CrimFH 532/93

Rochelle Manning

v.

Attorney-General

The Supreme Court sitting as the Court of Criminal Appeal

[16 August 1993]

Before Justices A. Barak, S. Levin, E. Goldberg, E. Mazza, D. Dorner

Further hearing in the Supreme Court, on the judgment of the Supreme Court (Justices A. Barak, S. Levin, E. Mazza) on 18 January 1993 in CrimA 2998/91, in which the Supreme Court dismissed the appeal of the petitioner on the judgment of the District Court which declared the petitioner extraditable.

Facts: The petitioner was tried for murder in the United States. The trial was declared a mistrial after the jury failed to reach an unanimous verdict, and the prosecution cancelled the indictment, reserving the right to submit a new one.

The petitioner returned to Israel. The United States requested her extradition to stand trial for the same murder, and the District Court declared her to be extraditable. Her appeal to the Supreme Court was denied, but the President of the Supreme Court granted her application to hold a further hearing on the question of whether the defence of double jeopardy was relevant to the extradition proceedings.

The petitioner argued that although under American law she would not have a defence of double jeopardy, she would have this defence under Israeli law if tried in Israel, and therefore Israel should not extradite her to the United States.

Held: If tried in Israel, the petitioner would not have a defence of double jeopardy under Israeli law. She was therefore extraditable.

Petition denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992.

Extradition Law, 5714-1954, ss. 2, 8.

Penal Law, 5737-1977, ss. 30, 300(a)(2).

Israeli Supreme Court cases cited:

[1] CrimA 72/60 *Attorney-General v. Juiya* [1960] IsrSC 14 1093.

[2] CrimA 244/73 *Rever v. State of Israel* [1974] IsrSC 28(1) 798.

[3] CrimA 250/77 *State of Israel v. Krishinsky* [1978] IsrSC 32(1) 94.

[4] HCJ 20/50 *Schwartz v. Presidency of the Supreme Military Tribunal* [1950] IsrSC 4 185.

American cases cited:

[5] *Arizona v. Washington* 434 U.S. 497 (1978).

[6] *Wade v. Hunter* 336 U.S. 684 (1949).

For the petitioner — Y. Golan.

For the respondent — R. Rabin, Head of the International Affairs Department, State Attorney's office.

JUDGMENT

Justice E. Goldberg

1. The Government of the United States applied to extradite the petitioner and her husband, in order to put them on trial for an offence which, according to its basic elements, is equivalent to an offence of murder under section 300(a)(2) of the Penal Law, 5737-1977.

The District Court granted the application of the Attorney-General and declared the petitioner and her husband extraditable. Their appeal to this court in CrimA 2998/91[*] was denied unanimously in a judgment given on 18 January 1993 (hereafter — 'the judgment').

The petitioner and her husband submitted a petition to hold a further hearing, and their application was considered by the President of this court. In his decision on 1 March 1993, the President denied the application of the husband, but with regard to the petitioner he held:

> 'With regard to Rochelle Manning's petition for a further hearing, which addresses a question about the previous proceeding in the United States, I find there are grounds to hold a further hearing

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[*] *Manning v. Attorney-General* [1993] IsrSC 47(1) 573.

> on the question whether it is relevant, from the viewpoint of the laws of extradition, that a prior criminal proceeding against the petitioner took place in the United States, which was declared a mistrial, and I so order.
>
> Therefore Rochelle Manning's application for a further hearing is granted.'

2. The facts forming the basis of the extradition application are set out in the opinion of Justice Mazza,[*] and we will quote what he says in so far as it is relevant to the question before us:

> 'When the investigation [of the United States' authorities] was completed, Mrs Manning was put on trial, on an indictment that is identical in content to the indictment which is now the basis of the application to extradite her and her husband. The indictment, before a grand jury, was apparently also filed against the appellant and Bill Ross, but because Mr Manning was absent from the United States, the trial was held with regard to Mrs Manning and Bill Ross only. The trial, which took place in December 1988 and January 1989, did not lead to a verdict, for the jury were unable to reach an unanimous verdict. The court therefore decided to discharge the jury and it declared a mistrial. Thus the trial was terminated, and the prosecution cancelled the indictment, reserving the right to submit a new indictment.
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> The appellant was consequently released from arrest and she returned to Israel. After a while (on 27 July 1990), the new indictment was filed against the appellants; this is identical in content to the previous one, and their extradition was requested (on 27 December 1990) on the basis of this' (square parentheses added).

3. Within the framework of the appeal, the petitioner's learned defence counsel argued, as stated in the judgment, that —

> 'Since the appellant has been put on trial once, she should not be extradited in order to allow her to be put on trial a second time: first, because putting her on trial a second time is contrary to the double jeopardy rule, whereby a person should not be put in jeopardy of conviction, for one act, more than once. Second,

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[*] *Ibid*. p. 578.

> because even if, under the law prevailing in the United States, starting a new trial, after the previous trial is terminated as a mistrial, does not constitute a breach of the double jeopardy rule, the extradition application should not be granted on the basis of a wide interpretation of the double jeopardy rule, whereby a mistrial is the "comparative equivalent" of an acquittal.'*

4. This argument was rejected by Justice Mazza for three reasons:

> 'First, because it does not accord with the provisions of the law and the convention; second, because there is not a sufficient basis for determining that putting the appellant on trial a second time will breach the double jeopardy rule within the meaning thereof in American law; and third, because even on the basis of the wide interpretation of the requirement of double criminality, a mistrial cannot be construed, under our law, as an acquittal verdict.'†

The detailed reasoning of Justice Mazza is stated in his opinion, and the reader is referred to it.

5. Justice Barak did not see fit to determine the question whether section 8 of the Extradition Law, 5714-1954, 'includes a closed list of issues that allow a petition for extradition to be denied from the outset.'‡ In his opinion, 'this approach is not absolutely certain,'§ and he would have been prepared 'to adopt a different approach'.** However he accepted the opinion of Justice Mazza, 'that in the circumstances of the case before us — and in view of the law relating to a mistrial in the United States — the appellant does not have… a defence of "double jeopardy" in the United States.'††

With regard to the argument of the learned defence counsel about the 'comparative equivalent' whereby 'a person wanted for trial should not be extradited if, were he to be put on trial in Israel, he would have a defence of 'double jeopardy', even if this defence is not available to him in the country asking for his extradition (the United States),'‡‡ Justice Barak said that indeed 'the question of the comparative equivalent… may arise only within the framework of the requirement of 'double criminality' (enshrined in s. 2 of the

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* *Ibid. p. 5*83.
† *Ibid*.
‡ *Ibid.* p. 591.
§ *Ibid*.
** *Ibid*.
†† *Ibid*.
‡‡ *Ibid*., p. 592.

Extradition Law).'[*] However, whereas Justice Mazza rejected the argument of the defence counsel while expressing a reservation about the approach of Prof. S.Z. Feller (in his book Law of Extradition, the Harry Sacher Institute for Research of Legislation and Comparative Law, 1980, at 167) that one should examine double criminality both *in abstracto* and *in concreto*, Justice Barak left the question undecided 'since *prima facie* "double criminality" must be examined — as Prof. Feller says, ibid. p. 170 — both *in abstracto* and *in concreto*.'[†]

Justice S. Levin also agreed that the appeal should be denied.

6. The starting point in the argument of the learned defence counsel in this petition was that the petitioner does not in fact have a defence of 'double jeopardy' under the law in the United States. Moreover, he did not argue in the appeal that a mistrial in the law of the United States is equivalent to an acquittal in our law. His argument is that in order to declare the petitioner extraditable, it is not sufficient that under the law in the United States it is possible to put her on trial a second time, and that she will not succeed with a defence of 'double jeopardy'. The Israeli court must further determine that even under *our law* the petitioner does not have this defence. This cannot be said to be the case, since —

> 'The "double jeopardy" rule, in its wide meaning, is a fundamental principle of our legal system. It guarantees the freedom of the individual and his right not to be put on a criminal trial once again, after he already was in danger of being convicted. It has even become a "constitutional" right with the legislation of the Basic Law: Human Dignity and Liberty… and this "constitutionality" must influence the method of interpretation that must be adopted with regard to the Extradition Law.'

It follows that —

> 'Whatever the reasons for the laws of the United States may be, and whatever the circumstances may be there, from our viewpoint, and because of considerations based on the principles of our legal system, it is fitting that the outcome of a proceeding where such a decision was made should be an acquittal, and therefore we should refrain from extraditing someone who has

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[*] *Ibid*.
[†] *Ibid*.

> been discharged because of a mistrial. Just as we would not put him on trial once again before our court, so we should not agree that he should be put on trial once again before the courts of the country making the application.'

This outlook, according to the argument of the learned defence counsel, is similar to what is stated by Justice Barak in the judgment, since Justice Barak asks:[*]

> 'Take the case of a wanted person who is put on trial in Israel, and although he is not acquitted or convicted in Israel, he has in Israel a defence of "double jeopardy" against being put on trial once again in Israel… is it clear and obvious that he should be extradited to a country where he does not have a defence of double jeopardy?'

This is the heart of the petitioner's argument, that she has a defence of 'double jeopardy' in Israel, and why, therefore, was the court in the judgment content merely because under the laws of mistrial in the United States the petitioner does not have a defence of 'double jeopardy' there?

The learned defence counsel further argues that if Justice Barak raises in his judgment the question: 'Would we ever extradite to a foreign country a ten-year-old minor, who has no criminal liability in Israel, but has criminal liability in the foreign country?'[†], how can the petitioner, who does not have criminal liability under our laws because of 'double jeopardy', be extradited merely because she has such liability in the foreign country?

It is unnecessary to emphasize that the thesis raised by the learned defence counsel is based on the argument that the list of situations set out in s. 8 of the Law is not a closed list, and that the law does not set out all the laws of extradition exhaustively, and alongside it we should apply the principles of the Israeli legal system and its values. Consequently a person wanted for extradition has the defence that under the extradition laws, in their wide meaning, he is not extraditable because of the application in Israel of the 'double jeopardy' rule.

7. The judgment was based on the premise that 'the application in our law of the double jeopardy rule with regard to an accused whose first trial was terminated and never reached a verdict, either of conviction or acquittal, was

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[*] *Ibid*., p. 591.
[†] *Ibid*., p. 592.

not in doubt' (per Justice Mazza[*]) and that it is well-known that 'even though the "double jeopardy" rule is not mentioned expressly in the Criminal Procedure Law [Consolidated Version], it is available to every accused in Israel…' (*per* Justice Barak[†]). This assumption about the existence of the 'double jeopardy' rule in our law, even though it is not enshrined in legislation, will continue to appear in our deliberation, even though it has already been said in CrimA 72/60 *Attorney-General v. Juiya* [1] at 1097, that the court was not referred 'to any precedent in which a person was acquitted in Israel on the basis of the defence that an indictment constituted a double jeopardy,' and this is also true of case-law reported until the present.

The defence of 'double jeopardy' is one branch of the rule 'of long standing that a person should not be put on a criminal trial for the same matter more than once' (CrimA 244/73 *Rever v. State of Israel* [2], at p. 801). However, although the defence of a prior conviction or prior acquittal relies upon *res judicata*, 'the prohibition of "double jeopardy" relies on the *danger* of conviction for an offence that an accused faced in a previous trial' (*Attorney-General v. Juiya* [1], at p. 1097).

It follows that this defence will succeed only if the accused was put on trial in the first proceeding under a 'proper' indictment, and before a competent court, for only then was he in danger of being convicted (CrimA 250/77 *State of Israel v. Krishinsky* [3] at p. 96).

The reasons given in American case-law for the rule in the Fifth Amendment of the Constitution that forbids double jeopardy are that the State, which has the resources and the power, should not be allowed to make repeated attempts in order to convict an accused of the same offence:

> 'subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'

Moreover the accused has a —

> 'valued right to have his trial completed by a particular tribunal, which also is not absolute but must at times give way to the public's interest in fair trials designed to end in just judgments.'

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[*] *Ibid*., p. 588.
[†] *Ibid*., p. 592.

The defence of 'double jeopardy' has an additional significance, since the State has an advantage in the second proceeding over the accused, in that it has found out from the first proceeding the strength of his defence and its weak points. See W.R. LaFave and J.H. Israel, *Criminal Procedure*, St. Paul, 1985, at 898-9, and also 21 *Am. Jur.* 2nd, Rochester and San Francisco, 1981, at 440.

8. What can we learn from the aforesaid about the classification of the 'double jeopardy' rule within the framework of criminal liability?

In the defence of 'double jeopardy' the defendant does not attack the facts in the indictment, and he does not claim that they do not disclose a criminal offence. The assumption in this defence is that the criminality of the act does apparently *exist*, but despite this the accused should not be put on trial a second time with a danger of being convicted, after the first proceeding was terminated without a decision about his guilt. If so, raising the argument of 'double jeopardy' has nothing to do with negating criminality.

'Double jeopardy' does not fall, therefore, within the sphere of justice (like 'necessity' and 'justification') where there is no offence *ab initio*, nor is 'double jeopardy' concerned with an exemption (such as repenting of encouragement, under s. 30 of the Penal Law), in which the act led to a criminal offence, but a later event is what cancels the criminal liability. We are also not concerned with the absence of a preliminary condition for the existence of the offence (such a minority and insanity), in which framework are included the cases of incapacity. In other words, the 'double jeopardy' rule, in essence, does not fall within the category of limitations to the *criminality* of the act (see Feller, *Principles of Criminal Law*, the Harry Sacher Institute for the Investigation of Legislation and Comparative Law, volume 2, 5747, at 503-507).

From this it can be seen that the defence of 'double jeopardy', after the first proceeding, presents merely a barrier to the *realization* of criminal liability, under the assumption that this exists. The act was *prima facie* an offence before the first proceeding and it also remains so thereafter, but because of the first proceeding the criminal liability, which arose *prima facie* when the act was committed, cannot be realized. From this the defence of 'double jeopardy' can be seen as an extension of the category of limitations to the realization of criminal liability, where 'the limitation to the realization of criminal liability assumes, as implied by this very expression, the existence of an act that constitutes an offence and criminal liability *that already rests* with a person who ought to be tried for it, or with a person who has already been tried for it,

but its realization is barred, in some degree, because of a *special reason*, which arises later, and which is the limitation itself' (Feller, *ibid*., vol 2, at pp. 619-20).

9. So it transpires that the question whether the 'double criminality' required in section 2 of the Extradition Law must be considered, only *in abstracto* or also *in concreto*, does not arise at all when the person whose extradition is requested raises the defence of 'double jeopardy', which he does not have in the country making the request. This is because, as explained above, the *prima facie* criminality of the act, also under our law, is the point of origin for the actual defence, and here lies the basic difference between this defence and a defence that the act attributed to the person wanted is not an offence under Israeli law (because, for example, of the young age of the person requested).

After reaching this point, the question whether section 8 of the law includes a closed list of issues that allow an extradition application to be rejected becomes superfluous, for even if you say that it is not, extending the list can only be done for value considerations 'reflecting the normative system of the State', which prevent it from extraditing a person requested 'by disregarding its law and public policy' (Feller, *ibid*., at p. 181). We have already said that the defence of 'double jeopardy' does not attack the criminality of the act even under our system, and all that is argued is that there is a barrier to realizing the criminal liability even if this exists. It cannot be said that extradition of a person to a country where such a barrier does not exist (when in Israel it arises only 'in rare circumstances where the trial of an indictment filed lawfully before a competent court is "terminated", and there are no provisions in the law that determine the nature of the "termination" and its significance in the context under discussion' (Y. Kedmi, *On Criminal Procedure*, Dionon, 1993, at p. 590)) harms the fundamental principles of our system or the 'basic principles of the society and the country' (see Feller, *ibid*., at p. 211), to such an extent that the person requested should not be extradited. Not only has the defence of 'double jeopardy' not succeeded empirically in our case-law until now, but we do not even regard as 'double jeopardy' a case where the State appeals the acquittal of an accused, even though he may be convicted on appeal.

From the above it appears that even if the petitioner had the barrier of 'double jeopardy' in Israel because of the mistrial, her argument should be rejected for two reasons: first, there is no absence of double criminality, and,

second, the barrier of 'double jeopardy' when a trial is terminated is not a principle that conflicts with the basic principles of our system.

10. It is not superfluous to add that the defence of 'double jeopardy' which the petitioner raises would also not succeed if the petitioner were brought to trial in Israel, under the rule in HCJ 20/50 *Schwartz v. Presidency of the Supreme Military Tribunal* [4]. In that case a proviso was applied that the defence of 'double jeopardy' cannot succeed when the first trial is terminated 'before it is completed, for reasons that are not the fault of the court or the public prosecution.' As stated there, on p. 193 —

> 'Just as in a case where the jury is discharged, a need arises [in that case] to discharge the panel of the court in the first trial. This need and this discharge forestall the applicant's defence arguments in the second trial, and his defence of double jeopardy will not succeed' (square parentheses added).

It follows that the petitioner would not be able to raise a defence of 'double jeopardy' after her first trial was terminated 'in circumstances not the fault of the court and the public prosecution'. This is the case when the first trial is terminated as a mistrial, and we must apply the 'comparative equivalent'.

11. For the said reasons, I would deny the petitioner's petition.

Justice S. Levin

1. I agree with my esteemed colleague, Justice Goldberg, that the defence of double jeopardy, in the circumstances in which it arises in the case before us, does not concern the issue of criminal liability. Notwithstanding, we are not released from considering the question whether the court in Israel may deny the extradition application even though the matter does not fall within section 8 of the Extradition Law.

2. Just as in the first hearing, I am also now prepared to assume, without deciding the issue, that the provisions of the aforesaid section 8 do not constitute a closed list; notwithstanding, I would hesitate before making even a general categorization of exceptional cases where the application would be denied in circumstances that are not included in the said section. I am prepared to assume that perhaps it is possible to include in the said category extreme cases where granting the extradition application would be contrary to public policy in Israel; but even the formula that the court will refuse an application in circumstances where the foreign law (apart from with regard to criminal liability) conflicts with fundamental principles of our legal system is

problematic. Thus, for instance, it has already been said more than once that cross-examination is an established principle in the Israeli legal system; will we refrain from extraditing someone, when all the conditions justifying his extradition are fulfilled, merely because in the legal system of the country making the request the adversarial system is not practised? What would we say if a country with which we have made an extradition treaty refused to grant an extradition application merely for the reason that the rules of procedure and evidence in our country are different from the law applicable there?

3. With regard to the case before us, I should cite once again the remarks of my esteemed colleague, Justice Mazza, who wrote the following in his judgment:*

> '…(that) the question whether there exists an obstacle to retrying someone an accused or wanted person, who raises the defence of double jeopardy, should under the (prevailing and the proper) law be considered in the courts of the country making the application, and not within the framework of the extradition application. The law prevailing in this matter in the other country, with which we have made an extradition treaty, may be consistent or inconsistent with the criteria whereby the issue is determined under our law. However entering into the treaty, as long as the treaty is in force, obliges the State of Israel to respect the right of the other country to deal with the said issue under its laws. In this respect we should also consider the principle of reciprocity, and there is no need to discuss at length its importance in extradition law as an international norm.'

I agree with this completely; and I do not consider that the circumstances of the case before us justify a deviation from the reasons set out in section 8 of the law, even if I were to determine this deviation to be possible under the law.

I too would deny the petition.

Justice E. Mazza

For the reasons that I gave in my judgment at the appeal stage, and in agreement with the additional reasons of my esteemed colleague, Justice Goldberg, I agree with the conclusion that the petition should be denied.

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* [1993] IsrSC 47(1) at p. 588.

Justice D. Dorner

I agree, for the reasons stated by my colleague, Justice Goldberg, that the petition should be denied.

Like my colleague, I too am of the opinion that, in addition to the cases where the conditions of section 8 of the Extradition Law are not fulfilled, a wanted person should not be extradited if putting him on trial is contrary to the fundamental principles of the Israeli legal system.

The defence of 'double jeopardy' — as distinct from the defence of *res judicata* — cannot prevent extradition under section 8, and it also does not reflect a fundamental principle of our system.

Justice A. Barak

1. I agree that the petition should be denied. My reason for this is that in the circumstances of the case before us, the petitioner would not have a defence of double jeopardy if she were put on trial in Israel. My colleague, Justice Goldberg, discussed this issue, and pointed out that 'the defence of "double jeopardy" which the petitioner raises would also not succeed if the petitioner were brought to trial in Israel.' I agree with Mr Golan that the relevant question in this matter is not whether the petitioner has a defence of 'double jeopardy' in the United States. My reasoning in this regard in the appeal was wrong. The relevant question is whether the petitioner could defend herself in Israel, if put on trial here, with a defence of double jeopardy. As stated, my answer to this question is in the negative. The reason underlying this opinion of mine is that — as pointed out by my colleague Justice Goldberg and as discussed by my colleague Justice Mazza in the appeal — in view of the procedural stage where the petitioner stands in the United States, her trial has not yet ended because of a manifest necessity. The declaration of a mistrial means, in the circumstances of the case, that the proceeding has not yet ended, and that its non-completion is not the fault of the prosecution. In these circumstances, the jeopardy faced by the petitioner has not yet ended. This is the reasoning given in the United States for the rules of double jeopardy (see 21 *Am. Jur. 2d*, *supra*, at 462). According to the approach in the United States, when a trial is terminated — after a mistrial occurs because of the existence of a hung jury — it is not seen as a trial that has ended. The accused continues to be regarded as facing the first jeopardy that he faced in the past (see *Arizona v. Washington* (1978) [5]). Of course we do not have juries in Israel, and therefore the question of a hung jury cannot arise. We are therefore compelled to consider the 'comparative equivalent'. This comparison must be made on the basis of the reason underlying the rules of 'double jeopardy'. It is also the attitude in Israel that if the trial has not yet finished for reasons that do not depend on the prosecution, the jeopardy faced by the accused should be regarded as continuing to exist (see *Schwartz v. Presidency of the Supreme Military Tribunal* [4] at p. 192). Therefore if the trial in Israel were terminated for a reason that is not dependent on the prosecution, like the termination of a trial by the court for one reason or another, this would not be regarded as double jeopardy under Israeli law. This result is indeed the right one. It makes the proper balance in taking account of the legitimate interests of

the accused and the legitimate interests of the public. The Supreme Court of the United States discussed this in one case, and it stated:

> 'The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of the law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again… What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.' (*Wade v. Hunter* (1949) [6] at 688).

It follows that the petitioner does not have a defence of double jeopardy in Israel, and her petition should be denied.

2. In view of this conclusion, I do not need to decide the important questions that arose in the appeal and the further hearing. I have pointed to some of these questions in my opinion in the appeal. I left them undecided. Here too I would like to leave them undecided. In any event I wish also to leave undecided the question whether the criterion proposed by my colleague, Justice Goldberg — the violation of fundamental principles of our legal system — is the proper criterion, or whether it is perhaps too wide in certain cases (such as the example of cross-examination brought by my colleague, Justice S. Levin) and too narrow in certain cases (such as a procedural immunity that is not based on a fundamental principle). Moreover, can it not be said that the rules about double jeopardy are based on the desire to prevent a miscarriage of justice to the accused? Should this not be regarded as protection of a fundamental principle? I am aware of the sound answers that can be given to these questions, and even of questions that can be raised against those answers. It seems to me that within the framework of the petition before us we do not need to decide them, and I wish, as stated, to leave them undecided.

Petition denied.

16 August 1993.