CA 9796/03

1. Haviv Shem-Tov

2. Ram (Rahamim) Shem-Tov

v

State of Israel

The Supreme Court sitting as the Court of Civil Appeals

[28 July 2005]

Before Vice-President M. Cheshin and Justices M. Naor, E. Hayut

Appeal of the judgment of the Tel-Aviv-Jaffa District Court (Justice A. Tal) on 8 September 2003 in OM 1478/02.

Facts: Over a period of two weeks, the appellants deposited a total of approximately 390,000 dollars into their bank account. They did this by means of ten separate deposits on ten different days, and each individual deposit was slightly less than the amount which at that time required reporting under the Prohibition of Money Laundering Law, 5760-2000 ('the law'). Since the appellants lived abroad, the respondent applied in a civil proceeding to the District Court for forfeiture of the amount deposited. Under s. 22 of the law, forfeiture in a civil proceeding requires the state to prove that an offence was committed with the money whose forfeiture is requested. In this case, the state argued that the splitting of the total amount deposited into smaller sums that were slightly less than the amount requiring reporting constituted an attempt to evade the reporting requirements under the law, which is in itself an offence under s. 7(b) of the law. The District Court ordered the forfeiture of a sum of 150,000 dollars out of the total amount deposited. The appellants appealed. They argued that the offence of evading reporting under s. 3(b) of the law referred only to 'prohibited money' as defined in s. 3(a) of the law, and the state had not proved that the money concerned was 'prohibited money.' They also argued that the state's burden of proof in a civil forfeiture proceeding under s. 22 is the criminal burden of proof (beyond all reasonable doubt) rather than the civil burden of proof (on a balance of probabilities).

Held: The offence of evading reporting under s. 3(b) refers to all money, and not merely 'prohibited money.' The method of evading the reporting duty, which is known as structuring, gives rise to a strong suspicion of an offence under s. 3(b) of

the law, unless the person making the deposits can give an innocent explanation for the structuring of the deposits. With regard to the state's burden of proof under s. 22 of the law, Vice-President Cheshin and Justice Naor held that the burden of proof is the one required in a civil trial, although there is a need for more substantial and weighty evidence than what is required in a normal civil trial. Justice Hayut sought to leave the question of the burden of proof undecided, since in the circumstances of the case the state had discharged even the criminal burden of proof. The structured nature of the deposits gave rise to a very serious suspicion that the appellants intended to evade reporting by their actions, and the fact that the appellants had given no explanation of their actions meant that the state had succeeded in proving that an offence of evading reporting had been committed.

Appeal denied.

Legislation cited:

Basic Law: Human Dignity and Liberty.

Civil Procedure Regulations, 5744-1984, r. 500(7).

Dangerous Drugs Ordinance [New Version], 5733-1973, ss. 36C-36J.

Fight against Crime Organizations Law, 5763-2003, s. 17.

Prohibition of Financing Terrorism Law, 5765-2005, s. 24.

Prohibition of Money Laundering Law, 5760-2000, ss. 1, 2(b), 3, 3(a), 3(b), 4, 5, 6, 7, 7(d), 9, 10, 21, 22, 22(a), 22(a)(1), 22(a)(2), 22(c), 28.

Prohibition of Money Laundering (Duties of Banking Corporations with regard to Identification, Reporting and Keeping of Records) Order, 5761-2001, ss. 8, 8(1), 9.

Israeli Supreme Court cases cited:

[1] HCJ 779/92 *Salama v. Mayor of Nazareth* [1993] IsrSC 47(5) 183.

[2] CrimApp 1542/04 *State of Israel v. Adar* [2004] IsrSC 58(3) 613.

[3] CrimApp 10157/03 *Iskov v. State of Israel* (unreported).

[4] CrimA 946/04 *State of Israel v. Oved* (not yet reported).

[5] CrimA 7475/95 *State of Israel v. Ben-Shitrit* [1998] IsrSC 52(2) 385.

[6] CrimA 7376/02 *Cohen v. State of Israel* [2003] IsrSC 57(4) 558.

[7] CrimA 4735/03 *Tzabari v. State of Israel* [2004] IsrSC 58(1) 681.

[8] CrimA 232/55 *Attorney-General v. Greenwald* [1958] IsrSC 12 2017.

[9] CA 475/81 *Zikri v. Klal Insurance Co. Ltd* [1986] IsrSC 40(1) 589.

[10] CA 125/89 *Ballas v. Estate of Rosa Rosenberg* [1992] IsrSC 46(4) 441.

[11] CA 373/89 *Masry (Shahin) v. Halef* [1991] IsrSC 45(1) 729.
[12] CA 36/99 *Yaffeh v. Estate of Hannah Glaser* [2001] IsrSC 55(3) 272.
[13] CA 670/79 *HaAretz Newspaper Publishing Ltd v. Mizrahi* [1987] IsrSC 41(2) 160.
[14] CA 2275/90 *Lima Israel Chemical Industries Ltd v. Rosenberg* [1993] IsrSC 47(2) 605.
[15] CrimA 6251/94 *Ben-Ari v. State of Israel* [1995] IsrSC 49(3) 45.
[16] CrimA 7520/02 *Hamati v. State of Israel* [2004] IsrSC 58(2) 710.
[17] LCrimA 1601/91 *Tzarfati v. State of Israel* [1991] IsrSC 45(3) 408.
[18] CrimA 2831/95 *Alba v. State of Israel* [1996] IsrSC 50(5) 221.
[19] CrimA 556/80 *Ali v. State of Israel* [1983] IsrSC 37(3) 169.

Israeli District Court cases cited:
[20] CrimC (Naz) 132/03 *State of Israel v. Guetta* (unreported).
[21] MA (Jer) 9416/03 *ENS Credit Ltd v. State of Israel* (unreported).
[22] OM (Jer) 2212/03 *Gad v. Siman-Tov* (unreported).
[23] AP (Jer) 418/04 *David Eden Chen Ltd v. Registrar of Currency Service Providers* (unreported)
[24] CrimC (Jer) 358/04 *State of Israel v. Buhadna* (unreported).

American cases cited:
[25] *United States v. Thakkar*, 721 F. Supp. 1030 (1989).

Jewish law sources cited:
[26] Proverbs 24, 6.
[27] Jeremiah 12, 1.
[28] I Kings 18, 29.

For the appellant — U. Penso, C. Baruchi.
For the respondent — M. Zamir.

JUDGMENT

Vice-President M. Cheshin

The Prohibition of Money Laundering Law, 5760-2000 ('the law' or 'the Prohibition of Money Laundering Law') is a new law in Israel, and, as it title says, its purpose is to fight the phenomenon of 'money laundering.' Its origins lie in a long list of offences that are listed in the first schedule to the law, including drugs offences, prostitution offences, gambling offences and other offences. These offences are all called 'source offences' by the Prohibition of Money Laundering Law. 'Money laundering' is making a transaction in property that was obtained by means of a source offence, property that was used for committing a source offence or property that facilitated the commission of a source offence (all of which are referred to in the law as 'prohibited property') for the purpose of concealing or obscuring the source of the property, the identity of the owners of the rights therein, its location, its movements or the making of any transactions therewith. See s. 3(a) of the law (its wording will be cited below). An act of money laundering constitutes a serious offence, and anyone who commits it is liable to serious penalties. It should be noted that the law does *not* address the source offences themselves. These are treated in the usual way. The offenders are sentenced in accordance with the provisions of the ordinary criminal codex and whoever is acquitted is discharged. The law is only concerned with the ill-gotten gains of those source offences and the money and property that were used for, or that facilitated, their commission. The purpose of the law is, in the main, to forfeit to the state treasury any money that the law regards as prohibited money, and the technique that it adopts is a technique that is practised in tax law. As has been said elsewhere with regard to the issue of tax collection:

> 'This is the way that the government acts: it looks for crossroads where money passes from hand to hand; it stations at those crossroads government authorities that are owed money by the citizen, and the citizen cannot continue on his journey unless he pays over to the

authority what he owes it' (HCJ 779/92 *Salama v. Mayor of Nazareth* [1], at p. 186).

One of the main ways in which transfers of money from hand to hand and from place to place are discovered is by imposing a duty of regular reporting on transfers of property and money that are made in the various financial systems. Thus, in our case, a duty was imposed on banks in Israel to report to the competent authority under the law certain transactions that they make, and carrying out a transaction in property for the purpose of frustrating that duty of reporting constitutes in itself an offence under the law. According to the wording of s. 3(b) of the law:

'Prohibition of money laundering

3. (a) …

(b) Whoever makes a transaction in property or whoever provides false information, with the purpose that no report will be made under section 7 or in order not to report under section 9, or in order to make a report incorrect, under the aforesaid sections, shall be liable to the penalty prescribed in sub-section (a); for the purposes of this clause, "providing false information" — including not providing an update with regard to an item that requires reporting.'

2. The case before us revolves around the provisions of s. 3(b) that we have just cited, and mainly the phrase 'whoever does a transaction in property,' with the emphasis on the word 'property.' This is the riddle that we are required to solve: do the dictates of the legislature in s. 3(b) apply to any transaction in property, even if it is not proved that it is prohibited property, or is 'property' in the context of s. 3(b) only prohibited property? If we answer this question according to the first alternative, then an additional question will arise with regard to the issue of forfeiting the property. But first let us describe the main facts of the case.

The main facts in the case and the proceedings that have taken place up to this point

3. The appellants, a father and son, are residents of the United States and they own an account at the Hadar Yosef branch of Bank HaPoalim in Tel-Aviv. In May 2002, within a period of approximately two weeks, between 6 May 2002 and 20 May 2002, the second appellant made ten deposits in the aforesaid account which amounted to a total sum of 392,380 United States dollars. The deposits were made in the following manner: on each of the 6th, 8th, 9th, 10th, 12th, 13th, 14th and 15th of May (the 11th of May was a Saturday)[1] a sum of 40,000 dollars was deposited; on the 16th of May a sum of 39,380 dollars was deposited and on the 20th of May 33,000 dollars were deposited.

4. On the dates of the deposits, between 6 May 2002 and 20 May 2002, according to the representative rate[2] of the dollar, each deposit of 40,000 dollars was equal to an amount varying between 193,760 New Israeli Sheqels and 197,280 New Israeli Sheqels. Section 8(1) of the Prohibition of Money Laundering (Duties of Banking Corporations with regard to Identification, Reporting and Keeping of Records) Order, 5761-2001, which was enacted pursuant to the Prohibition of Money Laundering Law, at that time required the banks in Israel to report to the Prohibition of Money Laundering Authority every deposit of cash in a bank account, or any withdrawal therefrom, in an amount of NIS 200,000 or more. Thus we see that each deposit that the second respondent made was of a sum that was slightly less than the minimum amount which at that time required a report to be made to the Authority.

5. The aforesaid cash deposits aroused the suspicion that they were offences under the Prohibition of Money Laundering Law, and therefore the state applied to the Tel-Aviv-Jaffa Magistrates Court to

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1 Editor's note: banks in Israel are closed on Saturday and open on Sunday.

2 Editor's note: the 'representative rate' is the official rate of a foreign currency against the Israeli sheqel, as published by the Bank of Israel, for calculating the value of money in one currency in another currency.

make an order to freeze the appellants' bank account, to carry out an investigation and to prevent the money being smuggled out of the account. The court granted the application and made an order as requested. Subsequently, pursuant to the provisions of s. 22 of the Prohibition of Money Laundering Law, the state filed in the Tel-Aviv-Jaffa District Court an application to forfeit the 392,380 dollars that were deposited in the appellants' account. This provision of statute makes it possible to forfeit — without a conviction — the property of a person who has committed an offence under s. 3 or s. 4 of the law, *inter alia* when that person is not in Israel or cannot be located, so that it is not possible to file an indictment against him. The state's application pointed out that a deposit of money in the total amount that the appellants deposited required a report to be made by the bank to the Prohibition of Money Laundering Authority under s. 7 of the law, and that in order to prevent such a report being made, contrary to the prohibition provided in s. 3(b) of the law, the appellants chose to split the deposit of the total amount into ten separate deposits. Since the appellants are not in Israel on a permanent basis, it is not possible to file an indictment against them, and therefore the court was asked, pursuant to its authority under s. 22 of the law, to make an order to forfeit the money that was deposited in the account. The application for the forfeiture was accompanied by bank statements which prove that the deposits were made. Subsequently the state applied to file additional documents in evidence, but these were not admitted by the trial court, since they were not filed together with the forfeiture application nor were they presented during the hearing that took place in the presence of counsel for the appellants. We too will therefore ignore the aforesaid evidence.

6. The application to forfeit the property was served on the appellants by means of service outside the jurisdiction under r. 500(7) of the Civil Procedure Regulations, 5744-1984, and they filed their reply. In this, the appellants focused on various legal arguments, but they gave no explanation with regard to the source of the money, or with regard to the nature of the deposits or why they decided to split them. It can be said that the lack of an explanation by the respondents with regard to all of these matters is significant. The appellants'

argument was that since there was no *prima facie* evidence that connected the money that was deposited with one of the source offences in the Prohibition of Money Laundering Law, the deposits do not fall within s. 3(b) of the law. According to them, the provisions of s. 3(b) of the law, like the provisions of s. 3(a), apply to property that has been proved to come from a source offence. The appellants further argued that even if s. 3(b) applied to property that was not proved to have come from an original offence, in order to carry out the forfeiture proceeding in accordance with the provisions of s. 22 of the law, it should be proved beyond all reasonable doubt that the property was obtained by means of an offence under s. 3(b). The state, so it was alleged, had not discharged this burden since it did not prove the *mens rea* required in an offence under s. 3(b); in other words, the state did not prove that the deposits were made *with the purpose* that no report would be made.

7. The District Court (the honourable Justice A. Tal) rejected the appellants' claims and granted the state's application to forfeit the money. Indeed, so the court held, it had not been proved that the appellants' money originally involved a source offence, but under the provisions of s. 3(b) of the law there was no need at all to prove that the money originated in a source offence. This provision of the law applies to all property, including property that has not been proved to be prohibited property. The court based this conclusion on several considerations, including the language of s. 3(b) and additional sections of the Prohibition of Money Laundering Law, the purpose of the section and the law and the background to the legislation. The court further held that the burden of proof required in order to forfeit property in a proceeding under s. 22 of the law was the burden of proof required in civil law, namely the balance of probabilities. The civil forfeiture proceeding, so the court explained, was intended (*inter alia*) for cases in which the owner of the property is not present in Israel on a permanent basis, and therefore there is no possibility of filing a criminal indictment against him. Against this background, requiring a burden of proof according to the standard in criminal trials would frustrate the purpose of the proceeding and make it into an ineffective law enforcement tool. In view of this conclusion, the

court considered the question whether the elements of the offence in s. 3(b) of the law had been proved to the extent required in civil law, and it found that the offence had been proved. Finally the court held that of the total amount of approximately 400,000 dollars that had been deposited in the appellants' account, only a sum of 150,000 dollars would be forfeited, 'since it had not been proved that the money was *"prohibited property"* merely because of the amount and number of the deposits' (emphasis in the original). The appeal before us is directed against that decision.

The essence of the dispute between the parties

8. At the outset we posed the main question in dispute between the parties, which is whether the provisions of s. 3(b) of the law apply only to 'prohibited property' as defined in the Prohibition of Money Laundering Law — i.e., to property that was involved in a source offence — or whether they apply also to property that has not been proved to be prohibited property? For the purpose of forfeiting property under s. 22, it must be proved that the property whose forfeiture has been requested was involved in an offence under s. 3 or s. 4 of the law. If we reach the conclusion that s. 3(b) applies to 'prohibited property' only, it follows that the appellants do not fall within the scope of s. 3(b), since it has not been proved that the source of the money involved an offence, and the forfeiture should be cancelled. By contrast, if we find that the provisions of s. 3(b) apply to *all* property, the appellants' property will fall within the scope of s. 3(b), and then we must consider the question of the forfeiture in s. 22. A decision on this question will determine whether the state discharged the burden of proof and consequently whether the forfeiture order was lawful. That, then, is a description of the dispute in outline.

9. Let us take a closer look at the normative framework of the case, and study further the provisions of law that are relevant to it.

The normative framework

Supervision and reporting

10. In the year 5760-2000 an important event happened in Israel. A new prickly bush — a new species of offences — was added to the

'thicket' of criminal offences in our legal system, namely the offences of money laundering. These offences have many aspects, but in essence they involve 'the making of a transaction in property, sometimes by means of the financial system, with the purpose of assimilating property that originated in criminal activity within property that has a legal and innocent character, by obscuring the illegal source of the property' (draft Prohibition of Money Laundering Law, 5759-1999, *Draft Laws 5759*, at p. 420). The purpose of money launderers is to turn illegal money into legal money, to make it as pure as snow, to raise money from the sewers and to give it the fragrance of spring flowers. The Prohibition of Money Laundering Law is intended to attack the infrastructure and the methods used by money launderers, and it revolves around two main issues: *first*, defining the acts that fall within the scope of money laundering offences and determining sanctions for them; *second*, creating an administrative enforcement mechanism by imposing reporting duties on various of financial service providers with regard to the activities of their customers, and setting up a supervision and control system, headed by the Prohibition of Money Laundering Authority, which is responsible for implementing the law and collecting the information that is accumulated pursuant thereto. The reporting and supervision mechanism – a mechanism by means of which the provisions of the law are implemented — is in practice the cornerstone of the Prohibition of Money Laundering Law. The heart of this mechanism lies in the provisions of s. 7 of the law, which impose a duty on financial service providers to report various financial transactions that are made by their customers. The purpose of the reporting is self-evident: it is to discover the true nature of transactions that may appear on the surface to be innocent whereas their real purpose is money laundering. Under s. 7(d), all the reports are sent to the database that was established under the law (as stated in s. 28 of the law), and the Prohibition of Money Laundering Authority is responsible for managing the database, processing the data in it and making it secure, and the Prohibition of Money Laundering Authority also decides whether to send the information to the authorities that are competent to continue dealing with the matter.

11. The provisions of s. 7 of the Prohibition of Money Laundering Law are lengthy, but for our purposes we must address the provisions of s. 7(a)(2). These state the following:

> 'Imposing duties on financial service providers
>
> 7. (a) In order to enforce this law, the Governor of the Bank of Israel shall make an order, after consulting the Minister of Justice and the Minister of Public Security, with regard to the types of matters and transactions in property, which shall be set out in the order, that a banking corporation shall —
>
> (1) …
>
> (2) Report, in the manner provided in the order, the transactions in property of a recipient of the service that are set out in the order;'

By virtue of his power under s. 7, the Governor of the Bank of Israel made an order called the Prohibition of Money Laundering (Duties of Banking Corporations with regard to Identification, Reporting and Keeping of Records) Order, 5761-2001 (hereafter — the Reporting Duties Order), which describes in great detail the reporting, supervision and control duties imposed on the banks by virtue of the law (there are additional orders with regard to the reporting duties of other bodies, but these do not concern us). What is relevant to this case is s. 8 of the Reporting Duties Order, which is entitled 'Reporting according to the size of the transaction' and states that 'a banking corporation shall report to the competent authority the transactions set out below: …' Further on s. 8 of the Reporting Duties Order sets out various issues, all of which concern transfers of money, cheques and other methods of payment, and it imposes a duty on the banks to report to the competent authority various banking transactions above a certain sum. Section 8(1) today provides, after its amendment, a duty of the bank to report all deposits of cash into

an account or withdrawals of cash from an account in an amount equivalent to at least NIS 50,000. Prior to 1 January 2004, which includes the period when the deposits were made by the second appellant, the amount that required reporting by the banks was NIS 200,000 or more. To complete the picture we should point out that s. 9 of the Reporting Duties Order requires a banking corporation also to report to the competent authority any 'transactions of a recipient of the service, which in view of the information in the possession of the banking corporation appear to it to be unusual…'. The same section further provides (as set out in the second schedule to the Reporting Duties Order) that 'activity that appears to be designed to circumvent the reporting duty provided in s. 8' of the order can be regarded as an unusual transaction.

12. We have said that the provisions of s. 7 of the Prohibition of Money Laundering Law are the heart of the control and supervision mechanism, and to provide a complete picture we should mention the provisions of s. 9 of the law, which is mentioned in s. 3(b), as well as in s. 7, and which, according to the title of the section, concerns the 'duty of reporting money when entering or leaving Israel.' This provision of the law imposes a duty on someone who enters or leaves Israel to report money that he is carrying with him above certain amounts. Section 9 contains additional provisions but we shall not address the details of these since they are not relevant to the present case.

Money laundering offences

13. Money laundering offences are defined in s. 3 of the Prohibition of Money Laundering Law as follows:

> 'Prohibition of money laundering
>
> 3. (a) Whoever makes a transaction in property, which is property as stated in paragraphs (1) to (3) (in this law — prohibited property), with a purpose of concealing or obscuring its source, the identity of the owners of the rights therein, its location, its movements or the making of any

> transactions therewith shall be liable to ten years imprisonment or a fine twenty times the fine stated in s. 61(a)(4) of the Penal Law —
>
> (1) Property that originates, directly or indirectly, from an offence;
>
> (2) Property that was used to commit an offence;
>
> (3) Property that facilitated the commission of an offence.
>
> (b) Whoever makes a transaction in property or whoever provides false information, with the purpose that no report will be made under section 7 or in order not to report under section 9, or in order to make a report incorrect, under the aforesaid sections, shall be liable to the penalty prescribed in sub-section (a); for the purposes of this clause, "providing false information" — including not providing an update with regard to an item that requires reporting.'

The main points in this provision of the law are as follows (we shall address the details in our remarks below): the offence in s. 3(a) concerns the making of a transaction in 'prohibited property,' for the purpose of obscuring the illegal source of the property, the identity of the owners of the rights therein, its location, its movements or the making of a transaction therewith. The offence under s. 3(b), which is relevant to our case, concerns the making of a transaction in property or providing false information with the purpose that there will not be any report under ss. 7 and 9 of the law. The term 'property' is defined in s. 1 of the law as 'land, movable property, money and rights, including property that is the consideration for other property, and any property that arises or derives from the profits of property as

aforesaid.' A 'transaction in property' is defined, *inter alia*, as the granting or receipt of ownership or of another right in property, various banking transactions and also combining prohibited property with other property, even if it is not prohibited property. The term 'offence' that appears in s. 3(a) is defined, in s. 2(a), as an offence as set out in the first schedule to the law, and as we have seen above, these offences are referred to as 'source offences.'

14. The law provides that the penalty for an offence under s. 3(b) is identical to the sanction prescribed for the offence in sub-section (a), which is ten years imprisonment or a fine twenty times the fine stated in s. 61(a)(4) of the Penal Law, 5737-1977. In addition, according to the provisions of ss. 21 and 22 of the law which we shall address below, whoever breaches ss. 3 or 4 is also liable to the forfeiture of the property involved in the offence.

15. Against the background of what we have said up to this point, let us take a closer look and focus on the provisions of s. 3(b) of the law. The main problem before us, let us recall, concerns the interpretation of the combination of words 'transaction in property' in s. 3(b), and in our customary manner let us begin with the language of the section.

'Transaction in property' in s. 3(b) of the law — language

16. The decision in the appeal before us will be decided by the interpretation that is derived from the provisions of s. 3(b) of the law. Any voyage of interpretation begins — and ends — with the language of the law, and so too will our voyage on this occasion. The first question that we must therefore decide is this: what is the meaning of the combination of words 'transaction in property' in s. 3(b) of the law? To be more precise: does the 'property' of which s. 3(b) speaks include all property — whether it is 'prohibited property' in accordance with s. 3(a) of the law or property that has not been proved to be prohibited property — or should we perhaps say that the Prohibition of Money Laundering Law is only concerned with money laundering; money laundering only concerns the laundering of dirty money; and the purpose of the law will point to the interpretation of the concept of 'property' in the provisions of s. 3(b), and lead us to a

conclusion that it is not speaking about all property but only about 'prohibited property' as in s. 3(a) of the law.

17. Let us read the provisions of s. 3(b) with an open mind, and when we reach the combination of words 'transaction in property' let us ask ourselves: what is this 'property' of which the law speaks? This concept, we have seen above (in para. 13), was defined by the legislator as various types of property, but we do not find in the definition any restriction with regard to the *source* of the property. According to its wording, therefore, the provisions of s. 3(b) of the law refer to property of all kinds, whether it is prohibited property or property that has not been proved to be prohibited property. That is the simple interpretation.

18. Let us turn from the provisions of s. 3(b) and look at the provisions of s. 3(a), and we will see that whereas subsection (b) speaks only of 'property' in general, the provisions of subsection (a) expressly and specifically concern themselves with 'prohibited property.' What therefore is the reason that the legislature on one occasion used the term 'property' and on another occasion used the term 'prohibited property' unless it is to distinguish between 'prohibited property' in subsection (a) and property that does not have a presumption of being prohibited property in subsection (b)? Indeed, the legislature is presumed, when it makes use of one concept, not to mean another concept; this presumption is particularly strong because, if in the very same law the legislature chose to use two different terms, this is not an accident. This conclusion is reinforced by the fact that the term 'prohibited property' was conceived in subsection (a) itself; this is the place where it was conceived and this is the place where it was first mentioned. Clearly, had the legislator intended to speak specifically of 'prohibited property' so soon afterwards — i.e., in subsection (b) — we would have been told this expressly. The very proximity between the two subsections is what particularly emphasizes the difference between them, and I have difficulty finding an excuse or justification for adding to the express words that the legislature chose to use. As the court said in CrimApp 1542/04 *State of Israel v. Adar* [2], at p. 619, where a question identical to the one before us arose:

> 'Indeed, if in the very same provision of statute — in places that are next to one another — the law speaks once of 'prohibited property' and once of 'property,' the intention and purpose can be derived from the language, and the interpretation of the law will be the simple one… namely that the provisions of s. 3(b) of the Prohibition of Money Laundering Law apply to property that is not necessarily "prohibited property".'

We will find another example of the distinction between 'property' and 'prohibited property' in the provisions of s. 24(a) of the law, which uses the language: 'Not making a transaction in property, including prohibited property…'. From this we see that there is 'property' and there is 'prohibited property,' and the law is perfectly capable of distinguishing between them. This is true of s. 24(a) and it is also true of s. 3(b).

19. Moreover, if we read the provisions of s. 3(a) and (b) one after the other, we will realize that restricting the provisions of subsection (b) merely to 'prohibited property,' as the appellants argue, will make it a subset of the provisions of subsection (a), thereby making it completely superfluous and undermining its purpose as a provision of statute. We reach this conclusion both from its language and from its substance. According to the language of the section, the offence defined in subsection (a) concerns, in essence, the making of a transaction in prohibited property in order to conceal or obscure any identifying detail or any indication of the source of the property, the identity of the owners of the rights therein, its location, movements and any transaction made with it. We are speaking about an attempt to obscure the 'smell' or 'colour' of the money (even though we know that money does not have a smell or colour). If we now say that subsection (b) applies only to 'prohibited property,' the acts listed in it easily fall within the scope of the prohibited acts listed in subsection (a), since making a transaction in property or providing false information with the purpose of preventing reporting under s. 7 or under s. 9, as stated in section 3(b), are merely different methods that are intended to 'conceal or obscure' the characteristics of the prohibited property as stated in section 3(a). Should we therefore say

that the provisions of subsection (b) of section 3 are of no significance? That they are swallowed up by the provisions of subsection (a) and no trace of them remains? Moreover, if we interpret the provisions of s. 3(b) of the law as applying only to prohibited property, not only will the essence of the provisions evaporate and cease to exist, but we will also have difficulty seeing how the state will ever forfeit property in accordance with the provisions of s. 22 of the law. We shall address this question of the forfeiture in our remarks below.

From a substantive perspective, subsection (a) and subsection (b) were designed independently for different, albeit complementary, purposes. Subsection (a) concerns property that was involved in the commission of a source offence, namely an offence that is 'external' to the Prohibition of Money Laundering Law (a drugs offence, prostitution, gambling, or any other offence as set out in the first schedule to the law). The purpose of the offender who moves property from place to place is to conceal and obscure the illegal origin of the property and thereby hide the commission of an offence that is 'external' to the law. Unlike subsection (a), subsection (b) concerns property that was involved in the commission of an offence under the Prohibition of Money Laundering Law itself — an offence that is internal to the law — since it speaks here of a transaction made in property with the purpose that no reporting will be made under the Prohibition of Money Laundering Law; in other words, it is a transaction made for the purpose of frustrating the implementation of the law itself. The two provisions in s. 3 prohibit different types of conduct, even though they have the same context, and this leads to the difference in their purposes. As the court said in *State of Israel v. Adar* [2], at p. 620:

> 'The heart of the law… lies in the provisions of s. 3(a). Here the law establishes its main prohibition, and the other provisions of the law revolve around this prohibition. The provisions of s. 3(b) of the law constitute, according to their purpose, a safety net around the main provision in s. 3(a). Whoever attempts to launder property that was obtained by means of an offence —

> including property that was used to commit an offence or property that facilitated the commission of an offence — will do everything in his power in order to conceal his deeds from the authorities. It is this conduct of the offender that s. 3(b) seeks to frustrate. This is the reason for the reporting duty imposed on banking corporations, as set out in s. 7 of the law, and for making it an offence when someone makes a transaction in property for the purpose of frustrating the making of a report under s. 7 (or in order to make a report incorrect).'

See also the remarks made by Justice G. (De-Leeuw) Levy in the judgment in CrimC (Naz) 132/03 *State of Israel v. Guetta* [20].

20. Applying the provisions of s. 3(b) of the law (also) to property that has not been proved to have originated in an offence is consistent with the language and the purpose of the provisions of ss. 7 and 9 of the law. The provisions of ss. 3(b), 7 and 9 are interrelated, and reading them in their proper sequence will automatically clarify the scope of application of s. 3(b). Contrary to its policy in other laws, in the Prohibition of Money Laundering Law the legislature placed the practical aspects of the law before the theoretical ones. In other laws the legislature first tells us about duties and obligations, and only after this does it stipulate the offences that are committed by persons who breach the duties and obligations imposed on them, and the penalties for these offences. But in the Prohibition of Money Laundering Law the legislature began with the offences and sanctions and only later on does it discuss the duties and obligations. If we now read the Prohibition of Money Laundering Law in the normal way, we will begin with the provisions of ss. 7 and 9, which are the provisions that impose reporting duties of various kinds, and then we will continue on to the provisions of s. 3(b), which is the section that prescribes a criminal offence and penalties for anyone who breaches the reporting duties imposed by the provisions of ss. 7 and 9. We see that in essence the provisions of ss. 7 and 9 — and the same is true of the provisions of the Reporting Duties Order — apply to all kinds of property and not merely to 'prohibited property.' The criteria that determine the reporting duties of the financial service providers

under s. 7 — and of persons entering and leaving Israel under s. 9 — do not relate at all to the source of the property, namely whether it is an illegal source or not. The criteria only relate to the value of the property, namely whether the transaction is unusual in comparison to the customer's regular transactions, etc.. Just as the rope follows the bucket and the shadow follows its owner, so the interpretation of s. 3(b) should follow the provisions of ss. 7 and 9 of the law. The purpose of section 3(b) is to act as a safety net around the provisions of ss. 7 and 9 (just as it acts as a safety net around the provisions of s. 3(a)), and where the provisions of ss. 7 and 9 lead it too must follow. And if the duty of reporting under the provisions of ss. 7 and 9 applies to all property — whatever its source — what explanation, logic or reason is there in holding that an offence of a transaction that attempts to evade the duty, such as providing false information as stated in s. 3(b) of the law, should apply only to 'prohibited property'? The question is a rhetorical one. See also the remarks of Justice G. (De-Leeuw) Levy in *State of Israel v. Guetta* [20].

21. To conclude our discussion of the language of the section, let us mention two additional provisions of the law to which the appellants refer in support of their position. The first section is s. 5, which tells us the following:

> 'Proof of knowledge
>
> 5. For the purposes of sections 3 and 4, it is sufficient to prove that the person who carried out the transaction knew that the property was prohibited property, even if he did not know with what specific offence the property is associated.'

According to the appellants, this section proves that the legislator did not see fit to distinguish between the offence in s. 3(a) and the offence in s. 3(b), and therefore s. 3(b) also relates to 'prohibited property.' But this is no argument. Section 5 refers to the provisions of ss. 3 and 4 in so far as they concern 'prohibited property,' and this is the simple meaning of the text. It is sufficient that s. 5 applies to the provisions of s. 3(a), and there is no need for it to apply also to the provisions of s. 3(b).

22. The second section to which the appellants refer is s. 6 of the law, which uses the word 'property.' According to them it is apparent from the section that the meaning is 'prohibited property.' According to their approach, this proves that the legislature was not always precise in using the term 'property' in the Prohibition of Money Laundering Law, and this strengthens their argument that by using the word 'property' in s. 3(b) the legislature *de facto* meant 'prohibited property.' The following is the text of the relevant part of s. 6:

> 'Restriction upon criminal liability
>
> 6. (a) A person shall not be criminally liable under section 4 if he did one of the following:
>
> (1) He made a report to the police in the manner and at the time that will be prescribed, before making the transaction in property, of the intention to carry out the transaction, and he acted in accordance with its guidelines in respect of that transaction, or he made a report to the police as aforesaid after making the transaction, as soon as possible in the circumstances of the case after making it;
>
> …'

This argument should also be rejected. The first part of s. 6 expressly refers to s. 4; section 4 concerns 'prohibited property' of a specific kind, and anyone who reads s. 6 will automatically realize that it is merely speaking of 'prohibited property' of a certain kind.

'Transaction in property' according to s. 3(b) of the law — purpose

23. Now that we have seen that from a linguistic point of view the provisions of s. 3(b) of the law also apply to property that has not been proved to originate in an offence, the question of the purpose automatically arises. For language is merely a means of expressing

the purpose, and the question is whether the purpose of the law is consistent with its language. Our answer to this is yes. The Prohibition of Money Laundering Law was enacted as a result of the realization that in recent years the nature of crime in Israel has changed, and in addition to the offences with which we have always been familiar, we are witness to the increasing phenomenon of crime syndicates. There is today in Israel a subculture of sophisticated, complex and very carefully organized crime, which sometimes even has a large number of participants. This criminal activity includes drugs offences, offences relating to prostitution, weapons trafficking, gambling, the distribution of obscene material, theft, forgery, smuggling, etc.. This sophisticated criminal activity, which extends across continents and seas, involves huge sums of money, both for the purpose of financing the criminal activity and as the proceeds thereof, and the criminals take pains to launder these amounts of money, obscure their source and create a false impression that it is clean money. Money laundering offences are carried out in sophisticated and complex ways that are difficult to identify, and as the explanatory notes to the draft Prohibition of Money Laundering Law stated: 'The methods of money laundering are many and varied, but what is common to most of them is an exploitation of the effectiveness, computerization and globalization of the world financial systems… in order to deposit money and transfer it from place to place while concealing the identity of the owners of the rights therein and the source of the money' (*Draft Laws 5759*, at p. 420). One does not need an unusual imagination in order to realize and understand how great is the social danger inherent in these offences, and as long as offenders are given a free hand their activity will be successful. The trial court rightly said, therefore, (in para. 47 of the judgment) that 'this struggle [against money laundering] is not an end in itself, but mainly a means of realizing the goal of fighting dangerous drugs offences and organized crime' (square parentheses supplied). This was discussed by Justice Türkel in CrimApp 10157/03 *Iskov v. State of Israel* [3], at para. 5:

> 'We are speaking of a serious offence, which some say is a national scourge, that is spreading like a cancer to

> almost all sectors of the economy. This is criminal activity that involves organized crime and endangers society, the economy and the citizens of the state. In order to fight this phenomenon and eliminate it, the Prohibition of Money Laundering Law was enacted…'

24. We should also point out that the cancerous phenomenon of money laundering is worldwide, and western countries began to fight it years ago. This is reflected in international agreements that have been made, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention, 1988) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the Strasbourg Convention, 1990). In 1989, the seven industrialized nations (G7) established in Paris an international task force to fight money laundering (FATF — the Financial Action Task Force) and dozens of countries are now members of this: see L.A. Barbot, 'Money Laundering: An International Challenge,' 3 *Tul. J. Int'l & Comp. L.* 161 (1995). In 1991 the Council of Europe adopted a directive that aims to ensure that the member countries of the Union fight money laundering: Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering (91/308/EEC). The State of Israel was also required to act to fight money laundering, and the Prohibition of Money Laundering Law was intended to put it at the forefront of the war against this serious phenomenon. Indeed, the Prohibition of Money Laundering Law was introduced because of the need to fight criminals who launder money and the need to comply with the standards set by western countries, but this was all based on a recognition that good can only fight evil by attacking the resources used to finance crime. Cf. CrimA 946/04 *State of Israel v. Oved* [4], at para. 7. These purposes were expressed in the explanatory notes to the draft Prohibition of Money Laundering Law (*Draft Laws 5759*, at pp. 420-421):

> 'The international fight against crime, especially against crime in the field of dangerous drugs and other serious felonies, has focused in the last decade on the

> phenomenon of money laundering, which is used mainly by drugs dealers and criminals involved in organized crime, with ever increasing sophistication, as a means of keeping in their possession the profits of their criminal activity.
>
> …
>
> The recognition that the State of Israel also serves as a convenient base for money laundering activities, and that legislation in the field of money laundering serves national and economic interests, as well as the interest of the rule of law, are the product of experience that has been accumulated in recent years, as a result of new thinking by the law enforcement authorities in the field of drugs and organized crime. This experience shows that an effective fight against drugs trafficking and the manifestations of organized crime is impossible without attacking the phenomenon of money laundering directly, by using tools that are suited to the characteristics of the phenomenon and by means of the dedication and efforts of the financial institutions themselves in cooperating with the law enforcement authorities in this struggle.'

As MK Tzipi Livni pointed out in the debate during the second and third readings of the draft law, the concern was that if no prohibitions were made against money laundering, Israel would become a hotbed for the activity of major criminals and a refuge for criminals. She said (*Knesset Proceedings*, 2 August 2000, at p. 10905):

> 'When a state becomes a convenient place for organized crime, when a state become a refuge for money laundering, it inevitably also becomes a permanent home to organized crime. We are speaking, gentlemen, of offences of dangerous drugs, of prostitution and offences that we have specifically determined to be offences that are characteristic of international organized crime.'

See also the remarks of Minister of Justice Tzahi HaNegbi during the debate on the first reading in the Knesset (*Knesset Proceedings*, 19 April 1999, at pp. 4245-4247; MA (Jer) 9416/03 *ENS Credit Ltd v. State of Israel* [21], at para. 4(a); OM (Jer) 2212/03 *Gad v. Siman-Tov* [22], at para. 11; AP (Jer) 418/04 *David Eden Chen Ltd v. Registrar of Currency Service Providers* [23]; G. Amir, 'On the Prohibition of Money Laundering Law, 5760-2000,' 15(6) *Taxes (Missim)* A-83 (December 2001). For a detailed review of the law, see also: R. Flatto-Shinar, 'Bank Confidentiality and the Duty of Trust on the Altar of the Fight against Money Laundering — a Comparative Survey,' *Maazanei Mishpat (Scales of Justice)*, vol. 3 (2003-2004), at p. 253).

25. 'With stratagems you should wage war' (Proverbs 24, 6 [26]) — so the wisest of men told us. The war on sophisticated crime — if we are seeking to eliminate it, or, at least, to decrease it — clearly requires a sophisticated response. This is the way of war. There is no other. A response of this kind was what the legislature wished to provide in the Prohibition of Money Laundering Law, a law that reflects a major change in approach in so far as it concerns the changing forms of crime that is continually spreading in our country. In order to deal effectively with the complexity of money laundering offences, which involve money transfers and the making of transactions between countries all over the globe, we need continuous and close scrutiny and unceasing supervision at all times of the various financial activities, while maintaining complete transparency. The law is based on the premise that money launderers act in devious and cunning ways, and it will be possible to expose their misdeeds only if a sweeping and absolute reporting obligation is imposed on every transaction above a certain amount and on every unusual transaction. Were we to say otherwise, then we would create loopholes and allow money launderers to evade the law. This is indeed the principle upon which the Prohibition of Money Laundering Law is based: the principle is the principle of reporting — sweeping reporting, broad and full reporting — since we recognize that, because of the great difficulty involved in revealing money laundering, there is no other way of effectively discovering

offences and offenders. A broad reporting duty *ex ante* properly serves the purposes of the law, makes it possible to trace properly any transactions made with property, and thereby facilitates the discovery and detection of money laundering. See in this regard the remarks made by Minister of Justice Tzahi HaNegbi during the first reading in the Knesset *(Knesset Proceedings*, 19 April 1999, at p. 4246). See also *State of Israel v. Guetta* [20].

26. The importance of the reporting duty as a main tool in the war against illegal money can be seen from the precise and extensive discussion thereof in the law, and pursuant to the law in the establishment of the reporting mechanism that was chosen. Indeed, reporting is a means and not an end, but it is a means without which the essence of the law would be lost. Thus, once the banks became a tool in the hands of money laundering criminals, the legislature thought it right to depart from well-established doctrines, and it decided to erode even the bank's duties of trust and confidentiality vis-à-vis its customers (in this regard, see Flatto-Shinar, 'Bank Confidentiality and the Duty of Trust on the Altar of the War against Money Laundering — a Comparative Survey,' *supra*, at para. 24). As the explanatory notes to the draft law pointed out (*Draft Laws 5759*, at p. 424):

> 'The obligations of reporting, identification and keeping records that it is proposed to impose on the various financial institutions are justified because of the vital importance of the fight against the phenomenon of money laundering, even though they involve an interference in the right to privacy and the duty of trust between the customer and the financial institution. Duties of this kind can be found in the legislation of many western countries because of the recognition that these obligations are intended to prevent criminals abusing financial institutions and harming their reputation and the propriety of their business in consequence.'

With regard to all of this we say that if you remove from the Prohibition of Money Laundering Law the duty of reporting, you remove its very soul.

27. Our remarks above were not intended merely as an academic discussion. We discussed these matters, at length, in an attempt to discover what lies at the basis of ss. 7 and 9 of the law and to understand these provisions thoroughly and reveal their secrets. Now we know what the provisions of ss. 7 and 9 wished to instruct us, and from this we can discover the proper and correct scope of their application. We know that reporting is one of the cornerstones of the Prohibition of Money Laundering Law, that the law would be ineffective without it, that it is the basis for the ability of the authorities to fight serious crime and their attempts to try to eliminate the crime of money laundering. The duty of reporting movements of money is intended to serve as a tool in the war against money laundering, but once it was established the duty became one of the central pillars on which the Prohibition of Money Laundering Law is based. A close examination of the position shows us that the authorities face many difficulties before they are able to discover the connection between large sums of money that move from place to place and the source of that money — for our purposes, that it is prohibited money — and it was found that an effective way of escaping from the maze would be by imposing a sweeping and absolute reporting duty, a reporting duty that is not conditional upon the money being prohibited property. Indeed, at the end of the process it is possible that it will be discovered that the property concerned is not necessarily prohibited property, but we will know this only after sorting and examining all the large sums of money that are passed from hand to hand.

28. The duty of reporting movements of large sums of money from place to place is therefore regarded as a matter of supreme importance, and for this reason the legislature saw fit to provide a special offence in s. 3(b) that prohibits any undermining or disruption of the reporting. The interest that is protected in the provisions of s. 3(b) is the urgent need for the making and accuracy of reports. The offence defined in the section is the undermining of the banks' ability to make true and correct reports, and consequently the undermining of the ability of the authorities and the police to discover the source of the property. This is the reason for the offence, which involves

transactions that are made with property, as well as providing false information, with the purpose of evading reporting as required in ss. 7 and 9 of the law or with the purpose of making the report incorrect. Now we can see that if we accept the appellants' interpretation according to which the provisions of s. 3(b) apply only to property that was obtained by means of an offence, we will not realize the purpose of the law and the goal that the legislature wished to achieve. If we do not apply the section to all persons who make suspect transactions — like the splitting of the money that the appellant's did — we will find it very difficult to discover the money launderers.

29. The appellants further argue that applying the provisions of s. 3(b) also to property that has not been proved to be involved in an offence leads to a result that is illogical. How so? According to the appellants, this is because subsection (a) concerns property directly involved in source offences — offences of prostitution, drugs, gambling and other similar evils — whereas subsection (b) concerns evading a report with regard to property which may be prohibited property or which may not be prohibited property. *Prima facie* the seriousness of the offences in subsection (a) and subsection (b) are completely different, because the offence in subsection (a) is a more serious offence whereas the offence in subsection (b) is a less serious offence, and it is therefore also to be expected that the penalties that are prescribed for offenders under subsection (a), as opposed to offenders under subsection (b), should be completely different. But since we know that the penalties in the two subsection are identical, we can therefore deduce — by tracing our path backwards, from the penalty to the offence — that the provisions of s. 3(b), like the provisions of s. 3(a), only concern 'prohibited property.' The appellants find support for their position in the provisions of s. 10 of the law, according to which the penalty for breaching a reporting duty with regard to property when entering or leaving Israel (as provided in s. 9) is six months imprisonment or a fine. The offence in s. 10 of the law, so the appellants claim, is similar in essence to the offence in s. 3(b), since both of them concern a breach of a reporting duty. Assuming that both the provisions of s. 3(b) and the provisions of ss. 9 and 10 relate to property that is not necessarily prohibited property,

and knowing as we do that the penalty for an offence against the provisions of s. 3(b) of the law is ten years imprisonment, how is it possible that the penalties provided for the two offences are so different from one another?

It is possible that the difference between the two offences is, as the trial court already discussed, that the offence under s. 3(b) requires an element of purpose ('with the purpose' in the words of the section), whereas the offence created by s. 9 only requires awareness. Whether this is the case or not, we can understand and justify the severity of the penalty in the provisions of s. 3(b). As the court said in *State of Israel v. Adar* [2], at p. 620:

> 'Indeed, the great majority of cases will be ones in which people are making transactions in "prohibited property," and it is these that the legislature wishes to catch in its net. With regard to persons making transactions in "property" that is not "prohibited property," and they are the minority, they too will be required to explain why they did the prohibited acts that they did, and the penalty, if they are brought to trial, will fit the crime. The safety net that s. 3(b) creates around s. 3(a) cannot be said to be an imaginary safety net. The provisions of s. 3(b) have made the duty of reporting into a primary duty, and it cannot be said that in interpreting the law in accordance with its language we have created a monster that should be banished from the earth.'

Indeed, the reasons that we mentioned above for the interpretation of s. 3(b) are also valid for deriving the intention of the law from the language and purpose of that provision of law.

30. Our conclusion therefore is that, even according to its purpose, s. 3(b) is intended to apply to all property, whether it is prohibited property or property that has not been proved to be prohibited.

31. Let us make a final remark in this context, which is directly relevant to our case. As we have seen, the law, together with the Reporting Duties Order, imposes a reporting duty on the movements of property in values above a certain amount. The movement of

property in values under that amount does not require reporting (subject to exceptions that we have mentioned). But just as in the game of 'cops and robbers,' robbers take steps when moving property from place to place to outsmart the authorities. A common and simple way to undermine the reporting obligation with regard to the movement of money and to cause difficulties for the authorities is to carry out a procedure known as 'structuring.' The concept of structuring means that a deposit of money is split into several deposits, so that in each deposit an amount smaller than the amount requiring a report is deposited. Without structuring, the total amount would have required reporting, and the structuring results in a splitting of the amount into small amounts that are exempt from reporting. Structuring is therefore a means of creating a veil between the large sum of money and the duty of reporting, and its purpose is to undermine the ability of the authorities to trace that large sum of money. As the explanatory notes to the draft law state (*Draft Laws 5759*, at p. 420):

> 'The methods characteristic of money laundering are as follows:
>
> …
>
> (3) "Structuring" or splitting deposits and transfers into a series of transactions that are exempt from a duty of reporting or documentation, where there are such obligations, for bank transactions in certain amounts;'

See also the remarks of Minister of Justice Tzahi HaNegbi in the debate in the Knesset (*Knesset Proceedings*, 19 April 1999, at p. 4245).

Indeed, both in theory and in practice, structuring is the making of a transaction in property 'with the purpose of there being no reporting,' and it therefore follows that it constitutes an offence under the prohibition in s. 3(b). This will remain the case until a new method is invented for evading reporting.

32. Revealing transactions to be structuring transactions is of great importance, even — and perhaps especially — where we are concerned with money whose source is unknown. The activity of

structuring or providing false information with regard to property that seems *prima facie* to be innocent property creates a pillar of darkness between the truth and the law enforcement authorities. Were it not for the existence of a sweeping and absolute reporting obligation, the authorities would have great difficulty in discovering any activity of structuring or any other activity that is designed to undermine the reporting obligation. This can be compared to a search that is made on the person of someone who enters a public place; everyone is searched, even a saint!

Penalty for deliberate evasion of reporting — comparative law

33. The phenomenon of money laundering is a global one, like the offences that it seeks to conceal — drugs offences, offences associated with prostitution, trafficking in human beings, gambling — and civilized countries have developed various models of scrutiny and reporting in order to catch money launderers. The Israeli model is similar in some aspects to the model adopted in the United States, so we will now say a few words about the law in the United States.

34. The main prohibition of money laundering in the law of the United States is found in the Money Laundering Control Act (18 USC §§ 1956, 1957) of 1986, and as a part of the fight against money laundering banking corporations in the United States were made liable to report every movement of money in an amount of 10,000 dollars or more. See 31 C.F.R. § 103.22(b)(1). See also C. Boran, 'Money Laundering,' 40 *Am. Crim. L. Rev.* 847 (2003); *Butterworths International Guide to Money Laundering Law and Practice* (second edition, 2003, Toby Graham, ed.), ch. 33, 'United States of America,' by Dr K. Alexander) at p. 628 *et seq.*. An act of structuring is stated to be a criminal offence, and the same is the case in the Bank Secrecy Act of 1970 (31 USC § 5324). In the words of the law:

'Structuring transactions to evade reporting requirement prohibited

§ 5324

(a) No person shall, for the purpose of evading the reporting requirements of… the reporting or recordkeeping requirements imposed by any order issued under… or the recordkeeping requirements imposed by any regulation prescribed under… —

…

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.'

The penalty prescribed for anyone who commits this offence is five years imprisonment or a fine.

35. Under the law in the United States, the reporting obligation is a sweeping obligation that includes all property, and not merely prohibited property. Even the offence of structuring is not based necessarily on property that was obtained by means of an offence. Thus, for example, in *United States v. Thakkar* [25], where an accused argued that one of the elements of the offence of structuring was that the property originated in an offence, the argument was rejected. In the words of the court (*ibid*. [25], at p. 1032):

> 'The statute clearly condemns the act of evasive structuring, regardless of whether the money involved is "dirty" or not. It is hard to imagine how the language could be clearer.'

36. Until now we have discussed the offence of a deliberate evasion of reporting. Let us now turn to the forfeiture proceeding, which we shall address briefly.

Forfeiture of property in a civil proceeding

37. Now that we know that the provisions of s. 3(b) of the law also apply to property that has not been proven to be involved in an

offence, let us turn to the question of the forfeiture, as the law requires. It will be recalled that the trial court decided to forfeit $150,000 dollars out of the approximate sum of $400,000 that they deposited at Bank HaPoalim, and the question is whether the forfeiture was done lawfully, and whether the state discharged the burden of proof as it was required to do to justify the forfeiture.

38. Chapter 6 of the Prohibition of Money Laundering Law, in ss. 21 and 22, speaks of the forfeiture of property that is involved in an offence against the law, and the purpose of the forfeiture — as is evident from the text and like in other forfeiture proceedings — is to ensure that an offender should not profit, that his ill-gotten gains should be taken from him, and that criminals and potential criminals should be aware that everything will be done so that there will be no need to ask 'why the path of the wicked is successful' (Jeremiah 12, 1 [27]). That the wicked should receive their just deserts means, for our purpose, that the offender should not be allowed to keep the fruits of the criminal tree for himself. In this regard the Minister of Justice, MK Tzahi HaNegbi, said in the debate on the first reading of the Prohibition of Money Laundering Law (*Knesset Proceedings*, 19 April 1999, at p. 4246):

> 'With regard to the forfeiture of the property, in the Dangerous Drugs Ordinance that was adopted there are provisions that were introduced ten years ago with regard to the forfeiture of property. We think that these provisions have been proved to be very effective in the fight against criminals, since in the context of drugs, where there is a potential for huge profits, when there is a possibility that this economic profit will not come into their possession, this has a deterrent effect.'

This purpose of the forfeiture proceeding is important in this case, as we shall see below.

39. The Prohibition of Money Laundering Law distinguishes clearly and in detail between two kinds of forfeiture: forfeiture in a criminal proceeding and forfeiture in a civil proceeding. The provisions of s. 21 concern, as the title of the section says,

'Forfeiture of property in a criminal proceeding,' and they address the case of someone who has been convicted of an offence under ss. 3 or 4 of the law. When someone has been so convicted, the court should order (subject to some exceptions), in additional to any other penalty, that property that has the value of the property that was involved in committing the offence should be forfeited from his property. But we are concerned in the present case with 'Forfeiture of property in a civil proceeding,' which is addressed in s. 22 of the law. The text of the law is:

'Forfeiture of property in a civil proceeding

22. (a) The District Court, upon an application of the District Attorney, may order the forfeiture of property in a civil proceeding (hereafter — civil forfeiture) if it finds that both of the following are fulfilled:

(1) The property was obtained, directly or indirectly, by means of an offence under sections 3 or 4 as the profits of that offence, or an offence under those sections was committed with it;

(2) The person suspected of committing an offence as aforesaid is not permanently in Israel or cannot be located, and therefore it is not possible to file an indictment against him, or the property as stated in paragraph (1) was discovered after the conviction.

(b) The respondent in the application shall be whoever claims a right in the property, if he is known; if the court makes a determination as stated in section 21(e), the convicted person

shall also be a respondent in an application under this section.

(c) A decision of the court under this section may be appealed in the manner that a decision in a civil proceeding may be appealed.

(d) Property that is not the property of the suspect may not be forfeited under this section, unless —

(1) The owner of the right in the property knew that the property was used for an offence or agreed thereto; or,

(2) The owner of the right in the property did not acquire his right for consideration and in good faith.

Section 23 of the law goes on to tell us that a forfeiture of property under the Prohibition of Money Laundering Law is subject to the provisions of ss. 36C to 36J of the Dangerous Drugs Ordinance, *mutatis mutandis*.

40. Section 22(a) is the section that was used to forfeit the appellants' money, and the question is whether the appellants satisfy the two conditions provided in that section of the law. There is no doubt that the appellants satisfy the second condition, namely the condition that the appellants are not permanently in Israel, and the question is merely whether they satisfy the first condition, namely the condition that 'the property was obtained, directly or indirectly, by means of an offence under sections 3 or 4… or an offence under those sections was committed with it.' According to the appellants, they do not satisfy this condition for the reason that the state needed to prove that they carried out an act of structuring for the purpose of evading reporting (as required by s. 3(b) of the law), to the degree of proof required in a criminal trial, namely beyond all reasonable doubt. The state failed in this task of proving the *mens rea*, so the appellants

continue to argue, and therefore the forfeiture should be void. The trial court rejected this argument and held that the burden of proof in the forfeiture proceeding under s. 22 of the law is the burden of proof in a civil proceeding, namely the balance of probabilities, and that the state had discharged this burden. In this appeal, the appellants are attacking these findings.

41. We too are of the opinion — like Justice Tal in the trial court — that the appellants' arguments should be rejected. First, the title of s. 22 — 'Forfeiture of property in a civil proceeding' — is capable at least of hinting that the forfeiture proceeding is a civil proceeding. If this is the case as a rule, it is even more so when that civil forfeiture proceeding comes after a forfeiture in a criminal proceeding, but is separate from it. Second, s. 22(c) provides that a decision in a civil forfeiture proceeding may be appealed 'in the manner that a decision in a civil proceeding may be appealed.' This is another indication that the proceeding is a civil proceeding. Third, we tend to agree with the remarks of Justice Tal that requiring a standard of beyond all reasonable doubt, were that to be required, would rule out any real possibility of a forfeiture, and in any case it would unjustifiably and unnecessarily make matters difficult for the state. This is mainly the case when the suspect is abroad or cannot be located. In that context it may be said that the key to extricating himself from this position is held by the owner: let him come to Israel, give whatever explanations he has, and even face a criminal trial. In any case, he can also try to explain whatever requires an explanation from his place of residence. But it would be strange if we were to give greater rights to someone who refuses to appear in Israel, so that he would have the right to control the proceeding and the property in Israel by remote control.

42. In clarification we should add that when speaking of the difficulties faced by the state we are referring mainly to the forfeiture of property under the first alternative in s. 22(a)(1), namely the forfeiture of property that was 'obtained, directly or indirectly, by means of an offence under sections 3 or 4 as the profits of that offence…'. The position is different with regard to the forfeiture of property under the second alternative in s. 22(a)(1), namely when 'an

offence under those sections [3 or 4] was committed with it.' In our case, we are concerned with property for which no reporting was made as stated in s. 3(b). In a case of this kind — which is the case here — the position of the state is far better from the perspective of the rules of evidence.

43. Indeed, the forfeiture of property does involve, as the appellants' claim, a violation of property rights — a right that is now enshrined in the Basic Law: Human Dignity and Liberty — but from a close examination it will be seen that in our case the conditions of the limitations clause are satisfied, and that the conditions of this clause, in the circumstances of the case, do not necessarily require a burden of proof as required specifically in a criminal case. But it should be remembered, *inter alia*, that we are not speaking of taking property from someone in the same way as imposing a fine. The premise in this case is that the property that it is proposed to forfeit was used to commit an offence under s. 3(b) of the law; the property is 'criminal property,' and the forfeiture proceeding was intended to remove that criminal property from the pocket of its owner. The state's action is similar in certain senses to an action for unjust enrichment. If we regard the matter in this way, we will realize that we are in the sphere of civil law, the environment is one of civil law, and the burden of proof will automatically be determined accordingly. On the subject of forfeiture, Justice Kedmi said in CrimA 7475/95 *State of Israel v. Ben-Shitrit* [5], at p. 410:

> 'I accept the state's position, according to which a forfeiture and a fine are not alternative penal methods. A fine is a penalty in the simple sense, and the purpose of imposing it is "penal." By contrast, forfeiture is not a penalty, in the basic sense of this concept, and its purpose is not "penal"; it is to deprive the robber of his ill-gotten gains.'

See also CrimA 7376/02 *Cohen v. State of Israel* [6], at p. 573; CrimA 4735/03 *Tzabari v. State of Israel* [7], at pp. 692-693; CrimC (Jer) 358/04 *State of Israel v. Buhadna* [24], at para. 8.

44. In determining that the civil burden of proof is the standard for this case, we are taking into account the global nature of the phenomenon of money laundering and the relative ease with which money can be moved from country to country. A million dollars can be moved from one place to another at the press of a button, and it is impossible to know the details of the transfer. The provisions of s. 22 of the law are also intended to catch persons who committed an offence outside Israel, to prevent offences being committed by remote control and to frustrate any evasion of the law by abusing the limitations of territorial jurisdiction. The premise underlying section 22 is that since we know that money laundering offences are unrestricted by political boundaries, only a sanction that also goes beyond accepted territorial boundaries will have the power to provide a proper response to those offences (cf. the provisions of s. 2(b) of the law, which state that for the purpose of this chapter, an offence as stated in subsection (a) that was committed in another country shall also be regarded as an offence, provided that it is also an offence under the laws of that country'). The premise in s. 22 is that the owner of the property, as in our case, is situated outside the borders of Israel or cannot be located. Once we realize this, we will also know that the prosecution is in an inferior and weak position from the perspective of the rules of evidence. As the trial court said, imposing on the prosecution a burden of proof as in criminal trials will make it difficult to prove that the offence was committed, and it may even make the task almost impossible, since it is not feasible to interrogate the owner of the property and to carry out the proceedings that are usually required in order to prove beyond all reasonable doubt that an offence has been committed. It can therefore be said that requiring proof on the standard of beyond all reasonable doubt is likely to undermine the purpose of the law severely.

45. Notwithstanding what we have said, we should confess that the forfeiture proceeding is not a 'pure' civil proceeding, and we would be deceiving ourselves if we ignored its criminal aspects. Even if we say that the proceeding is in essence a civil proceeding, and therefore the burden of proof that the state must discharge is the standard required in a civil proceeding, I think that weight should still be

attached to the nature of the proceeding — a proceeding that is intended to be a substitute for an ordinary criminal proceeding and, what is more, a proceeding that is designed to harm property rights. The weight of this factor should move the burden of proof along the scale: it should fix its place within the category of civil burdens of proof, but in that sub-category of burden of proof that is reserved for those grave and serious cases that require more substantial evidence than usual, or, if you will, a larger amount of evidence than that required in a normal civil case. Thus, the burden of proof will admittedly be examined on a balance of probabilities, but more substantial and weighty evidence will be required than in the usual case. See and cf. CrimA 232/55 *Attorney-General v. Greenwald* [8], at pp. 2063-2064; CA 475/81 *Zikri v. Klal Insurance Co. Ltd* [9]; CA 125/89 *Ballas v. Estate of Rosa Rosenberg* [10], at p. 449; CA 373/89 *Masry (Shahin) v. Halef* [11], at p. 742; CA 36/99 *Yaffeh v. Estate of Hannah Glaser* [12], at p. 286; CA 670/79 *HaAretz Newspaper Publishing Ltd v. Mizrahi* [13], at p. 186; CA 2275/90 *Lima Israel Chemical Industries Ltd v. Rosenberg* [14]; for a discussion of the citations, see Y. Kedmi, *On Evidence* (2003), at pp. 1502-1502, 1554-1559.

46. This proposed solution is capable of expressing the principle that there ought to be a 'close reciprocal relationship between the degree and nature of the sanctions imposed and the procedural rights given to someone upon whom the authorities wish to impose the sanction': K. Mann, 'Punitive Civil Sanctions,' 16 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 243 (1991), at p. 260. This solution realizes the purpose underlying s. 22 of the law: it protects the civil framework that the legislator expressly intended and at the same time it takes into account the serious nature of the sanction, the circumstances of imposing it and the fact that we are concerned with a substitute for a criminal proceeding. Thus the solution acts as a protective shield against a disproportionate violation of the individual's property rights. We cannot accept the appellants' claim that the requirement of the standard of proof for a civil trial will discriminate against foreign residents as compared with Israeli residents, since the latter are subject to s. 21 which requires the

standard of proof for a criminal trial. These are different proceedings that are conducted in different circumstances, and the argument of discrimination is no argument.

47. The provisions of s. 22(a)(1) of the law concern two different kinds of offence: the first kind concerns property that was obtained, directly or indirectly, 'by means of an offence under sections 3 or 4,' whereas the second kind — which is relevant in our case — concerns property with which 'an offence under those sections [3 or 4] was committed.' A higher standard of proof will make it difficult for the prosecution, especially, as we pointed out in para. 42 above, in the first type of case, whereas in the second type of case, at least in a case of structuring, the prosecution's position will be easier. If this is the case in general, it is certainly so in our case.

Both in the first type of case and the second type of case the prosecution will be obliged to rely mainly on circumstantial evidence, but in the case of structuring, as in our case, it is possible to say that the matter speaks for itself (*res ipsa loquitur*). The unique nature of the structuring leads us to the conclusion that when an act of structuring has been proved and the owner of the property lives abroad, the burden of proof passes to the owner to bring evidence to rebut the conclusion implied by the *prima facie* evidence. Thus, for example, a deposit of money in an account in instalments, one shortly after the other, when each deposit is slightly less than the amount that requires reporting automatically establishes a presumption that structuring has been carried out. At this point the (tactical) burden passes to the owner of the property to give an explanation for his actions. If he does not do so, it can be said that the state has discharged the burden of proof imposed upon it.

48. In the civil forfeiture proceeding provided in the Fight against Crime Organizations Law, 5763-2003, it is stated in s. 17 of that law that for the purpose of forfeiting property in a civil proceeding, the commission of the offence should be proved according to the standard of proof required in a criminal trial, whereas the connection between the property and the offence will be proved according to the standard of proof required in a civil trial. Notwithstanding the similarity between the arrangements, it appears that applying the rule

in the aforesaid law is not relevant in our case, since the offence under discussion in s. 3(b) is an offence against the Prohibition of Money Laundering Law itself, as opposed to offences that are mentioned in the Fight against Crime Organizations Law, which are offences that are 'external' to the law.

49. The rule, then, is that in a forfeiture of property under s. 22 of the law, the state's burden of proof is the burden of proof in a civil proceeding, but more substantial and weighty evidence than in a normal civil trial will be required.

50. A final word on the question of the offence in s. 3(b) of the law and on the question of forfeiture: in case someone should come and say that we have ignored principles in the law, we should add that we are aware of the problematic conclusion implied by our opinion with regard to the provisions of s. 3(b) of the law and the question of forfeiture. But the alternative to this interpretation, which is the alternative that the appellants espouse, will inevitably lead us to make the law ineffective and useless as a weapon against money laundering. This alternative is unacceptable to us and we therefore do not accept it.

From general principles to the specific case

51. Our normative voyage is complete and the time has come to examine the case of the appellants before us. The appellants' complaint is with regard to the forfeiture of 150,000 dollars out of the sum of approximately 390,000 dollars that was deposited at the Hadar Yosef branch of Bank HaPoalim. The forfeiture was made in accordance with s. 22(a) of the Prohibition of Money Laundering Law, and, as we have seen, two preconditions must be satisfied before property can be forfeited under that provision of statute. There is no dispute that the second condition, the condition provided in s. 22(a)(2), that the owner of the property 'is not permanently in Israel or cannot be located' is satisfied in our case. The question is merely whether the first condition, the one provided in s. 22(a)(1) of the law is satisfied, namely whether the aforesaid sum of approximately 390,000 dollars was involved in the commission of an offence under s. 3(b) of the law. In other words, did the appellants carry out a

transaction in the property 'with the purpose that no report will be made under section 7… or in order to make a report incorrect, under [s. 7]…'? To be more precise, does the manner of depositing that sum of approximately 390,000 dollars — a deposit that would have required a report had it been done at one time — in ten separate deposits where each one does not require a report, on dates that were almost consecutive, constitute evidence of a purpose that the appellants contemplated, namely that there would be no report, etc.. The state claims that it has succeeded in discharging the burden of proof that rests with it, whereas the appellants reply that it has not done so.

52. There is no doubt in my mind that the law supports the state, and that the circumstantial evidence clearly proves that the appellants' purpose was to evade reporting under s. 7, and possibly in addition, indirectly, to make a report incorrect. Indeed, the manner of depositing the money can be said to speak for itself (*res ipsa loquitur*), and in these circumstances the burden to adduce evidence that rebuts the *prima facie* presumption rests with the appellants. The appellants are like someone who has possession of a balcony from which a flowerpot falls on the head of an innocent passer-by; just as the person having possession of the balcony has the burden to explain how such a thing happened, so too are the appellants required to explain what happened. The manner of making the deposits created a presumption of fact (*praesumptio facti*) that the appellants sought to evade the reporting duty by means of structuring, and this presumption required them to come forward and explain. But the appellants did not come forward nor did they explain. The appellants are full of legal arguments, but in none of these have we heard even a hint of an explanation for their actions. The absence of an explanation for their actions strengthens what their actions imply. Indeed, had the appellants provided an explanation, we would certainly have listened to their complaints. But the appellants have acted like in the Biblical verse, in that 'there was no sound nor any answer nor any response' (I Kings 18, 29 [28]). All that we have heard from them — or to be more precise, from their counsel, since we have not seen them at all — was merely that they made the

deposits openly without trying to hide their identity. But this argument is so weak that it deserves no answer. The appellants further claim that they gave no explanation for their acts since the prosecution did not present any evidence that they could rebut. This argument also is so weak that it is insulting to the intelligence of anyone who hears or reads it.

53. The appellants further argue that 'sometimes even innocent people whose property is the product of their hard labour have many different reasons why they may wish their transactions at the bank not to be reported to the authorities, including a fear of tax investigations, the need for privacy, etc.,' and that it is inconceivable in such circumstances that their property should be forfeited. In this argument the appellants are attacking the actual obligation to make reports, and thus they undermine the purpose of the law, i.e., the purpose that the law should apply to *all* property and to *every* movement of money as stated in the law and in the Reporting Duties Order. Were we really concerned with an innocent deposit, we would expect to receive an explanation of this, rather than idle conjectures and speculative guesses as to the reason for the lack of reporting, which are meaningless. I can only repeat what was said in *State of Israel v. Adar* [2], at p. 620, in this regard:

> 'Indeed, the interpretation of the provisions of s. 3(b) so that they apply also to innocent and honest property is not an easy interpretation, but let us ask ourselves truly and honestly the following question: if a person is dealing with innocent and honest property, and he knows that he is committing a very serious offence when he does an act with that property with the purpose that there will be no reporting to the authorities, why should he do such an act with the purpose that there should be no reporting to the authorities? Why should he take upon himself a risk and become a serious offender by doing a prohibited act?'

Let us also add the following: randomness is a part of life and there are even cases where one random event follows another. But where acts that appear random occur sequentially one after another, the randomness becomes a pattern like the rising of the sun in the

east. As the court said in CrimA 6251/94 *Ben-Ari v. State of Israel* [15], at p. 129:

> 'Divine intervention and prophecy are not a common occurrence, and when alleged "divine interventions" occur one after another in circumstances that all point to the guilt of an accused, we say — as human beings — that the accused should be convicted and that there is no reasonable doubt in our minds. Indeed, chance, divine intervention, the hand of God, optical illusions, when they occur time and time again in the same context, do not achieve a cumulative effect but an exponential one. Thus randomness becomes a pattern, and the value of an argument that it is a divinely created illusion is of negligible value.'

Indeed, a person's intention — even a special intention — can be comprehended from his acts, and the act creates a 'presumption as to intention.' A person usually intends the results that are the natural and likely consequence of his acts. This assumption can be rebutted, of course, but someone who does the act must provide an explanation for it. This is the case in general and also with regard to the intentions of the appellants in the deposits that they made without giving, or even trying to give, any kind of explanation.

54. The circumstantial evidence that the state presented in our case therefore creates a mosaic, and the picture that we obtain from this mosaic is a clear one: the purpose of the appellants was to evade any reporting of the deposit of the money in the bank. This purpose can be seen from the evidence; the appellants did not even try to disprove it, and they certainly did not succeed in disproving it. Thus, when no explanation is heard from the appellants with regard to the reason why they chose to deposit the money as they did, the standard of proof required in the civil trial is satisfied, even when the amount of evidence required is greater than usual. Without making any firm determination in this regard, it can be argued that the state also satisfied the requirement in a criminal trial, to prove its right to the forfeiture according to the standard of beyond all reasonable doubt.

55. With regard to the forfeiture of the 150,000 dollars, we have not found this forfeiture to depart from the proper degree of proportionality, and the appellants' argument in this regard is also rejected.

56. Finally, I have read the opinion of my colleague Justice Hayut, and I agree with her recommendations to amend the law.

Conclusion

57. In conclusion, it has been proved that the appellants committed the offence provided in s. 3(b) of the Prohibition of Money Laundering Law as required in order to forfeit the money under s. 22 of the law, and therefore the appeal should be denied. The forfeiture order consequently becomes final. The appeal is denied. The appellants shall pay the state costs and legal fees in a sum of NIS 75,000.

Justice M. Naor

1. I agree with the opinion of my colleague, Justice Cheshin.

2. With regard to the burden of proof (paras. 45-46 of my colleague's opinion), the burden of proof is, as my colleague said, the civil burden of proof. With regard to the amount and strength of evidence required, I would not make any rules in this regard. I agree with the conclusion that in our case the required amount of evidence certainly exists.

Justice E. Hayut

1. I agree with the determination of my colleague Justice M. Cheshin and with all his reasoning with regard to the interpretation of s. 3(b) of the Prohibition of Money Laundering Law, 5760-2000. Indeed, the property to which the section refers is all property and not merely 'prohibited property' as defined in s. 3(a) of the law. This interpretation is required both by the language of the law, with all of its provisions, and by the purpose that underlies the law, to provide the law enforcement system with more effective tools than the ones it had previously, for the purpose of fighting serious and organized

crime. I also accept my colleague's position that drastic legislation is required in order to contend with crime of this sort, as a necessity that should not be belittled. Indeed, a democratic state sometimes needs to relax its principles and introduce reporting requirements and criminal sanctions on a wide scale in order to fight the crime that afflicts it.

Notwithstanding, in view of the broad interpretation given to the term 'property' in s. 3(b) of the Prohibition of Money Laundering Law, an undesirable result emerges whereby the penalty imposed on the offence under s. 3(b) of the law, which my colleague defined as an offence that is intended to act merely as a 'safety net' in order to ensure compliance with the reporting duties provided in the law, is identical to the penalty imposed on the 'core offence' prescribed in s. 3(a) of the law. In other words, anyone who carries out transactions in property — any property — with the purpose of preventing a report as required by the law is treated in the same way as someone who carried out transactions that were intended to conceal the source of property that is defined as 'prohibited property': both the former and the latter are liable to a penalty of up to ten years imprisonment. The problematic nature of this becomes even starker in view of the provisions of s. 100 of the Prohibition of Money Laundering Law, which, like the offence under s. 3(b) of the law, also concerns a breach of reporting duties without requiring proof that the property with regard to which the offence was committed is 'prohibited property.' Nonetheless, the penalty for an offence under s. 10 of the law is merely six months imprisonment, as compared with a maximum penalty of ten years imprisonment for an offence under s. 3(b) of the law. It would appear that such a disparity in sanctions is unjustified and illogical, even if we take into account the difference between the *mens rea* element of purpose that is required under s. 3(b) of the law, as opposed to the *mens rea* element of awareness that is required in an offence under s. 10 of the law. I am of the opinion that the legislature should address this undesirable position, and act to amend it. One way of doing so is to reduce the disparity in the level of sanction between the offence provided in s. 10 of the Prohibition of Money Laundering Law and the offence in s. 3(b)

thereof. Another way is to give the accused an opportunity, in an offence under s. 3(b), to prove in his defence that the property with regard to which the offence was carried out is not 'prohibited property,' and if he does prove this, his position from a viewpoint of the level of sanction should be made equal to someone who committed an offence under s. 10 of the law.

2. With regard to the issue of forfeiture, we are concerned with a forfeiture of property in a civil proceeding pursuant to s. 22 of the Prohibition of Money Laundering Law, which provides in subsection (a) that:

'Forfeiture of property in a civil proceeding

> 22. (a) The District Court, upon an application of the District Attorney, may order the forfeiture of property in a civil proceeding (hereafter — civil forfeiture) if it finds that both of the following are fulfilled:
>
> (1) The property was obtained, directly or indirectly, by means of an offence under sections 3 or 4 as the profits of that offence, or an offence under those sections was committed with it;
>
> (2) *The person suspected of committing an offence as aforesaid* is not permanently in Israel or cannot be located, and therefore it is not possible to file an indictment against him, or the property as stated in paragraph (1) was discovered after the conviction.
>
> …

(Emphasis supplied).

From this provision it can be seen that the reasons why a forfeiture is effected in a civil proceeding rather than a criminal proceeding

(which is the subject of s. 21 of that law) are in essence 'technical' reasons, and they concern the fact that the person who is a suspected of committing an offence is not in Israel or cannot be located, and therefore it is not possible to initiate a criminal proceeding against him, or the fact that the criminal proceeding in which the accused was convicted has been completed whereas the property relating to the matter was discovered only after the conviction. It follows that the civil classification of the forfeiture proceeding does not necessarily indicate the standard of proof required for the purpose of this proceeding. Indeed, from a substantive perspective, it is definitely possible to make a strong argument that the forfeiture is deeply rooted in the criminal proceeding from which it derives its essence and therefore the standard of proof that is required for the purpose of forfeiture under s. 22 of the Prohibition of Money Laundering Law — even though it is called a 'civil forfeiture' — is the standard of proof required in criminal cases, at least in so far as concerns the existence of an offence that constitutes a condition for the forfeiture. A similar model with regard to the standard of proof required in a civil forfeiture proceeding can be found in s. 17 of the Fight against Crime Organizations Law, 5763-2003, which is based on similar goals and purposes to those underlying the Prohibition of Money Laundering Law (however, see and cf. s. 24 of the Prohibition of Financing Terrorism Law, 5765-2005). Even in this matter the legislature would have done well to have stipulated clearly the standard of proof required for the purpose of a forfeiture of property in a civil proceeding under the Prohibition of Money Laundering Law, as it saw fit to do in the two other laws mentioned above.

3. However, in the case before us there is, in my opinion, no need to decide the question of what is the standard of proof required for a forfeiture under s. 22 of the law. The evidence presented satisfies the standard of proof required, even it is the standard of proof required in a criminal case (beyond all reasonable doubt), and certainly if all that is needed is the standard of proof required in a civil case (on a balance of probabilities). In this respect, we should mention once again that the appellants deposited a sum of approximately 300,000 dollars in *ten* different deposits that were

made one *immediately* after the other, and in each of them they deposited a sum that was *only slightly less* than the amount that required reporting at that time under the Prohibition of Money Laundering Law and the orders made pursuant thereto. These actions give rise to a very serious suspicion that the appellants made a 'transaction in property… with the purpose that no report will be made under section 7,' according to the language of s. 3(b) of the law. The fact that the appellants did not give any explanation of their actions raises questions, and it turns this suspicion, *in the specific circumstances before us*, into a certainty beyond all reasonable doubt (cf. the silence of an accused as corroboration for the prosecution's evidence: CrimA 7520/02 *Hamati v. State of Israel* [16]; LCrimA 1601/91 *Tzarfati v. State of Israel* [17]; CrimA 2831/95 *Alba v. State of Israel* [18], at p. 269; CrimA 556/80 *Ali v. State of Israel* [19], at p. 185; Y. Kedmi, *On Evidence* (part 1, 1999), at p. 221).

Since this is my opinion, I do not need to take a firm stand with regard to the position of my colleague Justice Cheshin that, for the purpose of forfeiting property in a civil proceeding under s. 22 of the law, the burden of proof is the same as in a civil proceeding, but there is a need that 'more substantial and weighty evidence than in a normal civil trial will be required' (para. 49 of his opinion).

For all of the aforesaid reasons, I too am of the opinion that the appeal should be denied.

Appeal denied.

12 Adar I 5765.
21 February 2005.