6) R. *v Surrey Justices.* Ex *parte Witherick* (1932) 1 K.B. 450.

(7) R. *v Molloy* (1921) 2 K.B. 364.

(8) R. *v Wilmot* (1933) 24 Cr.App. R. 63.

(9) R. *v Scott* (1856) 7 Cox C.C. 164.

(10) R. *v Colpus & Boorman* (1917) 1 K.B. 574.

(11) *Re Worral* Ex *parte Cossens* (1820) Buck. 531.

(12) R. *v Slogget* (1856) 7 Cox C.C. 139.

(13) R. *v Noel* (1914) 3 *K.B.* 848.

(14) *Comm. Customs & Excise v Ingram* (1948) 1 *All E.R.* 927.

Arnerican cases referred to:

(15) *State v Reinhart* (1895) *cited in Wigmore on Evidence* (3rd ed) Vol 3, p.239.

(16) *State v Novak* (1899), *ibid*., p.240.

(17) *State v Porter* (1897), *ibid*. p.245.

(18) *State v Guie* 186 Pac 329 (1919), *ibid*., p.245

(19) *Wilson v U.S*. 221 U.S. 365 (1911).

(20) *Davis v U.S*. 328 U.S. 582 (1946).

(21) *Shapiro v U.S*. 335 U.S. 35 (1948).

(22) *pano v New* York 360 U.S. 315 (1959).
(23) *Blackburn v Alabama* 361 U.S. 199 (1960).
(24) *Nicola v U.S.* 72 F. (2d) 780 (1934).
(25) *Hanson v U.S.* 186 F. (2d) 61 (1950).

A.S. Shimron for the appellant.
A. Kamar, Deputy State Attorney, for the respondent.

BERINSON J. The appellant was tried by the Haifa Magistrate's Court on the following five counts under sec.77 of the Income Tax Ordinance, 1947:
(1) giving incorrect information on a return of capital submitted as at 31 March 1957 in that he included an excess of 620 sovereigns;
(2) giving incorrect information in a return of capital submitted as at 31 March 1959 in that he did not include a sum of IL. 12,500:
(3) preparation of an incorrect return for the 1957 tax year in that he declared an income of IL.3,600, and thereafter reached agreement with the Assessing Officer whereunder his income for that tax year was put at IL.5,000 whereas his true income in that tax year was IL.69,490, thus omitting without reasonable explanation from the said return income amounting to IL.65,880;
(4) a similar offence of omitting the same income of IL.65,880 from the return for the 1958 tax year;
(5) an alternative offence of omitting the same income of 1L.65,880 from the returns for the 1957 and 1958 tax years.

At the outset counsel for the appellant pleaded that the fifth count suffered from being duplicatory and further did not disclose an offence, and with the consent of the representative of the Attorney-General, it was struck out.

In the Magistrate's Court the appellant was acquitted of the second and fourth counts but was convicted of the first and third counts for omitting an amount of IL.35,800. He appealed against the conviction but the Attorney-General did not appeal against the acquittal. The District Court acquitted the appellant on the first count as well but found him guilty of the third count, amending the conviction as follows: "Since we are unable to

determine whether this amount (of IL.35,800) was omitted from the return for the 1957 tax year or from that for the 1958 tax year, the conviction will stand for omitting this amount from the return for the 1957 tax year or from that for the 1958 tax year or from both together." In so convicting him, the Court treated the conviction as more in accord with the fifth count which had been abandoned as above but felt justified in doing what it did by virtue of its powers under sec. 12 (5) (b) of the Magistrate's Court Jurisdiction Ordinance (1947) to amend a count in order to give such judgment as, in its opinion, ought to have been given by the Magistrate's Court. In so doing the District Court relied on the judgment of this Court in *Attorney-General v Steinberg* (1), stating that in any event if the appellant did not omit chargeable income from the return for 1957, he omitted it for 1958, or omitted part in each year.

It seems to us that the path which the District Court followed is not open to us. Appellant's counsel rightly urged that by so convicting the District Court went beyond its powers. Under the said section the power of a District Court as an appellate court is to give such judgment as should in its opinion have been given by the court below on the charge of the evidence adduced. Might the Magistrate's Court, at the end of the hearing, have reverted to the fifth count and convicted for it, after having been included in the charge sheet and struck out with the consent of the prosecution in view of the opposition of defendent's counsel? It seems that it could not, precisely because it was struck out. And if the Magistrate's Court might not so revert, then also the District Court could not.

Mr. Shimron frankly admitted that the appellant was not substantively put at a disadvantage by the District Court's amendment of the charge, and had he been given the opportunity to plead against the charge in the manner which the District Court had in its judgment, he would not have advanced any new argument against the charge itself nor put in any evidence further to that before the court. Yet, he argues, had he had the opportunity to plead against the charge in its new form he would have shown that the District Court was not empowered to convict as it did - at least, he would have shown that the conviction certainly suffered from being duplicatory.

We agree with Mr. Shimron that in the circumstances of the case, as described above, it was not proper to vary the counts without giving the Defendant good opportunity to

plead to the variation, and had that been done, he would have had something to say to prevent such conviction as the District Court decided upon. Indeed, the fifth count was not struck out in vain by the Magistrate's Court without opposition from the prosecution. It is clear to us that in its original form it did not disclose any offence since the duty is to make a return of income for each tax year separately (sec. 43A of the Income Tax Ordinance) and no duty exists to submit a return for two years together. The offence can only be the making of an incorrect return for one particular year. Neither can the conviction on the amended count stand, first, because of the above point that the Magistrate's court could not revive - even if in an amended form - the count struck out by it at the outset and that therefore the District Court was debarred from doing so; and secondly - and this is the main reason - because the new count, as phrased by the District Court, contains in fact a number of separate alternative offences, the omission of the amount of IL 35,800 from the return for 1957, or the omission of that amount from the return for 1958, or the omission of an unaxetained part of that amount from the return for 1957 and omission of the remainder from the return of 1958.

Such a conviction is defective both for duplication and uncertainty. "1t is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict:" R. v Surrey Justices* (6) at 452; see also R. *v Molloy* (7) and R. *v Wilmot* (8).

According to *Attorney-General v Steinberg* different offences can be contained in one indictment in the alternative, provided that each is put as a separate count. lf the prosecution succeeds in proving that the Defendant has *prima facie* committed one of the alternative offences, the Defendant must answer to the charge. Should he not do so or not succeed in exculpating himself from all the alternative offences, he can be convicted of one of them but not on the basis of the very same facts of all of them or in a vague manner of one or other offence without choosing one of them.

For this reason, we must go back to the third original count and inquire whether he could be convicted of that or alternatively of the fourth count. These two counts of which the defendant was charged in the Magistrate's Court are in their nature alternative. That

they are so is not expressly stated in the indictment but that is unnecessary where they are clearly so. It is indeed manifestly clear in the present case: the appellant is alleged to have omitted an amount of IL.65,880 once only in one of two years but the prosecution did not know precisely in which of them. He was therefore charged with the omission of the entire amount alternatively in the one or the other year. Accordingly the Magistrate's Court could, at its election, have convicted him of one of these two alternative charges upon finding that all or part of the amount was omitted from the return for one of the two years. Since it found that an amount of IL.35,800 was omitted in the 1957 tax year, he was convicted of the third count and exonerated of the fourth count. There was no appeal by the prosecution against the latter, but according to *Habara v Yeroham* (2) that does not deprive the appellate court of the power to convict for the offence for which he should initially have been convicted on the evidence adduced in the case. Notwithstanding, therefore, the acquittal by the Magistrate's Court on the fourth count and the fact that the Attorney-General entered no appeal, the District Court could have convicted the appellant of one of the two counts, depending on the evidence before the Magistrate's Court. This course which was open to the District Court is obviously open to us as well, and we shall later consider the possibility and need to proceed accordingly.

Before doing so, we must deal with two other arguments by Mr. Shimron, each of which, if accepted, may relieve us from the necessity of dealing with the details of the omission alleged against the appellant.

The first argument is that in the course of other proceedings between the parties regarding the assessment for tax year 1957 ... counsel for the respondent pleaded an income of IL. 22,000 and the State is therefore bound by that. The income was at first fixed by agreement for each of the years 1952 to 1957 inclusive. Since, however, the appellant's declarations of capital disclosed unexplained differences, the Income Tax Commissioner reopened the assessments and increased them and also determined the appropriate assessments for 1958 and 1959. That was, done by distributing the capital differences among all these years; for 1957 the new assessment was put at IL. 22,000 as against the appellant's declared income of IL. 3,600 and the income earlier agreed of IL. 8,000. The argument was that this determination by the Commissioner, approved by court on appeal

against the assessment, is by way of an admission by the State of the correct income of the appellant in that year and the State now cannot argue otherwise here.

I must say that I have not quite understood the argument. What admission is there which prevents the State from arguing otherwise or in contradiction? The Commissioner estimated the appellant's income on the basis of the disclosed capital differences and made an arbitrary division of these in respect of those years according to his best judgment. This is not to be regarded as a determination of the true income of the appellant in those years, which bars the State from showing the facts as they really were. The determination is no more than was earlier agreed by the Assessing Officer to put the appellant's income for 1957 at only IL. 8,000. Mr. Shimron himself agrees that what occurred does not create an estoppel against the State and is not to treated as a final determination. If that is so. the most he can say is that the Magistrate's Court should have weighed the State's submissions in this case in the light of the fact that they vary from those made in that case. The evaluation of the evidence is primarily the concern of the court hearing the matter. In the present instance the Magistrate's Court had to decide which was preferable, the vague assessment of the Assessing Officer or the result emerging from all the evidence put to it. It preferred the latter and no one complained about that.

Incidentally, had we said that the Commissioner's assessment was determinative, then at least this "admission" upon which the appellant relies is calculated to convict him at once for concealing an amount of IL. 18,400, the difference between the assessment of IL. 22,000 and a declared income of IL. 3,600, and the plea that the appellant had not committed any offence would fall. I am certain that had the prosecution attempted to base conviction on this ground, Mr. Shimron would be the first to protest and rightly.

Mr. Shimron's second submission concerns two declarations of capital of March 31, 1957, and March 31, 1959, which the appellant filed with the Assessing Officer on his request under sec 45(1) of the Income Tax Ordinance, and which served as a basis for calculating the amount omitted from the annual returns of income. Mr. Shimron argued that the declarations of capital presented in court are not admissible as evidence. They form confessions in the sense of sec. 9 of the Evidence Ordinance since they contain statements from which the likely conclusion is that a criminal offence has been committed, and it was

given to the Assessing Officer, a person in authority. (See sec. 3 of the Income Ordinance which defines an Assessing Officer as an officer appointed to implement the Ordinance, possessing wide powers, including those under sec. 45). The declarations, being confessions which the appellant was compelled to make under the law, lacked "free and voluntary" foundation and are therefore inadmissible. Mr. Shimron argued further that the Income Tax Ordinance did not permit the use of information delivered under sec. 45 as evidence against the person delivering it, even if it is liable to incriminate him and in the absence of such a provision it is not permissible as evidence. Initially, the submission appeared very peculiar to me, its reasonableness somehow worried me, and as I continued to think about it and examine the sources I indeed grew conscious that it was completely baseless**.**

The first question is whether the declarations of capital, each on its own and together, fall within "confessions" within the meaning of sec. 9 of the Evidence Ordinance. *Archbold's Criminal Pleading* (34th ed.) p. 415, para 1104, states that "an extra-judicial confession is made where the prisoner makes an admission ... of his guilt or of any fact which may tend to the proof of it."

Mr. Shimron relies on this definition. He agrees that although the declarations as such do not confess any guilt, they contain, in his view, an admission of facts which tend to guilt. Mr. Kamar on the other hand argues that according to its terms sec. 9 of the Evidence Ordinance is limited to "confessions by the accused that he has commited an offence. It therefore applies only to actual confessions of an offence and not to admissions of facts which in themselves do not point to guilt. In his opinion, the terms of see. 9 are more in accord with the English rule which we have so far followed, and he suggests that we replace the one with the other. The rule in the U.S., as given by *Wigmore on Evidence* (Third ed.), vol. 3, para. 821, pp. 238 ff, is more stringent than the English rule.

> "A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it."

It clearly follows from this definition that an exculpatory statement by the accused or his acknowledgment of subordinate facts colourless with reference to actual guilt or in other

words not essential to the alleged offence is not a confession (*ibid*. pp. 239 & 243). The many precedents cited justify the above summary of the rule.

> "A 'confession' in a legal sense is restricted to an acknowledgement of guilt made by person after an offence has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred." *(State v Reinhart* (15)).

> "A confession is a voluntary admission or declaration by a person of his agency or participation in a crime... To make an admission or declaration a confession, it must in some way be an acknowledgement of guilt." (State v *Novak* (16)).

> "We take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves impart guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established.:' *(State v Porter* (17)).

And finally, a quotation which to some extent accords with the circumstances of the present case:

> "A confession is a direct acknowledgement of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction." *(State v Guie* (18)).

It is true that see. 9 of the Evidence Ordinance speaks of "confessions of an offence" but, as Mr. Kamar admits, the courts in this country normally regard every admission of a fact indicative of guilt or tending to prove guilt as a confession, and I do not see any reason for

departing from this course, which is at one with English practice. A local precedent may be found in the District Court judgment in *Mizan* (5), from which this Court did not demur on appeal.

The next question is whether the two declarations of capital meet the above tests of a confession. The first declaration, relating to Mar. 31, 1957, was filed on October 8, 1957. At that date, obviously, no income return had been submitted for the 1957 tax year; that was only done on May 18, 1958. It is therefore clear that on the date the declaration of capital was filed no offence had as yet occurred and that the declaration cannot be "a confession by the accused that he has committed an offence" (see. 9). On the other hand the second declaration, relating to March 31, 1959, was filed on September 9, 1959. At that date, the Assessing Officer already had the two income returns for 1957 and 1958 (the second was filed on June 18, 1959). Accordingly when the second declaration was filed, the offence of delivering an inaccurate return for 1957 had already been committed, if it was inaccurate. In this regard alone must the second declaration of capital be regarded as a confession, if (together with other documents) tending to the appellant's guilt.

Mr. Kamar goes on to urge that this declaration of capital does not have to be tested by "voluntariness" since it was not filed at the request of the Assessing Officer but by the appellant on his own initiative, not as a person suspected of having committed an offence but apparently in connection with objections to the assessments for 1957 and 1958. This is not quite correct. The appellant was invited to appear at a hearing before the Assessing Officer and was asked to bring along documents in his possession on which his objections to the assessments were based. Attached to the invitation was a form of declaration of capital for March 31, 1959. That was clear notice that this declaration was among the documents he was to bring with him. The appellant in fact so understood it and did what was required. Nor can it be said that at the time the appellant was not suspected of commission of an offence. Already on January 23, 1959, his bank safe was searched and gold coins were found there which he had not declared; the appellant was suspected because of that by the income tax authorities.

We now reach the main submission of Mr. Shimron, that the declarations of capital were not made voluntarily by the appellant and are therefore inadmissible in evidence

against him. This submission is based on the fact that the appellant was compelled to make the declarations under statutory dictate, since he was threatened by criminal sanctions under sec. 76 of the Ordinance if he did not comply with the request of the Assessing Officer.

There are a number of answers to this submission.

(1) When is an admission treated as a confession not voluntarily made? The test, it was said in Ha'adi (3), is a single one. "Where the admission was made by the defendant voluntarily, without compulsion, temptation or persuasion, it is valid, where it was not so made, it is invalid." To use the usual formula, a confession obtained under threats or improper assurances is invalid:

The Assessing Officer's request under sec. 45 of the Income Tax Ordinance to make a declaration of capital or to deliver any other information a person has in connection with his income is not unlawful compulsion or temptation or persuasion that can invalidate the declaration made or information delivered in response to the request.

In dealing with extra-judicial admissions Wigmore on *Evidence* (3rd ed.) vol. 4, para. 1050, pp. 7-8, says that "admissions made under a duty imposed by law stand on a special footing. It would seem that nothing in the principles governing Admissions excludes them." As exception to the rule he mentions *inter alia* the following two instances in which an admission may be invalidated. The first is when the statute imposing the duty requires a report to a public official but makes its contents confidential and expressly renders it as privilege a communication; even if not express the privilege may be implied where policy obviously requires it. Secondly, in criminal cases, an admission of this kind might receive protection from the privilege against self-incrimination.

In our opinion, neither of the said instances is applicable here. Not only does the Income Tax Ordinance not extend any privilege to information delivered in response to a notice under sec. 45 but it makes a failure to respond or the delivery of wrong information a criminal offence (secs. 75 & 76). All this shows that the legislative intent was that a person requested to deliver information which assists in determining his true income must produce that information, accurate and true. It cannot be that information is privileged from an

application to court against the person delivering it. If it were so, that would enable or facilitate the delivery of inaccurate information without fear and the purpose of the law set at naught. In *R. v Scott* (17), dealing with the examination of a bankrupt under a section of the Bankruptcy Act which bound him to answer questions touching his business affairs etc., it was decided that his answers even though incriminatory, were good evidence in a criminal charge against him. Lord Campbell said,

> "lf the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it."

And then,

> "When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment... We therefore think we are bound to suppose that in this instance, in which no such protection is provided, it was the intention of the Legislature to compel the bankrupt to answer interrogatories respecting his dealings and conduct as a trader, although he might thereby accuse himself and to permit his answers to be used against him for criminal as well as civil purposes" (at pp. 170-71).

Likewise, Alderson B put it succinctly:

> "My judgment proceeds upon the ground that if you make a thing lawful to be done, it is lawful in all its consequences; and one of its consequences is that what may be stated by a person in a lawful examination, may be received as evidence against him"(at p.175).

(2) The principle that invalidates incriminatory answers not given voluntarily, does not operate here for another reason as well. It is a leading rule that an official document kept by or found in the possession of a public official must be accessible to the representatives of the public and generally to the entire public, and it can serve as prima facie evidence of the truth of its contents. And its presentation in evidence, even if it tends to incriminate the public official or any other person, is not to be barred unless the law otherwise prescribes or if for some other lawful reason that official or other person is protected against disclosure of the document and its presentation in court. The reason is that the State requires it to be kept and does not ask of the official to commit an offence. "If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law" (*Wigmore on Evidence* (3rd ed.) para. 1259c, p. 349). 349).

This reason is equally operative with regard to records which the law requires the citizen to keep, including returns and other documents made under statutory requirement. These documents are not merely the private papers of the citizen which he can conceal and prevent their disclosure as evidence in court. They possess a public character and therefore if lawfully obtained are valid evidence: *Wilson v U.S.* (19); *Davis v U.S.* (20); *Shapiro* v U.S. (21). The public has an interest in their non-concealment and their availability for every lawful purpose. This interest prevails over the private interest of their owner to prevent disclosure.

(3) Although pleaded, there was in fact no proof that the declaration of capital was given under compulsion of "threat" of criminal sanction hanging over the appellant in the event of his non-compliance. The notice sent to him asked him to present a declaration in the form attached. The form follows sec. 45 of the Ordinance but contains no notice or warning that non-delivery of the required declaration is an offence under the law. True, every person is presumed to know the law. That is a legal presumption. It is another question whether in fact the appellant was aware of the statutory penal sections and as a result of such knowledge complied with the request but otherwise would not have done so. The burden of proof that the evidence which the appellant wishes to exclude was given voluntarily is, we know, upon the prosecution. A plea of improper influence exercised on the defendant, in consequence of which he confessed, must be explicit so that the prosecution knows what case it has to meet. Here the appellant neither attested nor pleaded that he knew of the

statutory penal sections and these it was which moved him to respond to the request and deliver the declaration of capital involved. In point of fact, there was no proof of the kind of influence exerted on the appellant that would justify the declaration being invalidated as evidence. The form asked the appellant to give correct particulars and to complete the form accurately. There is no reason for assuming that as a consequence he was influenced to include incorrect statements in the declaration: R. v *Colpus* (10).
(Berinson J. then analyzed at lenght the facts about the omissions and the related calculations, and continued.)

The result ultimately is that we uphold the conviction on the third count and find that a sum of IL.21,252 was omitted, without reasonable explanation, by the appellant from his return of income for 1957.

On the assumption that the amount omitted was IL.35,800 the appellant was sentenced to a fine of IL.14,000 or six months' imprisonment and a suspended term of three months. In respect also of the omission as above, although it is less, we do not think that the sentence is excessive and we uphold it and dismiss the appeal.

I have read the judgment of my learned friend, Halevi J., and I concur in it.

MANNY J. I concur in the judgment of my learned friends, Berinson J. and Halevi J.

HALEVI J. I agree.

2. As for the admissibility of the declaration of capital (exhibit P/4) which was the bone of contention in this appeal, it seems to me that learned Defence Counsel, and following him learned Deputy State Attorney, did not sufficiently distinguish between the confession rule and the privilege against self-incrimination.

The basic argument of Mr. Shimron was that the appellant submitted the declaration of capital to the Assessing Officer on his request under sec 45(1) of the Income Tax Ordinance, 1947, a request behind which lay the criminal sanction of sec. 76(1). For myself, it is immaterial that this criminal sanction was not made express in the notice of request sent

to the appellant, and I am ready to assume in his favour that he submitted return P/4 out of necessity, in order only to abide by his statutory obligation under sec.45(1) and with knowledge of the law, including sec. 76(1). Nevertheless that does not amount to "compulsion by some one in authority" in the sense of sec. 9 of the Evidence Ordinance but "compulsion under law." The only question that can arise regarding this kind of compulsion is whether the law goes so far as to compel a person to incriminate himself or leaves the door open to the privilege against self-incrimination.

3. The principle behind the privilege against self-incrimination - "one of the most sacred principles in the law of this country" (Lord Eldon in *Ex parte Cossens* (11) at p. 540) - is a Common Law principle which was given "constitutional" status by the Fifth Amendment in the United States ("No person...shall be compelled in any criminal case to be a witness against himself"). The source, it appears to me, lies in Jewish law, in the rabbinical formula "no person can declare himself a criminal *(rasha)" (Sanhedrin* 9b). The Latin aphorism - *"Nemo terretum se ipsum accusare (or predere)"* - is an almost literal translation and attests to the Jewish source. (See the passages cited by Riesenfeld, "Law Making and Legislative Precedent in American Legal History", (1949) 33 *Minn L.R.* 103,118, reproduced in McCormick, *Law of Evidence* (1954) p. 253, notes 9-10. See for the history of the principle in England, *Wigmore on Evidence* (McNaughton Rev. (1961)) vol. 8, para. 2250). With the reception of the substance of the Common Law in this country, through article 46 of the Palestine Order in Council and sec. 11 of the Law and Administration Ordinance, 1948, the Jewish law principle returned to its original source.

One must indeed distinguish carefully between the embracing meaning of the principle in Jewish Law, that a person cannot incriminate himself by his own utterance, and its more limited meaning in the Common Law, a person is not required to incriminate himself. "A person is, vis-a-vis himself, a relative, and no person can declare himself a criminal," *(Sanherdin.* 9b) is explained by Rashi *ad locum:* "That is to say, he is not incriminated by his own evidence since Torah disqualifies a relative as a witness."

4. For all the close similarity of the self-incrimination privilege and the confession rule and in spite of their possible overlapping in certain instances, a basic difference exists between them: see R. v *scott* (9) at pp. 169-70, and *Wigmore on Evidence, ubi supra,* para. 2266.

(a) The "confession" test under see. 9 of the Evidence Ordinance is directed to examining the *means by* which the confession was obtained from the defendant. If these means were "promises or threats" by "a person in authority", then

> "it would be dangerous - so the legislature assumes - to rely on it as being truthful... The true reason for excluding confessions not made 'voluntarily' is based on the consideration that it would be dangerous to rely on it for that reason as trustworthy evidence**."**

(Agranat J. *in Jarboni* (4) at pp. 155 3-54). (See, however, the reservations of McNaughton in *Wigmore on Evidence* (McNaughton Rev.) vol. 8, para**.** 2266, about this reason (which was that given in Wigmore 3rd ed.) in view of recent American decisions: *Spano v New York* (22) and *Blackburn v Alabama* (23)).

On the other hand the self-incrimination privilege is not based on fear of the untrustworthiness of incriminating evidence. The reason (or one of the important reasons) for it is that it is immoral - and even inhumane - to place a person in the "legal dilemma of either incriminating himself by a true admission of the crime he committed or committing a new crime by refusing to give evidence or by giving false evidence." (Cf. Williams, *The Proof of Guilt* (3rd ed.) p. 53). In this situation, according to the Common Law, a person may refuse to answer a question to which otherwise he would be obliged under law to reply truthfully. (See Wigmore on *Evidence para.* 2251, and particularly pp. 316 - 18).

(b) By requiring the prosecution to produce "evidence of the circumstances in which (the confession) was made" see. 9 is concerned with the factual question of whether any pressure or inducement was exerted by a person in authority to bring about the confession. Self-incrimination, by contrast, does not come from any "means" used on the defendant or accused to move him to confess the alleged offence but from the very "dilemma" of that person who knows in his heart - and perhaps alone knows without any one else suspecting him - that a true answer to the lawful question put to him might criminate him of the offence he has committed. The privilege therefore - as against the confession rule - obtains in cases of "legal compulsion" that would otherwise exist, that is, when the law (or the person acting in its name, a judge or authorized investigator) requires or "compels" the person being examined to give full and accurate answers to questions lawfully addressed to him. In this

situation, and only in this situation, does the question arise - and it is a question of law - whether in fact the law compels an answer even if it tends to be "self-incriminatory" or whether the person can insist on "the privilege" and refuse to answer questions which may expose him to the danger of a criminal charge.

(c) The stage of the proceedings at which the privilege may be exercised varies from that at which the question of the admissibility of confession occurs. The privilege is to be claimed before the possibly incriminatory answer is given. A person possessing the privilege who answers a question without protest, even if it may incriminate him, has waived the privilege and his answer is admissible against him in every civil and criminal court: see R. v *Slogget* (12) and R. v *Noel* (13): Kenny Turner, *Outlines of Criminal* Law (17th ed., 1958) para. 590; Cross *Evidence* (2nd ed., 1963) p. 227: *Wigmore on Evidence* (McNaughton Rev.,) paras. 2268 and 2275.

Only when the person, relying on the privilege, refuses to answer the question and is unlawfully required to answer it, will the incriminating answer be excluded as evidence against in any trial: R. v *Scott* (9): Kenny-Turner, *loc. cit.;* Wigmore, *op. cit.,* para. 2270, p. 417 and the precedents in McCormick, *op. cit.* para. 127 notes (1) and (8); Cf. *American Law Institute, Model Code of Evidence* (1942), rule 232 and *Uniform Rules of Evidence* (1953), rule 38.

5. Accordingly, the privilege is only to be pleaded and the question of its application in a given instance is only to be treated on a refusal to answer a question which has been put or to produce a document which has been requested. Had the appellant here refused at the time to file the return of capital requested under sec. 45 (1) of the Income Tax Ordinance or to answer any of the questions appearing on the form of the return, he could have been sued under sec. 76 (1) which provides that "every person who, without sufficient cause,... fails to comply with the request of a notice given to him under this Ordinance" is liable to imprisonment and fine. At the trial, the appellant could have pleaded in defence that the self-incriminating privilege was "sufficient cause" for failing to comply with the request of the Assessing Officer, and in view of this defence the court would have had to decide whether in fact the privilege existed as regards a request under sec. 45 (1) of the Ordinance. There is no need to consider this question in the present appeal since the appellant waived the

privilege (if any) by giving full answers to the questions set out in form P/4 and submitting a return of capital without contestation or opposition. In this regard, there are the direct precedents of *Nicola v U.S.* (24) and *Hanson v U.S.* (25) where it was held that persons liable for income tax, who delivered to the tax authorities upon request their books, documents and other information cannot subsequently rely on the Fifth Amendment in order to invalidate the use of this material as evidence against them in a criminal trial in which they stand charged for evasion of income tax. In *Nicola v U.S.* (24) it was said at p. 784 that the purpose of obliging a tax payer to hand over information is to enable the authorities to calculate the tax and verify its accuracy, and the tax payer cannot refuse to supply information and the question was whether he had waived privilege. The constitutional right, it was said, was intended for the benefit of the witness and if it was not claimed, he was deemed to have waived it. He could only claim the privilege from the Government agency when refusing to produce his books. It was too late to do so, after the information had reached the agency with his consent.

6. These grounds are sufficient for rejecting every plea against the admissibility of the return of capital. If the appellant possessed a self-incriminatory privilege, he had waived it. I should add that I can see no foundation in the plea itself of privilege regarding see. 45 (1) of the Income Tax Ordinance.

In Israel (unlike the United States) there is no constitutional assurance of the privilege and the legislature is free to repeal or deny it. In R. v *Scott* (9) Lord Campbell said (at p. 170):

> "Finally, the defendant's counsel relies upon the great maxim of English Law *memo tenetur se ipsum accusare*. So undoubtedly says the Common Law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself: that is, that he must answer questions by answering which he may be criminated."

The question whether a law which binds the citizen to deliver information, documents and returns to the Government in matters defined by law compels him to incriminate himself or whether it leaves it open to him to claim the self-incriminating privilege is ultimately, in

the absence of express provision, a question of statutory interpretation. At all events, in the absence of express statutory provision, a citizen who files a return (or other material as aforesaid) under lawful duty is clearly not privileged against the use of the material in evidence against him in a criminal trial. Not only is there no provision in the Income Tax Ordinance precluding the use of a return under sec. 45 (1) as evidence in a criminal trial of the person making the return for an offence under the Ordinance, but sec. 4 (2) provides the reverse:

> "No person appointed under... this Ordinance shall be required to produce in any court any return, document or assessment, or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duties under this Ordinance except as may be necessary for the purpose of carrying into effect the provisions of this Ordinance, or with a view to, or in the course of a prosecution for any offence committed in relation to income tax."

A distinction must be made between the "self-incriminating privilege" and the "immunity" from the production of returns in court. See. 4 (2) denies the immunity of returns made to the Assessing Officer under see. 45 (1).

Sec. 45 is not primarily directed to the disclosure of offences against the Ordinance, but the authority of the Assessing Officer to request returns, including one of capital, is to obtain full information about a person's income. The immediate purpose of the section is fiscal, to ascertain a person's true income so as to collect the tax due from him under the Ordinance. Were the citizen given the "privilege" to refuse to answer questions likely to incriminate him of an offence against the Ordinance (like the one dealt with here, omissions of income from the annual return), the privilege would prejudice not only the task of proving the criminal offence (which is the function of the privilege) but also the carrying out of the fiscal purposes of sec. 45. Two interpretations only are possible of this section - one which enables the Assessing Officer to obtain full information about a person's income and accordingly to determine and collect the tax due, and also, if the return discloses incriminatory matter, to pass such matter on to the Attorney-General for taking criminal proceedings; and one which permits a person receiving a notice under the section to refuse

to answer incriminating questions and accordingly also to prevent the Assessing Officer from obtaining full information about his income, that is, to prevent the due tax to be fixed and collected. Of these two interpretations, the first is to be chosen, for the second frustrates the purpose of the law.

A similar question was dealt with in England in connection with income tax law in *Commissioners of Customs and Excise v Ingram* (14). Under sec. 20 of the Finance Act, 1946, every registrable person must keep records and accounts, and preserve and produce them to the Commissioners as required. Every merchant, importer, etc. is also required to furnish the Commissioners information relating to the purchase or import of goods and to produce the books, accounts or other documents concerning the goods, as may be requested. The Act provides penalties for non-compliance with any request. Under Sec. 14 of the Crown Proceedings Act, 1947, the Crown may apply in a summary manner for the delivery of any accounts, the production of any books or the furnishing of any information under the enactments relating to purchase tax. The Commissioners applied for an order against the respondent. Lord Goddard stated (at p. 929) that

> "counsel for the defendants has argued that the court would not order the production of documents which may incriminate the subject. In my opinion, one cannot make any such limitation here. The very object of the Finance Act, 1946, in the sections which relate to the matter, is to give to the Crown the power of investigating a person's accounts and so forth to see whether he is defrauding the Revenue by not paying that which he ought to pay... (It) is quite a common-place of legislation designed to protect the revenue of the Crown, as it is realised that all the information must generally be within the knowledge of the taxpayer or the subject,... to oblige him to do certain things which may have the effect of incriminating him... It is said that when a man is called on under sec. 20 to produce his documents, his books, invoices or accounts..., he is entitled to take objection and say: 'I will not produce this one or that one because it may incriminate me.' It seems to me that that would be stultifying the whole purpose of the section, and the claim for privilege,

which, as between subject and subject in an action, may be made, has no application to this class of discovery or production."

These reasons are equally applicable in the present case.

Appeal dismissed

Judgment given on June 30. 1964.