HCJ 11339/05

State of Israel
v.
1. Beer-Sheba District Court
2. Meir Zano
3. Yisrael Ganon
4. David Tzafir
5. Yaron Sanker
6. Rafi Ohana
7. Moshe Ohana
8. Shalom Shitrit
9. David Akiva
10. Gal Bugnim
11. Public Defender's Office
12. Israel Bar Association

Applicants to join the proceeding:
1. Ilana Shelhov
2. Amir Shelhov

The Supreme Court sitting as the High Court of Justice
[8 October 2006]
Before President Emeritus A. Barak, President D. Beinisch,
Vice-President E. Rivlin
and Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In 1976 the Supreme Court held in *Kinsey v. State of Israel* [1] that when two accomplices are indicted in separate trials, one (the 'witness-accomplice') should not be called to testify against the other (the 'defendant') until the witness-accomplice's own trial has ended. This became known as the Kinsey rule. Thirty years later, the court is being requested to reconsider the Kinsey rule.

Held: The Kinsey rule, which was originally intended as a rule of proper practice, became over the years a binding rule from which the courts rarely departed. The court recognizes that the rule in its all-encompassing scope is no longer suited to present conditions and legal realities. It today constitutes an obstacle to conducting effective criminal trials. The time has come to depart from the all-encompassing rule and to determine a new point of balance between the competing values that lie at the heart of the Kinsey rule, and the rule as it is interpreted today can no longer stand.

(Majority opinion — President Beinisch, President Emeritus Barak, Vice-President Rivlin, Justice Naor) The time has come to cancel the rule of practice formulated in the Kinsey rule. The discretion given to the court to postpone the trial in order to wait for the witness's trial to end should be exercised very narrowly, in exceptional cases only and for special reasons that the court should state.

(Minority opinion — Justices Levy, Grunis) The Kinsey rule should no longer be followed. The court should exercise great caution when considering the credibility of the testimony of a witness-accomplice, whose separate trial has not ended, against the defendant. The right to a fair trial, which was protected by the Kinsey rule, should be protected instead by other means, particularly by the requirement of supporting evidence for the testimony of a witness-accomplice in s. 54A of the Evidence Ordinance, and by the privilege against self-incrimination in s. 47(b) of the Evidence Ordinance, which should be interpreted broadly so that any incriminating statement made during the testimony of the witness-accomplice in the trial of the defendant may not be used directly or indirectly against the witness-accomplice in his subsequent trial.

(Minority opinion — Justice Procaccia) The proper balance between the conflicting values will be achieved by a selective cancellation of the Kinsey rule, which will leave the trial court judicial discretion, in exceptional cases, to order the hearing of the witness-accomplice's testimony only after his trial has ended. (The scope of these exceptional cases was regarded as too broad by the majority opinion).

Petition granted.

Legislation cited:

Basic Law: Administration of Justice, s. 2.

Basic Law: Human Dignity and Liberty, ss. 5, 8.

Courts Law [Consolidated Version], 5744-1984, s. 77A(a).

Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996, ss. 21, 60-62, 61, 62.

Criminal Procedure (Testimony) Ordinance, 1927, s. 2(2).

Criminal Procedure Law [Consolidated Version], 5742-1982, ss. 74(e), 134, 145, 147, 155, 186, 196.

Evidence Ordinance [New Version], 5731-1971, s. 10A, 10A(c), 47, 47(a), 47(b), 53, 54A(a).
Evidence Ordinance Amendment Law (no. 4), 5740-1979.
Evidence Ordinance Amendment Law (no. 6), 5742-1982.
High Court of Justice Procedure Regulations, 5744-1984, r. 20(b).
Rights of Victims of Crime Law, 5761-2001.

Israeli Supreme Court cases cited:

[1] CrimA 194/75 *Kinsey v. State of Israel* [1976] IsrSC 30(2) 477.
[2] HCJ 398/83 *Avitan v. Bench of Three Justices* [1983] IsrSC 37(3) 467.
[3] HCJ 583/87 *Halperin v. Vice-President of Jerusalem District Court* [1987] IsrSC 41(4) 683.
[4] HCJ 6371/94 *Deri v. Jerusalem District Court* [1995] IsrSC 49(1) 133.
[5] HCJ 6876/01 *Barlai v. Justice of Tel-Aviv Magistrates Court* (unreported decision of 18 November 2001).
[6] HCJ 8800/05 *Duha v. Tiberias Magistrates Court* (unreported decision of 22 September 2005).
[7] HCJ 267/88 *HaIdra Rabbinical College Network v. Local Affairs Court* [1989] IsrSC 43(3) 728.
[8] HCJ 620/02 *Chief Military Prosecutor v. Appeals Court Martial* [2003] IsrSC 57(4) 625.
[9] HCJ 9264/04 *State of Israel v. Jerusalem Magistrates Court* **[2005] (1) IsrLR 400**.
[10] HCJ 6319/95 *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [1997] IsrSC 51(3) 750.
[11] CrimA 725/95 *Mandelbrot v. State of Israel* (unreported).
[12] CrimA 169/74 *Kadouri v. State of Israel* [1975] IsrSC 29(1) 398.
[13] CrimA 949/80 *Shuhami v. State of Israel* [1981] IsrSC 35(4) 62.
[14] CrimA 501/81 *Abu-Hatzeira v. State of Israel* [1982] IsrSC 36(4) 141.
[15] CrimA 777/80 *Beinashvili v. State of Israel* [1983] IsrSC 37(2) 452.
[16] CrimApp 9474/04 *State of Israel v. Alzam* (unreported).
[17] CrimApp 5899/00 *Ivorkin v. State of Israel* (unreported).
[18] CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589.
[19] CrimApp 8087/95 *Zada v. State of Israel* [1996] IsrSC 50(2) 133.
[20] CrimApp 12047/04 *State of Israel v. Ben-Yishai* (unreported).
[21] CrimApp 1657/04 *State of Israel v. Ben-Yishai* [2004] IsrSC 58(5) 577.
[22] HCJ 5091/03 *Turk v. Attorney-General* [2003] IsrSC 57(5) 665.
[23] CrimApp 7971/01 *State of Israel v. Teakman* (unreported).
[24] CrimA 125/75 *Meirom Ltd v. State of Israel* [1976] IsrSC 30(1) 57.
[25] HCJ 8850/02 *Pastinger v. Minister of Justice* [2004] IsrSC 58(2) 696.

[26] CrimApp 8639/05 *State of Israel v. Almarboa* (unreported).
[27] CrimApp 2846/97 *State of Israel v. Maharom* (unreported).
[28] CrimApp 7372/03 *State of Israel v. Moses* (unreported decision of 14 August 2003).
[29] CrimA 1774/02 *Kadosh v. State of Israel* (unreported decision of 20 November 2002).
[30] CrimA 330/84 *State of Israel v. Sha'ashua* [1985] IsrSC 39(1) 85.
[31] CrimA 64/87 *Gerstal v. State of Israel* [1988] IsrSC 42(3) 533.
[32] CrimA 579/88 *Suissa v. State of Israel* [1990] IsrSC 44(1) 529.
[33] CrimA 67/85 *Abeid v. State of Israel* [1986] IsrSC 40(3) 391.
[34] CrimA 44/81 *Moyal v. State of Israel* [1982] IsrSC 36(1) 505.
[35] CrimA 124/93 *Masada v. State of Israel* [1993] IsrSC 47(1) 480.
[36] CrimA 4596/05 *Rosenstein v. State of Israel* **[2005] (2) IsrLR 232**.
[37] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* **[2006] (1) IsrLR 320**.
[38] RT 3032/99 *Baranes v. State of Israel* [2002] IsrSC 56(3) 354.
[39] HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 746.
[40] CrimApp 4157/00 *Nimrodi v. State of Israel* [2000] IsrSC 54(3) 625.
[41] CrimApp 1355/98 *Ben-Ari v. State of Israel* [1999] IsrSC 53(2) 1.
[42] CrimA 400/84 *State of Israel v. Anjel* [1986] IsrSC 40(3) 481.
[43] CrimApp 2043/05 *State of Israel v. Ze'evi* (unreported decision of 15 September 2005).
[44] CrimA 6613/99 *Smirk v. State of Israel* [2002] IsrSC 56(3) 529.
[45] HCJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477; **IsrSJ SV 35.**
[46] CrimA 1538/02 *A v. State of Israel* [2004] IsrSC 58(3) 590.
[47] CrimA 209/87 *Shahada v. State of Israel* [1987] IsrSC 41(4) 594.
[48] CrimA 348/88 *Abu-Assad v. State of Israel* [1990] IsrSC 44(3) 89.
[49] CrimA 2642/99 *Masaraweh v. State of Israel* (unreported decision of 3 July 2003).
[50] CrimFH 4390/91 *State of Israel v. Haj Yihya* [1993] IsrSC 47(3) 661.
[51] FH 3081/91 *Kozali v. State of Israel* [1991] IsrSC 45(4) 441.
[52] CrimA 5329/98 *Dejani v. State of Israel* [2003] IsrSC 57(2) 273.
[53] CrimA 7450/02 *Eid v. State of Israel* (not yet reported decision of 17 March 2005).
[54] CrimA 2910/94 *Yefet v. State of Israel* [1996] IsrSC 50(2) 221.
[55] CrimA 29/86 *Barrett v. State of Israel* [1986] IsrSC 40(2) 430.
[56] CrimA 228/87 *Karmi v. State of Israel* [1988] IsrSC 42(1) 332.
[57] CrimApp 1572/05 *Zuartz v. State of Israel* [2005] (2) TakSC 64.

[58] CrimA 951/80 *Kanir v. State of Israel* [1981] IsrSC 35(3) 505.
[59] CrimA 639/79 *Aflalo v. State of Israel* [1980] IsrSC 34(3) 561.
[60] MApp 838/84 *Livni v. State of Israel* [1984] IsrSC 38(3) 729.
[61] CrimFH 4971/02 *Zagouri v. State of Israel* [2004] IsrSC 58(4) 583.
[62] CrimA 4391/91 *Hawaja v. State of Israel* [1995] IsrSC 49(2) 45.
[63] CrimA 2309/90 *Sabah v. State of Israel* [1991] (4) TakSC 324.
[64] CrimA 3427/91 *Salah v. State of Israel* [1993] (3) TakSC 444.
[65] CrimA 4391/03 *Abu Ria v. State of Israel* (unreported).
[66] CrimA 573/72 *Habura v. State of Israel* [1974] IsrSC 28(2) 57.
[67] CrimA 144/92 *Cavalero v. State of Israel* [1994] IsrSC 48(2) 407.
[68] CrimA 474/75 *Salem v. State of Israel* [1976] IsrSC 30(3) 113.
[69] CrimApp 537/95 *Ganimat v. State of Israel* [1995] IsrSC 49(3) 355.
[70] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.

Israel District Court cases cited:

[71] CrimC (TA) 40063/01 *State of Israel v. Kadosh* (unreported).
[72] CrimC (Naz) 43/03 *State of Israel v. Khalil* (unreported).
[73] CrimC (Naz) 37/03 *Fatali v. State of Israel* (unreported).
[74] CrimC (Naz) 1215/02 *State of Israel v. Masri* (unreported).
[75] CrimC (Naz) 1014/04 *State of Israel v. Otmala* (unreported).
[76] SFC (Jer) 4059/01 *State of Israel v. Kaloti* (unreported).
[77] CrimC (TA) 40067/02 *State of Israel v. Abu-Ras* (unreported).
[78] CrimC (Hf) 384/00 *State of Israel v. A* (unreported).
[79] SFC (TA) 1164/02 *State of Israel v. Ben-Yishai* (unreported decision of 27 October 2003).
[80] MApp (Naz) 2303/03 *State of Israel v. Masri* (unreported decision of 22 December 2003).
[81] MApp (BS) 20659/05 *State of Israel v. Abu-Sevila* (unreported decision of 15 May 2005).
[82] CrimC (TA) 3160/04 *State of Israel v. Levy* (unreported).
[83] CrimC (Jer) 3088/02 *State of Israel v. Malca* (unreported).
[84] CrimC (TA) 40056/04 *State of Israel v. Abramov* (unreported).

American cases cited:

[85] *Counselman v. Hitchcock*, 142 U.S. 547 (1892).
[86] *Kastigar v. United States*, 406 U.S. 441 (1972).
[87] *United States v. North*, 910 F. 2d 843 (D.C. Cir., 1990).
[88] *United States v. Hylton*, 294 F. 3d 130 (D.C. Cir., 2002).
[89] *United States v. McDaniel*, 482 F. 2d 305 (8th Cir., 1973).

[90] *United States v. Hsia*, 131 F. Supp. 2d 195 (D.D.C., 2001).
[91] *United States v. Danielson*, 325 F. 3d 1054 (9th Cir., 2003).
[92] *Byrd v. Wainwright*, 428 F. 2d 1017 (5th Cir., 1970).
[93] *U.S. v. Echeles*, 352 F. 2d 892 (7th Cir., 1965).

Canadian cases cited:
[94] *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451.
[95] *R. v. Primeau*, [1995] 2 S.C.R. 60.

English cases cited:
[96] *R. v. Farler* (1837) 173 Eng. Rep. 418 (K.B.).
[97] *R. v. Winsor* (1865) 10 Cox C.C. 276.
[98] *R. v. Pipe* (1967) 51 Cr. App. R. 17 (C.A.).
[99] *R. v. Richardson* (1967) 51 Cr. App. R. 381 (Central Criminal Court).
[100] *R. v. Turner* (1975) 61 Cr. App. R. 67 (C.A.).
[101] *R. v. Weeks* (1980) 74 Cr. App. R. 161.
[102] *R. v. Palmer* (1994) 99 Cr. App. R. 83.
[103] *R. v. Pentonville Prison Governor, ex p. Schneider* (1981) 73 Cr. App. R. 200 (D.C.).
[104] *R. v. Reed* (2003) EWCA Crim. 2667; [2003] All ER (D) 289.
[105] *Winsor v. R.* [1866] 1 Q.B. 390.
[106] *Tillett v. R.* (1999) Privy Council Appeal no. 56 of 1998.

For the petitioner — E. Barzilai, A. Hulata, U. Corinaldi-Sirkis.
For the second respondent — D. Yiftach, D. Inbar.
For the third respondent — A. Himi.
For the fourth and eighth respondents — E. Bar-Zion, V. Uzan.
For the fifth respondent — T. Aner, A. Cohen.
For the sixth respondent — A. Feldman, A. Yariv.
For the seventh respondent — A. Wishnia.
For the ninth respondent — D. Qual, A. Goer.
For the tenth respondent — L. Felus.
For the eleventh respondent — T. Aner, A. Kobo.
For the twelfth respondent — R. Toren.
For the applicants to join the proceeding — D. Pugach.

JUDGMENT

Justice E.E. Levy

1. Two persons are indicted for the same incident, but in separate indictments. Can the prosecution summon one, whose case is pending, as a prosecution witness in the trial of the other?

Three decades ago this court, *per* Justice M. Etzioni, decided this question in what was later to become known as the Kinsey rule:

> 'The proper practice should be that one defendant should not be brought to testify against another defendant, even if separate indictments have been filed against them, as long as there is a concern that the witness may expect a benefit in the form of a more lenient sentence in the trial pending against him. This can be prevented either by holding his trial before the testimony is given or by making him a state's witness and a stay of proceedings or a declaration by the prosecution that the trial against him will be cancelled when the testimony is concluded' (CrimA 194/75 *Kinsey v. State of Israel* [1], at p. 482).

Justice M. Shamgar agreed with these remarks, and he discussed the difficulty inherent in such testimony:

> 'In my opinion, there is a valid and real concern that the testimony of a witness as aforesaid in the trial of his accomplice will be nothing more than a dress rehearsal of the testimony that he intends to give at his own trial; in other words, he will of course seek to present his version of the sequence of events and his goal is likely to be to increase his chances at his separate trial by blackening his partner, his accomplice in the offence, against whom he is testifying, or by describing his own part in the offence as minimal. In this way the witness will increase his chances of being acquitted in his trial or he will minimize the relative weight of his part in the offence. An additional concern that arises in this context is that such a witness will indeed testify for the prosecution, but because his trial is pending, he can limit the scope of the cross-examination that he can expect from the defendant by relying on what is stated in the aforesaid section 47 of the Evidence Ordinance' (*ibid*. [1], at p. 489).

The roots of the Kinsey rule have spread out and taken a firm hold in Israeli law. The purposes underlying it — as well as the criticism of it —

have been studied in colleges and universities. What was originally intended to be a 'proper practice' has become, *de facto*, a binding rule from which the courts rarely depart. Now, thirty years on, we are required to consider whether there is a basis for changing this rule.

Factual background

2. Three indictments were filed in the District Courts in Tel-Aviv and Beer-Sheba. These reveal a disturbing picture of a sequence of serious offences in which respondents 2-10 were allegedly involved. They concern several conspiracies that were made by these respondents, some of which had a common purpose — assassinating rivals in a power struggle between criminal gangs, in order to bring about in this way what has become known as 'settling accounts.' These acts, of which the respondents are accused, resulted in the deaths of three persons, and serious injury to others. Two of the persons murdered, the late Shaked Shelhov and Tomer Shevet, were killed as a result of mistaken identity, after they happened upon the scene of the murder.

Two of the indictments were filed in the Tel-Aviv District Court. One of them concerns the activity of the fifth respondent (SFC 1119/04), and the other concerns the acts of respondents 6-10 (SFC 1120/04). The third indictment (SFC 994/04) was filed in the Beer-Sheba District Court against respondents 2-4. The three indictments contain many pages and include long lists of prosecution witnesses, which presaged lengthy trials to come.

The following, in brief, are the facts of the indictments.

a. *SFC 994/04*

In the first charge it is alleged that the respondents, with others, decided to kill a resident of Ashkelon, Shalom Domrani, because of a dispute whose particulars are of no importance to our case. For this purpose, they initiated contact with another criminal gang, which included the fifth respondent, Yaron Sanker, which also had an interest in targeting Domrani. The conspirators decided to carry out their plan on 2 June 2003, in the morning, when Domrani was supposed to leave his home on the way to the Beer-Sheba Magistrates Court. Some of the conspirators waited nearby, and when it appeared that Domrani was about to leave his apartment, Sanker and the second respondent entered the building and waited for the lift to arrive, on the assumption that their victim would be in it. In fact, Shay Ben-Amu, a friend of Domrani, was using another lift, and when Sanker and the second respondent, Yisrael Ganon, saw him, they opened fire with pistols that were

in their possession. As a result Ben-Amu was wounded and required medical treatment to save his life.

The second charge in the indictment also concerns Domrani. It is alleged that in a further attempt to assassinate their victim, the second respondent, on the orders of the first respondent, fired a 'Galil' rifle at a vehicle in which Domrani was supposed to be travelling, according to the information in their possession. As a result of this shooting, the late Shaked Shelhov, a girl who was only sixteen years old, was killed; unfortunately she was caught up in the incident after she entered the vehicle which Domrani had exited several minutes earlier. Other passengers who were in the vehicle, Dennis Shemesh and Yaniv Revach, were wounded.

b. *SFC 1119/04 and SFC 1120/04*

The indictment in SFC 1119/04 contained six charges, in which Sanker was alleged to have committed a host of offences when he was escaping from a twelve year prison sentence. It should be stated at this stage that during his interrogation Sendar confessed to all the incriminating facts attributed to him, and he even described to his interrogators the role of the other respondents in the various events.

The first charge in this indictment concerned an armed robbery that Sanker committed, according to the prosecution, on 20 February 2003, in a money-changing business in Ashdod, by threatening the teller and taking away with him the contents of the safe, which amounted to approximately NIS 140,000.

The other charges concerned the conspiracy which Sanker made with respondents 6 and 7, in which respondents 8-10 also took part. The indictment in SFC 1120/04, which was filed against respondents 6-10, also concerns these five charges. In order to understand the background to the offences, it should be stated that respondents 6 and 7 are the brothers of the late Hanania Ohana (hereafter: 'the deceased'), who was murdered on 5 March 2003, and with whom Sanker became acquainted during his term of imprisonment. Following the murder of the deceased, his brothers reached a decision to kill everyone who was involved in the incident, and also everyone who was connected with them or expressed satisfaction at the deceased's death. *Inter alia*, these respondents wished to cause the death of Domrani, Shelomo Zarihan, the brothers Yaakov and Nissim Alperon, Yitzhak Abergil and Hayim Shabi. In order to carry out the conspiracy, respondents 6 and 7 agreed with Sanker that in return for carrying out the planned assassinations he would receive their protection, as well as a place to live and a car. It was

also agreed that the eighth respondent would serve as the contact between respondents 6 and 7 and Sanker, take Sanker to the scene of the crime and provide him with the means of carrying out the offences.

The first charge concerns an attempt to bring about the death of Shelomo Zarihan. It was alleged that on 6 May 2003 Sanker and respondents 8 and 10, together with one Guy Yehezkel, came to a meeting that was arranged with Zarihan at a café in Tel-Aviv. Sanker came to the meeting disguised as a security guard, and he carried on his person a loaded pistol. During the meeting, the fifth respondent directed his gun at Zarihan's head and pulled the trigger, but because his pistol jammed he did not succeed in carrying out his plan. Zarihan, who saw what was happening around him, began to flee while Sanker fired at him several times and hit him in the chest, the hip and the knees. It was also alleged that shortly after the event, Sanker and respondents 8 and 9 came to the hospital where Zarihan was being treated, for the purpose of finishing their job. But, after they saw the close security that had been stationed around him, they decided to leave.

An additional charge brought in the indictments concerns the attempt to assassinate Domrani, which was described above. A third charge concerns an attempt to murder Yaakov Alperon. It is alleged that Sanker was instructed by respondents 6 and 7 to hide in Alperon's car an explosive charge that had been prepared in advance. But Sanker had difficulty in closing the cover of the spare wheel in which he wanted to hide the explosive charge, and therefore he was compelled to take it out and leave as he came.

The fourth charge concerns an attempt to kill Yitzhak Abergil and persons with whom he was associated. It is alleged that on 24 September 2003 Sanker and the eighth respondent went with another person to a banqueting hall in Rishon LeZion, to which Abergil and his associates were invited. Sanker, the eighth respondent and their accomplice were equipped with gas canisters and an explosive charge, and their plan was to explode a car bomb at the entrance to the banqueting hall. But on their way there, Sanker, who was concerned about the killing of innocent bystanders, staged a road accident, and thus his accomplices' plot was foiled. On the same day the three persons concerned returned to the banqueting hall, and this time they were equipped with an M-16 rifle that had a telescopic sight attached. But this time also they did not succeed in carrying out their plan, since they did not succeed in identifying Abergil and his associates.

The last charge concerns the decision of respondents 6 and 7 to assassinate the late Hayim Shabi. It is alleged that these respondents ordered

Sanker and the eighth respondent to kill Shabi, and they even promised them a reward of 10,000 dollars if they succeeded in carrying out their mission. For this purpose Sanker was given a stolen car which had forged licence plates, and he was also given two pistols. On 1 October 2003, the ninth respondent, who was given the task of following Shabi, telephoned the eighth respondent and told him that he had located the victim and that he was following him. After a while, following reports that were given by the ninth respondent, Sanker and the eighth respondent arrived at the entrance of a hairdressing shop in Hod HaSharon where Shabi was present. Sanker entered and fired one shot at Shabi. Subsequently Shabi began to run away but Sanker did not stop firing more shots at him. When Shabi fell to his knees, Sanker approached him, shot him in the head and killed him. During this shooting, Sanker noticed the late Tomer Shevet, who was sitting on a fence outside the hairdressing shop and who had a similar appearance to Shabi. Consequently, in order 'not to take any risks,' Sanker also shot Tomer and caused his death.

3. As I have already said, Sanker, who was arrested in March 2004, described to his interrogators the events in which he claimed to have taken part, and also the role of the other persons involved in those events. It should be emphasized that it was only due to the evidence given by Sanker that the petitioner succeeded in drawing up indictments and arresting the other persons involved. But Sanker went back on his confessions in the course of his trial, and consequently he denied carrying out the acts attributed to him.

The respondents' trials

4. On 25 September 2006, while this petition was pending before us, the Tel-Aviv District Court (the honourable Vice-President B. Ofir-Tom and Justices M. Sokolov and I. Schneller) convicted Sanker of all of the six charges of which he was indicted. The trial took a long time, and this can be attributed not only to the fact that more than 200 prosecution witnesses were heard, but also to Sanker himself, who contested his confession, changed his lawyers no less than three times and also filed two petitions in this court that were dismissed *in limine*; in these he challenged interim decisions given in his case, and attached applications to stay the proceedings until the petitions were decided (HCJ 9141/05 *Sanker v. Police*, on 20 October 2005; HCJ 1747/06 *Sanker v. Tel-Aviv District Court*, on 19 March 2006). Until his case was decided, Sanker was held under arrest, and it should be emphasized that the period of his arrest was extended, with his consent, no less than *seven* times.

Indeed, Sanker was in no hurry to end his trial, but this conclusion should not cause any real surprise, if only for the reason that his being held under arrest for these charges took place concurrently with another sentence of imprisonment that he was serving.

The rate of progress in the trials of the other persons involved in the various events is also not encouraging. In the trial of respondents 6-10, 79 prosecution witnesses have been heard to date, and notwithstanding the declaration of the respondent that it waives the testimony of 63 of its witnesses, there remain another 75 witnesses, of whom the main witness will be Sanker. In the trial of respondents 2-4 admittedly most of the prosecution witnesses have been heard, but even in this case the prosecution case is far from complete, in view of the case law ruling that is being reconsidered in this petition, which stipulates that the completion of Sanker's trial is a precondition for his giving testimony for the prosecution in the trial of the persons alleged to be his accomplices. This prolongation of the proceedings also results in another side effect: I am referring to the prolonged period of arrest of the other persons involved. In this regard I will add that the period of arrest of respondents 2-3 has been extended so far *seven* times, and an application to extend it an eighth time is pending before the Supreme Court; the period of arrest of respondents 6-8 has been extended *eight* times and an application to extend it a ninth time has also been set down for a hearing; by contrast, respondents 4, 9 and 10 have been released under house arrest with various restrictions.

The reason why I have gone into detail is in order to emphasize the plight of the defendants arising from the legal position that currently prevails, in which they are compelled to wait a long time — sometimes a very long time — until their trial ends. This plight led to an application of the petitioner to the Beer-Sheba District Court to be allowed to have Sanker testify in the trial of respondents 2-4 even before his trial has ended. The petitioner pointed to the fact that of the six charges levelled against Sanker in the indictment, only in one — namely the attempt to assassinate Domrani — was he an accomplice of respondents 2-4, whereas the other charges against him were in no way related to those respondents. It was therefore argued that in view of the considerable sentence that Sanker was likely to receive following his conviction, there was no real danger that he would try to improve his position by giving false incriminating testimony in the trials of his accomplices. It was also argued that Sanker should not be regarded as someone who anticipated a benefit or reduction in sentence if he incriminated his accomplices. The

reason for this was that the negotiations that he held with the prosecution authorities, in an attempt to reach a plea bargain with them, had failed. Finally it was argued that Sanker's testimony should be allowed also because of the considerable harm to the public that was involved in compelling the prosecution to stay the proceedings being conducted against respondents 2-4 until his trial ended.

The District Court rejected these claims, while emphasizing the importance of the Kinsey rule in protecting the rights of the defendant and the witness-accomplice. It said:

> 'There is a concern that giving permission to have a witness who is an accomplice in the offence testify may violate the rights of the defendant and also the rights of the witness himself as the accused in the other case. We should not forget that according to what is accepted in our legal system the prosecution may give a benefit to a witness who is an accomplice in an offence, in order to encourage him to testify in the other trial. It is obvious that such a situation, even if we agree that this is an unavoidable necessity, is problematic with regard to the defendant against whom the accomplice in the offence testifies. The power given to the prosecution to file indictments and to make offers that include benefits to one defendant, *prima facie* at the expense of another defendant —again, even if this is necessary in view of the rampant and serious nature of the crime — does indeed require deep consideration and a broad perspective' (p. 3 of the decision of 9 October 2005).

The District Court went on to discuss how there may be cases that require a departure from the Kinsey rule, but in its opinion the conditions justifying this were not satisfied in the present case:

> '[Sanker's] reasons for testifying are complex, and this court cannot determine that he definitely has no personal interest that relates to his trial, if he testifies before us at this stage' (*ibid*., at p. 4).

The dispute in this petition and the scope of judicial review of interim decisions in criminal proceedings

5. The current petition concerns the aforesaid decision of the District Court, and in essence it seeks to persuade the court to abandon the 'Kinsey rule.' In this petition the petitioner also includes the case of respondents 6-10 and it requests that the court allows it to summon Sanker to testify in their

trial as well. As we have said, Sanker's trial ended recently, and therefore the petition has *prima facie* become moot, since there is no longer any obstacle — even according to the prevailing normative position — to his testifying in the trials of respondents 2-4 and 6-10. Moreover, it is well known that, unlike in civil proceedings, interim decisions given in criminal proceedings may be appealed within the framework of an appeal against the final judgment, and not previously or in any other framework. It is only in exceptional cases, by virtue of special provisions of statute that allow this, that the parties to the criminal proceeding may challenge decisions that have been given before the proceedings have ended (see ss. 74(e) and 147 of the Criminal Procedure Law [Consolidated Version], 5742-1982).

This matter, i.e., the inability to challenge judicial decisions immediately after they are given, has resulted and continues to result in the filing of many petitions in this court. These are designed, in practice, to serve as a substitute for the possibility of appealing interim decisions in criminal cases. These attempts are consistently rejected, and this was discussed by Vice-President M. Shamgar:

> 'The various procedural arguments that are raised before the criminal court and are within its jurisdiction are not considered by the High Court of Justice, but only — if there is a basis and need to do so — in the appellate court, which reviews the judgment of the trial court in a criminal case, as long as there is no contrary provision in statute.
>
> …
>
> In summary, if a decision is made in criminal proceedings, and a party is of the opinion that it is erroneous, he has the right to include this argument in the appeal on the verdict, if one is filed. He does not have a parallel right to apply to this court sitting as the High Court of Justice in a matter of procedure, and the court will not intervene in such a case nor adopt for itself the role of the court of appeal in criminal proceedings' (HCJ 398/83 *Avitan v. Bench of Three Justices* [2], at pp. 470-471, and see also HCJ 583/87 *Halperin v. Vice-President of Jerusalem District Court* [3], at p. 700; HCJ 6371/94 *Deri v. Jerusalem District Court* [4]; HCJ 6876/01 *Barlai v. Justice of Tel-Aviv Magistrates Court* [5]; HCJ 8800/05 *Duha v. Tiberias Magistrates Court* [6]).

There has been a whole host of decisions in the same vein, that the intervention of the High Court of Justice in decisions given in the course of a

criminal trial will be restricted only to rare cases in which there is an argument concerning a lack of jurisdiction or an extreme case of arbitrariness in a purely administrative field (*Halperin v. Vice-President of Jerusalem District Court* [3], at p. 702); it has also been held that such intervention is also possible in a case where the petition raises a fundamental question that has widespread ramifications, in circumstances where dismissing the petition will cause irreversible damage that cannot be repaired by means of an appeal on the final judgment (HCJ 267/88 *HaIdra Rabbinical College Network v. Local Affairs Court* [7], at pp. 732 *et seq.*; HCJ 620/02 *Chief Military Prosecutor v. Appeals Court Martial* [8], at p. 631; HCJ 9264/04 *State of Israel v. Jerusalem Magistrates Court* [9]).

Notwithstanding all this, in our opinion the current petition falls within the scope of the exceptional cases in which this court can consider a petition that is brought before it. The significance of the arguments raised in the petition goes far beyond the concerns of the parties in this case, and in practice these arguments may affect every criminal act in which several perpetrators are involved. The 'Kinsey rule,' which the petitioner wishes to have reconsidered, is one of the cornerstones on which the criminal law and the rules of evidence in our legal system are currently based. Moreover, the doubts that have arisen as to the suitability of the Kinsey rule to the legal position today also justify our considering this petition. Finally it should be emphasized that dismissing the petition *in limine*, for the reason that this court is not a court of appeal for interim decisions in criminal cases, would not leave the petitioner any practical possibility of bringing before us the fundamental arguments that it wishes to make. Admittedly the proceedings that are currently taking place against the other persons involved in the incidents, with the exception of Sanker himself, are, at the moment, in their early stages, but after they end — whether in a conviction or an acquittal — the arguments of the petitioner will have become hypothetical and irrelevant, and therefore it was not be able to challenge the decision then either. This unique situation will only allow the petitioner to bring its arguments before us by filing a petition that is directed at the interim decision.

Application to join the state's petition

6. As I have said, respondents 2-4 are alleged, *inter alia*, to be responsible for the death of the late Shaked Shelhov. Her parents, Ilana and Amir Shelhov, applied, by virtue of r. 20(b) of the High Court of Justice Procedure Regulations, 5744-1984, for an order that they should be joined as respondents in the petition. In their opinion, the prolongation of the

proceedings caused by the Kinsey rule affects not only the defendant, but also the victims of offences and their families, whose interests were recognized by the legislature in the Rights of Victims of Crime Law, 5761-2001. These persons cannot continue their lives in a normal manner while the completion of the legal proceedings against the persons accused of harming them or their loved ones cannot be foreseen, and this problem increases the longer the proceedings are drawn out.

I understand the applicants' pain. It is genuine and sincere. Notwithstanding, I will recommend that they are not joined as parties, in order not to complicate the issue that requires a decision, and also because we were cognizant of their arguments when we considered this petition.

The petitioner's arguments

7. On 16 Tevet 5766 (16 January 2006) we gave an order *nisi*, and after the detailed written replies of the respondents were filed, we also heard their oral argument. Below I shall state the arguments of the parties, and I will begin with those of the petitioner.

8. The petitioner's position, in a nutshell, is that the application of the Kinsey rule deals a serious blow to law enforcement, the protection of the public against dangerous criminals and even the constitutional rights of persons under arrest. It argues that since the 1970s, when the Kinsey rule was enshrined in the case law of this court, there have been changes in the legal climate in Israel: the basic outlooks on which our legal system is based have changed; many changes have been made to legislation and case law; the offences with which the law enforcement system is required to contend are more complex and involve more parties than in the past. In view of all this, it argues that the Kinsey rule has become a millstone and it is no longer suited to the legal reality of today. Moreover, the petitioner claims that the concerns that gave rise to the Kinsey rule are not supported by experience, since in many cases the witness has no interest at all in incriminating his accomplice. On the contrary, the prevailing phenomenon is that many witnesses wish to aid their accomplices who are their co-defendants or who are indicted separately, and very often — too often — the court is required to declare them hostile witnesses and to prefer the evidence that they gave during their interrogation, in accordance with the provisions of s. 10A of the Evidence Ordinance.

In the petitioner's opinion, the Kinsey rule created a strict rule of admissibility, which prevents the court, albeit temporarily, from hearing the testimony of the accomplice before his trial has ended. This rule, according to

the petitioner, is not only contrary to the provisions of s. 2 of the Evidence Ordinance, which provides that everyone is competent to testify, but it conflicts with the trend that can be seen in many judgments, which has gradually abandoned the rules concerning the admissibility of evidence and replaced them with rules concerning its weight. The impetus driving this trend, in the petitioner's opinion, is the desire to place before the court as much of the relevant evidence as possible, in the belief that this will lead to a more effective discovery of the truth. In contrast, the petitioner goes on to argue that the Kinsey rule prevents the prosecution from placing before the court a complete factual picture, and therefore it is nothing more than an obstacle in its quest to discover the truth. According to the prosecution, the court should not be burdened with strict rules, but it should be allowed to act as it does on a daily basis when it is required to determine questions of the credibility of witnesses, the weight that should be attributed to their testimony and the additional evidence that is required, if at all, in the circumstances of the case.

In this context, the petitioner goes on to point out that the Kinsey rule was not applied to state's witnesses, who are promised consideration for their testimony, even though in their case there is a real fear that they will seek to satisfy the prosecution even at the cost of giving false or fabricated testimony. By contrast, the witness-accomplice is not promised any consideration, and therefore the fear that he will expect to receive consideration for his testimony is merely theoretical, and so too is the fear that his testimony is unreliable. The petitioner also says that under the current state of the law and as a result of the heavy burden laid upon the legal system — which causes proceedings to be dragged out, sometimes to an intolerable degree — the prosecution may regard itself as having no choice other than to make an agreement with the accomplice, for reasons that are inappropriate, in which he is given various benefits in order to bring about a speedy conclusion to his trial. This situation may lead to an additional undesirable result, namely that defendants seek to prolong their trials deliberately, in order to exert pressure on the prosecution to make agreements with them that may undermine the administration of justice and the public interest.

The petitioner further argues that where defendants are brought to trial in one indictment and they testify in their own defence, the court may rely on the testimony of one defendant against his accomplice, notwithstanding the conflict of interests that there may be between them. Against this background, it questions whether there is any material difference that makes

it essential to refrain from doing this where accomplices in a crime are brought to trial in two *separate* indictments. In this respect, the petitioner also refers to the provisions of s. 155 of the Criminal Procedure Law, which allows a defendant who has pleaded guilty to the commission of the offences attributed to him to be called to testify against his co-defendants after he has been sentenced. It also emphasizes that a defendant's guilty plea, especially where it relates also to the role of the other defendants, may prejudice the judges sitting on the case, and notwithstanding this the legislature saw fit to allow his testimony.

An additional provision which the petitioner thinks is inconsistent with the Kinsey rule is s. 10A of the Evidence Ordinance. It is well-known that this provision allows statements that were made by the witness in interrogations to be adduced as evidence against an accomplice who is on trial where he changes his story in the course of his testimony before the court. The petitioner emphasizes that it is possible to make use of this provision even when the testimony of the accomplice is heard only after the accomplice's trial has ended, so that the Kinsey rule is likely to be rendered meaningless.

The petitioner goes on to refer to a whole host of rulings made by this court, which have limited the application of the Kinsey rule. In the petitioner's opinion, these cases prove that the court is no longer entirely satisfied with the logic of this rule, which raises questions as to whether its existence is justified.

9. At this point, the petitioner discusses at length what it defines as the 'Kinsey rule damage,' which includes matters that we have already mentioned, namely that the implementation of the rule leads to a considerable prolongation of proceedings as a result of the need to wait until the trial of the witness-accomplice is concluded; in many cases, and especially in serious felony cases in which defendants are held under arrest pending trial, this leads to prolonged periods of arrest that are sometimes unreasonable; in this respect, there is a concern that defendants who have been classified as a danger to the safety and security of the public may be released before their cases are decided. An additional side effect is that the prosecution authorities are sometimes compelled to reduce the seriousness of the charges, waive essential witnesses and make plea bargains that are unduly favourable to accomplices. It is argued that this reality gives the witness-accomplice an expectation that he will receive a benefit in return for his testimony, and this

expectation results in the witness-accomplice doing whatever he can in order to delay the proceedings in his case.

But the petitioner argues that the deleterious effects of the Kinsey rule are not limited to the aforesaid, but that the rule also affects the *quality* of the actual legal proceeding. This is because the rule dictates the order in which the witnesses testify, and may also result in the prosecution waiving the testimony of the accomplice, even though it is important and pivotal to the case. The failure to bring the testimony of the accomplice before the court at the right time — and, in the worst case scenario, not bringing it at all — undermines the ability of the court to weigh the evidence, arrive at the truth of the matter and do justice. Moreover, the Kinsey rule requires the trial court to determine, already at a preliminary stage, whether the concerns upon which this rule is based exist in the case before it or whether the prosecution should be allowed to have the accomplice testify. This determination, in addition to its inherent difficulty, requires the court to decide questions of credibility at a preliminary stage, rather than when it should do so, at the end of the trial.

Finally, the petitioner is of the opinion that the Kinsey rule does not need to be cancelled in statute. It was emphasized that the Kinsey rule is the creation of the court, and therefore the court also has the power to cancel it. Moreover, the rule outlined in the Kinsey case was originally defined as nothing more than a 'proper practice.' It does not embody any basic right that the respondents would like to see in it, and for this reason also the power to cancel or change it is not within the sole jurisdiction of the legislature.

The arguments of the eleventh respondent — the Public Defender's Office

10. The Public Defender's Office, which was joined as a respondent in this petition, is of the opinion that there is no reason to cancel the Kinsey rule, since it has become embedded in Israeli law as an inherent part of the constitutional right to a fair trial. In the opinion of this respondent, any violation of this right should satisfy the conditions of the 'limitations clause' provided in s. 8 of the Basic Law: Human Dignity and Liberty, namely it should *only be done in statute*; it should be *for a proper purpose*, and in this context the Public Defender's Office believes that considerations of efficiency are not a basis for such a purpose; and it should be *to an extent that is not excessive*, a requirement that it is argued is also not satisfied in view of the serious harm to defendants that will arise from a departure from the Kinsey rule. It is argued that the interest of shortening the length of the legal

proceeding may be achieved in other ways that are less harmful, such as increasing the number of judges in the legal system.

In the opinion of the Public Defender's Office, the rationale underlying the Kinsey rule remains valid today. Moreover, in its opinion, arguments that were made in the past against this rule have, over the years, become arguments that support it, and therefore today, even more than in the past, it should remain unchanged. In this context it was emphasized that the Kinsey rule came into existence when the prosecution was required to supplement the testimony of an accomplice with the stringent requirements of 'corroboration,' something which reduced the concerns inherent in such testimony. But this requirement was repealed in 1982, and now, under s. 54A(a) of the Evidence Ordinance, the testimony of an accomplice only requires 'support,' something that makes the concern for the rights of the defendant even greater than it was in the past.

The Public Defender's Office emphasizes that the Kinsey rule was originally defined as a 'proper practice' and not as a strict rule without exceptions. Indeed, this respondent set out in its reply a thorough review of judgments in which the court limited the rule's application and even held than in circumstances where the rationale underlying it does not exist, it should not be used. Notwithstanding, the importance of the rule should not be underrated precisely in those cases where it has not been qualified. It was therefore argued that the current state of the law is that the court has discretion to consider, in each case on its merits, whether the principle outlined in the Kinsey rule should be applied or not. Granting the petition and cancelling this rule are tantamount, in the opinion of the Public Defender's Office, to depriving the courts of this discretion and imposing upon them a strict rule that will undermine its ability to arrive at the truth.

The Public Defender's Office emphasizes that the Kinsey rule belongs to the field of criminal procedure and not to the rules of evidence. It is argued that it is not — as can be understood from the petitioner's arguments — a rule of admissibility that concerns the competence of the accomplice to testify against his co-defendant, but a rule that postpones the date of hearing the testimony to a later stage of the trial. For this reason, it believes that there is no basis to the argument that the cancellation of the Kinsey rule is consistent with the outlook that is currently prevalent in the rules of evidence, namely the replacement of rules of admissibility with rules of weight.

It is also argued that the difficulties created by the application of the Kinsey rule are a result of the immense burden of cases placed on the legal

system, but these reasons do not justify a violation of a defendant's right to a fair trial. It is also argued that the concern expressed by the petitioner, that the application of the Kinsey rule will result in defendants who are a serious danger to the public being released on bail is purely theoretical. In support of its position, the Public Defender's Office presented us with empirical data that it assembled, from which it can be seen that that the courts grant applications to extend the period of arrest under s. 62 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996, at a rate of almost 99 per cent. In this regard, the Public Defender's Office added that according to the figures in its possession, 75 per cent of persons under arrest consent to the extension of their period of arrest, and for this reason also the concern that they will be released is unfounded.

Finally, The Public Defender's Office points to new issues that may arise if the Kinsey rule is cancelled. It is argued that when preparing the witness to testify, the prosecutors will be required to meet with him while both parties wear two hats: the accomplice is a witness but also a defendant, whereas the prosecutors are not only the prosecutors in the trial of his accomplices but also in his trial. In such a scenario, the witness will be subjected to pressure, on the one hand, and an open and hidden agenda, on the other, and these will have ramifications on the testimony that he will give in the court. It was also argued that cancelling the Kinsey rule will lead to several criminal trials taking place simultaneously, and this increases the danger that conflicting decisions will be given.

The arguments of the twelfth respondent — the Israel Bar Association

11. The Israel Bar Association (hereafter: 'the Bar Association') adds several arguments to those of the Public Defender's Office. It complains that the consequences of the relief sought in the petition may be wider than necessary. In its opinion, the circumstances of the case that is the subject of the petition are difficult and exceptional, but this difficulty should not be exploited to achieve the general purpose of speeding up criminal trials by denying defendants a protection of paramount importance. Moreover, the Bar Association is of the opinion that the cancellation of such a fundamental element of the rules of evidence should be made in a criminal appeal, and not in a petition to the High Court of Justice.

The Bar Association refers in its arguments to s. 10A of the Evidence Ordinance. It argues that the arrangement set out in this section undermined the rights of the defendant, and this now justifies the existence of the Kinsey rule, so that they are not undermined even further. Just as s. 10A is the result

of legislation, so too any additional violation of the rights of defendants should be made in legislation. It also argued that in view of the well-known policy of the prosecution authorities, which only rarely file indictments on the offence of perjury, the fear of miscarriages of justice becomes even greater.

Moreover, it was emphasized that two government-sponsored draft laws relating to the cancellation of the Kinsey rule were tabled in the Knesset, but did not become law (see the draft Evidence Ordinance Amendment Law (no. 10), 5752-1992; the draft Evidence Ordinance Amendment Law (Amendment no. 13) (Testimony of Accomplice), 5759-1999). It is argued that this fact shows that the legislature did not desire the cancellation of the Kinsey rule, and the court should not do what the Knesset refused to do.

The arguments of respondents 2-10

12. The second respondent concentrated on the manner in which the petitioner chose to attack the decision of the trial court. He argues that this was an interim decision made in a criminal proceeding, which may not be appealed. He also argues that the petition suffers from a significant degree of delay, in view of the considerable amount of time — more than a year — that passed between the date of filing the indictment against Sanker and the filing of the petition. This delay shows that the petitioner did not do enough in order to increase the speed of the trial and thereby to minimize the damage caused by the application of the Kinsey rule.

The third respondent is of the opinion that the petitioner is to blame for the slow rate at which Sanker's trial is being heard, and the court should not allow him to suffer because of the petitioner's failings. The fifth respondent also supports this argument concerning the responsibility for the delay in the hearing of the trial. The third respondent further believes that the decision of the trial court shows that there is a real concern that his defence will be prejudiced if Sanker's testimony is heard now, and for this reason too it should not be set aside. Finally, if the petition is granted, the third respondent petitions that we disqualify the panel of judges that is trying his case in the District Court.

Respondents 6-10 also mentioned in their arguments the reasons underlying the Kinsey rule. These respondents also expressed the concern that cancelling the rule will result in a flood of appeals and applications for retrials, where it becomes clear that there is a disparity between the accomplice's story when testifying and the story he tells in his own trial. This result, it is argued, will further increase the burden of cases in the courts.

Respondents 6-10 are also of the opinion that the Kinsey rule *de facto* completes the provisions set out in s. 155 of the Criminal Procedure Law, which concerns the testimony of accomplices who are charged in the *same* indictment, and it determines that a defendant who pleads guilty should not be brought to testify as long as his trial has not ended. They argue that the Kinsey rule prevents the prosecution from being able to render this provision meaningless by indicting the accomplices in separate trials. Finally, these respondents complain against what they call 'a systematic and continuing reduction of the rights of defendants,' and they too argue that they should not be held responsible for the considerable burden that weighs upon the court system.

Deliberations

Testimony of an accomplice

13. The source of the difficulty inherent in the testimony of an accomplice in crime lies in the other role — the role of a defendant — which he has while he is testifying. The main concern that the Kinsey rule is intended to allay is that a witness, who is indicted for the same incident with regard to which his testimony is required, will focus — when he is giving his testimony — upon obtaining a benefit in his trial, and consequently he will seek to exaggerate the role of his accomplice in the commission of the offences, while minimizing his own role. This difficulty increases in view of the concern that when the defendant has the opportunity to cross-examine the witness, the latter will become silent and invoke the privilege against self-incrimination, and thereby it will not be possible for the defendant to undermine the credibility of the story that the witness presented in his evidence-in-chief. In the words of Lord Abinger that were uttered in the first half of the nineteenth century:

> 'The danger is that when a man is fixed and knows that his own guilt is detected, he purchases impunity by falsely accusing others' (*R. v. Farler* [96], at p. 419).

Although the seriousness of this concern should not be belittled, it should also not be denied that it is more significant in legal systems where the verdict is given by a jury, and not by professional judges for whom the task of weighing up the testimony of witnesses is an everyday matter. Here we should mention once again that in our legal system there is also no prohibition against — or restriction upon — calling as a witness anyone whose testimony may give rise to questions of credibility, such as mentally-ill persons, children, state's witnesses or persons who have been convicted in

the past of perjury, even though no one denies that these cases also give rise, *prima facie*, to questions of credibility. Against this background, Justice T. Strasberg-Cohen emphasized the role of the court in weighing up the testimony heard by it:

> 'A concern that the truth may be distorted does not justify a exception to the duty to testify. Such a concern exists in many cases where witnesses may give testimony that is untruthful for various reasons, whether revealed or hidden, and this does not prevent them from testifying; otherwise, I fear that there would be grounds for preventing the testimony of very many witnesses and the evidence that is brought before the court would be diluted. The proper party to address this concern is the court, which carefully and responsibly examines and weighs the credibility of the testimony given before it. The solution is certainly not to declare the testimony inadmissible *ab initio* because of a concern that the truth may be distorted. The witness should therefore be compelled to testify and it is the task of the judge who hears his testimony to give it the proper weight, with the aid of the various tools that the law, knowledge and experience have given him' (HCJ 6319/95 *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], at pp. 766-767).

Similar remarks were also uttered by Justice Y. Kedmi:

> 'It is well known that "everyone is competent to testify" — as stated in section 2 of the Evidence Ordinance — including those persons who have an interest in the outcome of the trial; and the fact that they are "interested" in the outcome as aforesaid only affects the question of their credibility and the weight of their testimony' (CrimA 725/95 *Mandelbrot v. State of Israel* [11]).

14. The origins of the practice that was adopted in our law by means of the Kinsey rule lie in the English common law, in which it is the jury that decides the verdict. I am referring to the two well-known judgments of *R. v. Winsor* [97] and *R. v. Pipe* [98], which were discussed at length in *Kinsey v. State of Israel* [1] (see also the remarks of Justice Y. Kahan in CrimA 169/74 *Kadouri v. State of Israel* [12], at p. 402).

This significant difference between the legal systems was not ignored by the justices who sat in *Kinsey v. State of Israel* [1] (see p. 488 of the judgment), but they saw fit to adopt this practice despite it (for criticism of the adoption of this practice by the Israeli legal system, against the

background of the fact that our legal system does not rely on juries, see U. Struzman, 'The King is Naked or the Jury that Controls the Court,' 13 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1988) 175; Y. Ginat, 'Has the Time Come to Re-examine the Kinsey Rule,' 42 *HaPraklit* (1995) 376). Additional concerns about the question whether the Kinsey rule should be allowed to continue should have arisen when the Evidence Ordinance was amended in 1979 (the Evidence Ordinance Amendment Law (no. 4), 5740-1979), and the arrangement that today is provided in s. 10A of the Ordinance was adopted. It is well-known that this arrangement, which was designed to provide a solution to the problems created by the considerable pressure that was exerted on prosecution witnesses in order to deter them from testifying, allowed the court to prefer the contents of a witness's statement as recorded in his police interrogation to a later version which he gives in his testimony in the court, which is a result of the pressure exerted upon him. A reading of s. 10A shows that the legislature did not see fit to distinguish between an ordinary witness and a witness-accomplice who is involved in a trial for the same incident with regard to which his testimony is required. Consequently this court has held that there is nothing to prevent the arrangement enshrined in s. 10A from also being used with regard to accomplices in a crime:

> 'The addition to the aforesaid Ordinance, which finds expression in section 10A, was only designed for cases in which the witness denies in court the content of the statement, claims that he does not remember the content or gives in the court testimony that differs from the statement in a material detail. Such a change in the presentation of the facts may find expression in the statements of a witness that has no connection or involvement in the offence, and it may occur in the statements of a witness that is an accomplice in the offence; as stated in the explanatory notes that accompanies the draft Evidence Ordinance Amendment Law (no. 4), 5738-1978, the purpose of the law is to remedy injustices that sprout from the fertile soil of the criminal trial, and in this regard there is, of course, no difference whether we are speaking of an accomplice in the offence or any other witness… In summary, it is obvious that the fact that a certain witness is an accomplice in the offence is not capable of excluding him from the class of persons whose testimony may be subjected to the aforesaid section 10A' (CrimA 949/80 *Shuhami v. State of Israel* [13], at p. 69, and see also CrimA 501/81 *Abu-Hatzeira v. State of Israel* [14], at pp. 149-150).

Vice-President Shamgar affirmed this position in another case as well, where he said that the express wording of the legislature in s. 10A of the Evidence Ordinance overrides the proviso that was established in *Kinsey v. State of Israel* [1] concerning the need to postpone the date of hearing the accomplice's testimony until the proceedings against him have been concluded:

> 'There is no basis for a distinction between types of witness according to their *connection* to the offence or according to whether they are, or are not, accomplices in the offence, because the wording of s. 10A cannot serve as a basis for a distinction between a witness who was involved in the offence or was an accomplice in it and a witness who was not involved or an accomplice… Above the rules of evidence… there is an express and later stipulation of the legislature, and in the areas where it applies, it has greater weight, and if it arises from its wording that it provides a new qualification of the application of a rule of evidence that was previously accepted, the express stipulation of the statute naturally prevails' (CrimA 777/80 *Beinashvili v. State of Israel* [15], at pp. 470-471).

15. The arrangement provided in s. 10A of the Evidence Ordinance, when applied to the witness-accomplice, *prima facie* undermines the Kinsey rule. By this I mean that even when the testimony of the accomplice is heard only *after* he is sentenced, the filing of the confession that he made during his interrogation exposes the court to that early version that was given *before* the legal proceedings against him were concluded, a situation that the Kinsey rule sought to prevent. How can these contradictions be resolved? It can only be that this is another expression of the outlook that leaves the work of weighing up the testimony to the court, which has before it all of the versions uttered by the witness, so that it can determine — as it so often does — which it thinks is the most credible version in view of the special circumstances of each case that comes before it. It should be emphasized that, when considering these versions, there is nothing to prevent the court from also taking into account the fact that the earlier version that was uttered in the course of the investigation was put forward by an accomplice, and consequently it should be treated with caution. But this in itself does not result in the inadmissibility of the version (for the reasons justifying this outlook, see A. Strasnov, 'In Favour of Applying Section 10A of the Evidence Ordinance to Co-defendants,' 38 *HaPraklit* (1988) 660, and for

those opposing it, see N. Zaltzman, 'Co-defendants and Section 10A(a) of the Evidence Ordinance [New Version],' 9 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1984) 625).

16. A further remark on the subject of s. 10A of the Evidence Ordinance: the Kinsey rule concerns a witness who made a statement in his interrogation that incriminates himself and his accomplice in a criminal act. Where this witness admits during his trial the facts of the indictment that was filed against him, the situation is simple because immediately after he is sentenced it is possible for him to testify against his accomplice. The difficulty focuses therefore on those witnesses who go back on their previous statement and deny in their trial the offences attributed to them. The considerable experience that has been accumulated during the many years since the Kinsey rule was determined and since s. 10A of the Evidence Ordinance was enacted shows that the majority of these witnesses, when they are called to testify in the trial of their accomplices, deny the confessions that they made in their interrogation even if they confessed willingly in their own trials. In such cases, the prosecution is compelled, almost as a matter of course, to resort to what is stated in s. 10A(c) of the Evidence Ordinance. Against this background, we are compelled to ask whether there exists any longer a reason for the lengthy delay in finishing the witness's trial, when what will ultimately be used to decide the trial of the accomplice is the witness's statement to the police and the witness's explanations for going back on it during his testimony in the court. With regard to the concern that even the statement made to the police was wholly or partially false, the answer to this lies in the requirement of s. 10A(d) of the Evidence Ordinance concerning additional evidence that constitutes 'support.'

The difficulties inherent in applying the Kinsey rule

17. Only a short time after the Kinsey rule was enshrined in the case law of this court did its consequences begin to emerge. As time passed, and the burden on the court system increased, the calls to change it became stronger (see A. Kammar, 'Towards a Cancellation of the Kinsey rule,' 42 *HaPraklit* (1995) 548, at p. 559). The criticism mainly targeted the fact that the rule, which provides that a witness should not normally testify until the proceedings against him have been completed, led to a significant prolonging of the proceedings, caused a miscarriage of justice to the defendant who was compelled to wait until the case of the witness-accomplice ended and increased the burden placed on the legal system. This was discussed by my colleague Justice M. Naor:

> 'The Kinsey rule governs the holding of trials and makes it difficult, very difficult, to end them quickly, in addition to many objective difficulties that are encountered by the judicial system' (CrimApp 9474/04 *State of Israel v. Alzam* [16]).

Elsewhere this was discussed by Justice M. Cheshin:

> 'Once again we are encountering, as we do on a frequent basis — on too frequent a basis — the stumbling block known as the Kinsey rule. The main prosecution witness is the applicant's accomplice in the horrifying act. That accomplice, who is supposed to testify against the applicant, has himself been indicted for the killing of the girl, and because his trial is still in progress, the proceedings against the applicant have ground to a halt' (CrimApp 5899/00 *Ivorkin v. State of Israel* [17]).

18. This problem became more acute in view of the provisions of the law concerning arrests and the concern that defendants that are a danger to the public will be released before their trial ends. There is no need to re-emphasize the seriousness of the violation of the individual's basic freedoms resulting from his being held under arrest until the end of proceedings, during a period when the defendant enjoys the presumption of innocence (see CrimFH 2316/95 *Ganimat v. State of Israel* [18]; CrimApp 8087/95 *Zada v. State of Israel* [19]). This outlook has also led to restricting the length of the period of arrest (see ss. 21, 61 and 62 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996). The longer it continues and the violation of the defendant's rights increases, the smaller the justification for ordering the arrest to continue. Against this background, this court has on more than one occasion found itself in a real dilemma, where the barrier erected by the Kinsey rule compels the parties to postpone the trial until the proceedings taking place against the witness-accomplice have been completed, while this delay involves the defendant remaining under arrest for a protracted period. Justice E. Hayut referred to this choice of two evils when she was asked to order the continued arrest of a defendant for the *ninth* consecutive time:

> 'The situation before us forces us to choose between two evils. One is the release of the respondent who is charged with a terrible act that led to terrible consequences — the death of a three year old child. Such an act indicates the considerable danger that the respondent poses and the concern that his release

> on bail represents a real risk to public safety and security. The other evil is leaving the respondent under arrest for such a long period, despite the presumption of innocence that he has' (CrimApp 12047/04 *State of Israel v. Ben-Yishai* [20]).

On another occasion Justice M. Cheshin said the following:

> 'It is not an everyday occurrence that the state applies for a fifth time to hold a defendant under arrest for more than nine months… Nonetheless, not only has the respondent been under arrest for such a long period, but it is difficult for us to know when his trial will end. The reason for this is that the state wishes to call Yihya Turk, his accomplice in the conspiracy, to testify against the respondent, but it is prevented from doing so because Yihya Turk is standing trial in a separate proceeding for the very same incident, and the Kinsey rule prevents the state from calling him immediately to testify against the respondent. Admittedly, the state applied to the court to allow it to call Turk to testify against the respondent, but the court refused to grant the application. The respondent's trial appears to be unable to proceed: it cannot progress until Turk's trial ends, and we do not know when Turk's trial will end… The Kinsey rule strikes us again and again, and it appears that nothing can help us' (CrimApp 1657/04 *State of Israel v. Ben-Yishai* [21], at p. 581, and see also HCJ 5091/03 *Turk v. Attorney-General* [22], at p. 672).

This issue — the inclination to release a defendant who has been under arrest for a prolonged period without the end of the proceedings against him being on the horizon — has led to another serious phenomenon. I am referring to the creation of a considerable opportunity for manipulations on the part of defendants, who have an incentive to exert pressure on the witness-accomplice in order to obtain — at the end of a 'war of attrition' — the release of the defendant from arrest. Moreover, some authorities have expressed a concern that the sword hanging over the prosecution's head — that a defendant who is standing trial will be released from arrest because of the protracted proceedings against him — may induce it to enter into lenient plea bargains with defendants or to remove serious offences from the indictment and other steps whose purpose is solely to achieve a speedy conclusion of the trial.

A general criticism has also been levelled at the Kinsey rule for causing a delay in hearing the most central testimony — the testimony of the person who is alleged to have been the defendant's accomplice and as such has first-hand knowledge of the facts, since he was involved in them. In view of this, it has even been argued that preventing the testimony from being heard denies the court important and relevant evidence and impairs its ability to arrive at the truth, and therefore also its ability to do justice (*Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], at p. 759).

19. It follows from this that the rule that was intended to further the interests of doing justice — by preventing the hearing of testimony whose reliability is questionable — is precisely what may result in justice being undermined, or at least to leniency being shown to defendants who have committed the most serious offences. This, I think, was what Justice M. Cheshin meant when he compared the Kinsey rule to a 'chemical compound that is capable of dissolving justice' (CrimApp 7971/01 *State of Israel v. Teakman* [23]). Another result of the protraction of proceedings is that it undermines the interest that the court will arrive at the truth and dispense justice to defendants *within a reasonable time*, since, in the words of Dr. H. Sandberg, 'in order to realize the goals of the criminal law, it is also necessary that the sentence that is imposed on the defendant is effective; effective means immediate, since the effect of criminal sentencing is significant only when the sentence is immediate' (H. Sandberg, *Rights of Defendants: the Right to a Separate Trial* (2001), at p. 27; see also CrimA 125/75 *Meirom Ltd v. State of Israel* [24], at p. 75). It should be said at this stage that in the past it is possible that the legal system was able to withstand the huge burden and the lengthy proceedings inherent in the application of the Kinsey rule. But it seems to me that those times have passed and will not return. The case load that exists in the courts today cannot be compared to the case load that existed when the Kinsey rule was made (see the report of the Commission for Examining the Structure of the Regular Courts in Israel (1997), chaired by Justice T. Or, and especially pp. 15-17 of the report; HCJ 8850/02 *Pastinger v. Minister of Justice* [25]; CrimApp 8639/05 *State of Israel v. Almarboa* [26]; CrimApp 2846/97 *State of Israel v. Maharom* [27]). Similarly, the scale of crime that we encounter today, which sometimes spans the whole globe, is incomparably greater than the scale of crime with which the legal system was required to contend when it created the Kinsey rule. Moreover, the sophistication of crime, the number of persons involved in it and its gravity are not what they were in 1976, the year in which the Kinsey rule was introduced.

20. In view of these difficulties, two draft laws were tabled with the aim of cancelling the Kinsey rule (see the draft Evidence Ordinance Amendment Law (no. 10), 5752-1992 (*Draft Laws* 5752, at p. 170); the draft Evidence Ordinance Amendment Law (Amendment no. 13) (Testimony of Accomplice), 5759-1999 (*Draft Laws* 5759, at p. 314)). The explanatory notes to the draft law of 1992 state:

> 'Often it is not possible to bring a person to trial if his accomplice in the offence is not called to testify in that proceeding. If the accomplices are charged in one indictment and the accomplice who gave incriminating testimony at the police station and whose testimony is required does not plead guilty, it will not be possible to sentence him and to call him to testify as a state's witness… Without the accomplice's testimony, it is possible that the prosecution will be unable to prove guilt, even on a *prima facie* basis, and in any case the silence of the defendant, the accomplice, at the trial will be sufficient to result in the acquittal of his accomplice in the offence. Filing separate indictments will also be of no avail in view of (the Kinsey rule)… *This delay in the proceedings harms the social interest of deterring offenders and bringing them to justice within a reasonable time. The rule also harms defendants who suffer from an injustice by waiting for their trials…* The draft law will correct this legal position. The draft law does not ignore the concern that the testimony of the witness will be self-serving and may besmirch his accomplice with a story that will benefit him in his forthcoming trial. This will be considered by the court, taking into account the circumstances and the other evidence, as in any other case where a witness has an interest or inclination to pervert the truth' (emphases supplied).

These legislative proposals did not become law, but the recognition of the difficulties inherent in the application of the rule — in an attempt to limit its scope — resulted in a whole host of cases that established an approach that gave the Kinsey rule a purposive interpretation, and where the rationale underlying it did not exist, the courts did not see fit to order the testimony of the witness to be postponed. This was discussed by my colleague, Justice D. Beinisch:

> 'In circumstances where we are not dealing with accomplices in the same overlapping factual parts of the offence, when there is

> no concern that the proposed witness has an interest in incriminating his accomplice and omitting his own part in the offence or minimizing it, and when it is clear from all the circumstances of the case that we are not dealing with a witness who is seeking a benefit for himself in return for that testimony, and there is also no reason to assume that he has been promised any benefit, it is difficult to see any justification for refraining from calling the witness-accomplice to testify until his trial ends. Moreover, since the Kinsey rule acquired a foothold in our legal system, there have been changes in legislation and often we are dealing with a witness who is not interested at all in testifying against that defendant… In cases such as this, when counsel for the defence has an opportunity to try and undermine the weight of the testimony, the reason for following the "Kinsey rule" and for preferring it to the need to realize the purpose of the proceedings and to hold a criminal trial efficiently and fairly is weakened' (CrimApp 7372/03 *State of Israel v. Moses* [28]; see also CrimA 1774/02 *Kadosh v. State of Israel* [29], at para. 12 of the judgment).

For decisions in a similar vein that were made in the trial courts, see CrimC (TA) 40063/01 *State of Israel v. Kadosh* [71]; CrimC (Naz) 43/03 *State of Israel v. Khalil* [72]; CrimC (Naz) 37/03 *Fatali v. State of Israel* [73]; CrimC (Naz) 1215/02 *State of Israel v. Masri* [74]; CrimC (Naz) 1014/04 *State of Israel v. Otmala* [75].

It has therefore been held that a defendant may waive the application of the Kinsey rule in his case. This approach is logical since the Kinsey rule was intended to protect the defendant and therefore there is no reason why he should not be entitled to waive it. Consequently it has been held that a defendant should not be prevented from calling his accomplice as a witness on his behalf, as a witness for the defence, even when the witness's trial is pending (see the opinion of Justice G. Bach in CrimA 330/84 *State of Israel v. Sha'ashua* [30], at pp. 89-90; see also CrimA 64/87 *Gerstal v. State of Israel* [31], at p. 536). It has also been held that where the defendant does not object at the relevant time to the testimony of an accomplice whose trial has not yet ended being heard — namely before the testimony is heard — he cannot do so after the event, and he should be regarded as someone who agreed to the testimony being heard (CrimA 579/88 *Suissa v. State of Israel* [32]).

21. In a whole host of decisions, the application of the Kinsey rule has been restricted, when the courts did not think it right to apply it in *every* case where the testimony of someone who was an accomplice in an offence was required. Thus it was held in the Kinsey rule itself that it does not apply in a case of an accomplice who is a state's witness, since he cannot be regarded as a witness who expects a benefit that will be expressed in the sentence, and therefore there is no concern that he will try to minimize his role at the expense of the defendant (see CrimA 67/85 *Abeid v. State of Israel* [33], at pp. 395-396). In another case, the court restricted the application of the Kinsey rule when it held that it was insufficient that the witness was the accomplice of the defendant in an offence, and it was even insufficient that he was being interrogated by the police, but it was necessary, as a condition for applying the rule, that at the time of giving the testimony an indictment had already been filed against the witness, or at least that there was a proven intention of filing one (CrimA 44/81 *Moyal v. State of Israel* [34], at p. 522). A similar trend was also expressed in the trial courts: in one case (SFC (Jer) 4059/01 *State of Israel v. Kaloti* [76]) it was held that an 'accomplice' for the purpose of the Kinsey rule was only someone who was being tried for the same offence for which the defendant was indicted. In another case (CrimC (TA) 40067/02 *State of Israel v. Abu-Ras* [77]) it was held that the Kinsey rule did not apply to persons who aided an offence, and in a third case (CrimC (Hf) 384/00 *State of Israel v. A* [78]) it was held that the Kinsey rule did not apply to offences that involved a large number of participants.

It is of interest to point out that a similar process has also occurred in England, where the application of the rulings in *R. v. Pipe* [98] and *R. v. Winsor* [97] has been restricted. Cf. *R. v. Richardson* [99]; *R. v. Turner* [100]; *R. v. Weeks* [101]; *R. v. Palmer* [102]; *R. v. Pentonville Prison Governor, ex p. Schneider* [103], at p. 212; *R. v. Reed* [104].

Thus we see that the application of the Kinsey rule has involved and continues to involve considerable difficulties, since it seriously undermines not only the due process of the legal proceeding but also its quality and the values of liberty and justice. These difficulties cannot be ignored. They require us to reconsider the nature of that rule, its place and its purpose in our legal system.

The Kinsey rule — proper practice and not a substantive right

22. Anyone who studies the judgment in *Kinsey v. State of Israel* [1] will see that the court did not intend to prevent utterly the hearing of an accomplice's testimony in a defendant's trial or to create, *ex nihilo*, a rule of

inadmissibility. All that the Kinsey rule sought to do — and this can be clearly seen from the language of the judgment in which it was introduced — was to indicate a practice that should be followed, without undermining the discretion given to the justices of the trial court to depart from this path in cases where they would see fit to do so. The court discussed this in the past when it held:

> '[The Kinsey rule] did not intend to affect the competence of the witness-accomplice and by means of case law to change the provision of statute that "Everyone is competent to testify in any trial, subject to what is stated in sections 3 and 4"… as stated in section 2 of the Evidence Ordinance [New Version], 5731-1971. [The Kinsey rule] is a "practical guideline" (*State of Israel v. Sha'ashua* [30], at p. 89) that *prevents* one defendant from testifying as a prosecution witness in the trial of another defendant who is his accomplice in the offence, as long as his own trial is pending' (*Suissa v. State of Israel* [32], at p. 533; see also *Kadosh v. State of Israel* [29]).

A study of the judgments in *R. v. Winsor* [97] and *R. v. Pipe* [98] shows that the courts in England also sought to arrive at this normative position. Chief Justice Cockburn described the proper process concerning the testimony of an accomplice as follows:

> 'In all such cases, if it be thought necessary, where two persons are in the same indictment, and it is thought desirable to separate them in their trials, in order that the evidence of the one may be taken against the other, I think, in order to ensure the greatest amount of truthfulness on the part of the person who is coming to give evidence under such remarkable circumstances, it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty is withdrawn and a plea of guilty taken, sentences should be passed, in order that the person coming forward to give evidence may do so with the mind free of all the corrupt influence which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might otherwise be liable to produce in the mind of the witness' (*R. v. Winsor* [97], at pp. 314-315).

Justice Blackburn also agreed with this conclusion:

> 'It would be judicious as a general rule, where the accomplice is indicted, that his case should be disposed of before he is called as a witness' (*R. v. Winsor* [97], at p. 320).

This was emphasized in later case law, where it was held that the rule outlined in *R. v. Pipe* [98] is a rule of practice, which was intended to direct the trial court and nothing more:

> 'The rules referred to in *Pipe* … are rules of practice and not rules of law' (*R. v. Pentonville Prison Governor, ex p. Schneider* [103], at p. 212).

See also in this context the judgment in the aforementioned case of *R. v. Turner* [100].

23. The Kinsey rule restricted itself to cases where the defendant and the witness are indicted separately. The problem is that the concern that this rule sought to eliminate — harming the defendant's defence — also exists when the indictment contains the cases of both defendants together (see CrimA 124/93 *Masada v. State of Israel* [35], at p. 483; see also Sandberg, *Rights of Defendants: the Right to a Separate Trial*, *supra*, at pp. 121-138). But this latter scenario was addressed by the legislature in s. 155 of the Criminal Procedure Law [Consolidated Version], 5742-1982:

'Sentencing of a defendant who pleads guilty

> 155. (a) If several defendants are charged in one indictment and some of them plead guilty to facts that are sufficient for them to be convicted and others do not plead guilty, the court shall not sentence the defendants who have pleaded guilty before the trial of the defendants who have not pleaded guilty has been held; but
>
> (1) If a defendant does plead guilty in this way, and the prosecutor or defence counsel give notice that he will be called to testify in the trial of the other defendants, *he shall not testify until he has been sentenced*;
>
> (2) In special circumstances that the court shall record, it may sentence the defendant who has pleaded guilty before the trial of the others has ended.'

Section 155 sought to prevent a defendant who has pleaded guilty from testifying against his accomplice before he is sentenced, and there is a considerable amount of logic in this. But the same danger, if not a more serious one, exists when all the defendants deny having committed the offences that are attributed to them, and therefore their inclination to exaggerate the role of their accomplices during their testimony, in order to minimize their own role, is likely to be greater. Notwithstanding this, the legislature did not stipulate any restriction with regard to the testimony of a defendant in such a scenario. Whatever the reason for this, the restriction provided in s. 155 with regard to the testimony of a defendant who has pleaded guilty was, as we have said, restricted to defendants who have been brought to trial *in a joint indictment*, and it is a fact that a similar provision was not also provided in the case of defendants who have been brought to trial in separated indictments. Some will say that this is the lacuna that the Kinsey rule seeks to fill, but I wonder whether this lacuna was not intentional, in view of the central approach of the legislature that everyone is competent to testify, except for those persons who have been excluded by virtue of a statutory provision.

In view of what we have said so far, the premise for our deliberations will be that an argument that the Kinsey rule gave defendants in a criminal trial a 'right' cannot succeed. This rule is merely a procedural guideline, which was intended to guarantee a certain aspect of the right to a fair trial, by preventing the defendant from being exposed to a risk that his conviction would be based on the false testimony of his accomplice. This leads me to the opinion that we should reject the argument that the cancellation of the practice determined in the Kinsey rule will lead to a violation of the right to a fair trial. But because of the great importance of this issue — the constitutional status of the right to a fair trial — and because the respondents focused their arguments on this, I see a need to discuss it at some length.

On the right to a fair trial

24. The state's authority to bring a person to trial gives it great power. The significance of the right to a fair trial is, in essence, that where the state wishes to make use of this power, it should do so within the framework of a fair trial, in which the justification for violating the basic freedoms of the defendant will be examined. Holding fair trials is 'an expression of the commitment of a civilized society to take deliberate action, in so far as possible, to prevent miscarriages of justice in the trials of individuals' (A. Stein, 'The Right to a Fair Trial,' *Human Rights and Civil Rights in Israel* (T.

Ben-Gal, D. Alexander, A. Bendor and S. Rabin eds., volume 3, 1992), at pp. 355-356). Therefore conducting fair trials is not merely a purpose in itself, but also a means that was designed to further the public interest to do justice and discover the truth.

Moreover, a fair trial is supposed to guarantee the protection of the 'general' human rights that the defendant has as a human being (see D. Bein, 'The Police Interrogation Rules — Are there Grounds for Codification of the Entrapment Laws?', 12 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 129, at p. 32; Sandberg, *Rights of Defendants: the Right to a Separate Trial*, *supra*, at p. 32; S. Trechsel, 'Why Must Trials Be Fair?', 31 *Isr. L. Rev.* 94 (1997), at p. 96). Therefore, in order that a trial may be considered fair, it should comply with various criteria, which include the need for impartiality and the absence of bias on the part of the persons sitting in judgment; the need for the trial to be transparent and public; the holding of the trial within a reasonable period of time; protection of the presumption of innocence and the right not to incriminate oneself; protection of the defendant's right to present evidence to prove his innocence, to object to prosecution evidence and to cross-examine its witnesses; the right of a suspect or defendant to know of the existence of investigation and trial proceedings against him (see Trechsel, *supra*, at p. 95, and R.B. Saphire, 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection,' 127 *U. of Pa. L. Rev.* (1978) 111).

The right to a fair trial does not merely realize a personal interest of suspects or defendants that are brought to trial. It is a public interest that every individual in society, as a potential defendant, knows that if and when criminal proceedings take place against him, they will be conducted duly and fairly. This was discussed by Prof. Goldstein:

> 'The criminal trial serves complex psychological functions. In addition to satisfying the public demand for retribution and deterrence, it permits the ready identification of the same public, now in another mood, with the plight of the accused. Both demand and identification root deep in the view that all men are offenders, at least on a psychological level. And from the moment the offender is perceived as a surrogate self, this identification calls for a "fair trial" for him before he is punished, as we would have it for ourselves' (A.S. Goldstein, 'The State and the Accused: Balance of Advantage in Criminal Procedure' (69 *Yale L.J.* (1960) 1149, at p. 1150).

What emerges from this is that the right to a fair trial is like a jigsaw puzzle. It is not reflected in a specific procedural arrangement or a specific right, but is based on an assortment of measures, procedural arrangements and substantive rights that combine together in order 'to rectify the unequal balance of power between the accused and the prosecution, which usually enjoys a preferred procedural status and additional advantages, and to ensure that the accused is given a proper opportunity to state his innocence and to act in order to prove it' (CrimA 4596/05 *Rosenstein v. State of Israel* [36], at p. 308). This was discussed by my colleague, Justice Beinisch, when she addressed the characteristics of the right to due process in the criminal trial:

> '… *first*, the purpose of the aforesaid right is to ensure a fair procedure and proper procedural safeguards for the fairness of the criminal trial vis-à-vis the accused. Procedural fairness is, therefore, what lies at the heart of the aforesaid right. *Second*, the right to a fair criminal proceeding applies to all stages of the criminal proceeding… Indeed, the police investigation stage is a preliminary proceeding to the trial itself, such that defects that occurred in it may have ramifications on the fairness of the criminal proceeding as a whole… *Third*, the protection of the right to a fair criminal trial is not confined to examining the potential effect of procedural defects specifically on the outcome of the trial; this context requires a broader perspective that is based on general considerations of fairness, justice and preventing a miscarriage of justice. *Finally*, we should point out that the right to a fair criminal trial is a multifaceted right, which may serve as a basis for deriving many procedural rights of the person under interrogation, the suspect and the accused in criminal proceedings' (CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [37], at para. 66).

At this point we should emphasize that the right to a fair trial cannot and also need not be identical in different legal systems. These may have procedural mechanisms and arrangements that vary from one another, or give litigants different rights without this signifying that any of them is a legal system that does not have fair trials. The choice between the different measures that are capable of guaranteeing fair trials, and the balance between the various competing interests are influenced by the character of the legal system, the prevailing legal tradition, the existing legal arrangements, etc.. Thus, for example, the measures that are intended to guarantee a fair trial in a

legal system where verdicts are given by juries cannot be identical to measures adopted in a legal system where verdicts are given by professional judges. The scope of the right to a fair trial may also vary in accordance with the values that the legal system seeks to promote and in view of the balance between them. Thus, for example, there may be differences between legal systems as a result of different outlooks concerning the proper balance between the public interest in eradicating crime and the interest in conducting fair trials (see in this regard: Sandberg, *Rights of Defendants: the Right to a Separate Trial*, *supra*, at pp. 30-31, and H.L. Packer, 'Two Models of the Criminal Process,' 113 *U. Pa. L. Rev.* (1964), which is cited by Sandberg). Moreover, the balancing point may also be influenced by considerations such as the activity of the legal system, in view of the interest that legal proceedings should be completed within a reasonable time, and the desire to deter potential offenders. This was also addressed by my colleague, Justice Beinisch, in *Yissacharov v. Chief Military Prosecutor* [37], where she described the right to a fair trial as —

> '... a multifaceted right that is open-ended, and its title and precise content vary from one legal system to another, even in the various international conventions… defining the boundaries of the right to a fair criminal trial is a difficult and complex task, and it must be done while taking into account all of the principles and characteristics of the relevant legal system' (*ibid.* [37], at para. 66).

The right to a fair trial in Israel

25. The Israeli legislature has not included the right to a fair trial expressly in any legislation, and several attempts to enshrine it in statute have also not succeeded (see the draft Basic Law: Legal Rights, *Draft Laws* 5754, 2219, at p. 99). Despite this, the right has always enjoyed an exalted position, and when the Basic Laws were enacted, it was recognized, according to some authorities, as a constitutional right that derived from the right to dignity (see A. Barak, *Legal Interpretation* (vol. 3, *Constitutional Interpretation*, 1994), at pp. 431-432), and according to others, as a constitutional right derived from the right to liberty (see E. Gross, 'The Procedural Rights of the Suspect or the Accused under the Basic Law: Human Dignity and Liberty,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 155 (1996), at pp. 169-170). In one case this was discussed by Justice D. Dorner:

> 'The Basic Law: Human Dignity and Liberty… gave the right of a person to a fair criminal trial the status of a constitutional basic

> right, especially by virtue of s. 5 of the Basic Law, which provides a right to liberty, and by virtue of ss. 2 and 4 of the Basic Law, which provide a right to human dignity. Under s. 11, the Basic Law binds all government authorities — the legislative branch, the executive branch and the judicial branch — to respect the rights provided in the law' (RT 3032/99 *Baranes v. State of Israel* [38], at p. 375).

This was also discussed by B. Okon and O. Shaham, who said:

> 'The Basic Law: Human Dignity and Liberty fundamentally changed rights in criminal law. The right of a person to liberty was enshrined. This has a special consequence for criminal law. This right struggles for supremacy in this field perhaps more than in any other field of the law. Within this context, a person's right to a fair trial has been recognized. The significance of this is a change in the ethical pyramid. Criminal procedure has become more important. From being merely a matter of procedure it has become a main tool in the service of the constitutional basic right' (B. Okon and O. Shaham, 'Due Process and a Judicial Stay of Proceedings,' 5 *HaMishpat* 11 (1995)).

(For more on the status of the right to a fair trial in our legal system, see *Yissacharov v. Chief Military Prosecutor* [37]; HCJ 9264/04 *State of Israel v. Jerusalem Magistrates Court* [9], at para. 8; HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [39], at p. 761; Y. Shahar, 'Criminal Procedure,' *Israel Law Yearbook*, 1992, (A. Rosen-Zvi ed.) 375; A. Barak, 'Human Dignity as a Constitutional Right,' 41 *HaPraklit* 271 (1994), at p. 281; D. Wiener, 'Further to the Amos Baranes Case,' 4 *Kiryat HaMishpat* 169 (2004), at p. 186).

26. Several legislative arrangements give the right to a fair trial in our legal system practical content. Section 2 of the Basic Law: Administration of Justice provides that 'In matters of the administration of justice, anyone who has judicial power is subject only to the authority of the law.' Section 77A(a) of the Courts Law [Consolidated Version], 5744-1984, is also intended to prevent a danger of a predisposition or a concern of bias; in the words of the section: 'A judge should not hear a case if he finds, on his own initiative or upon an application of a litigant, that there are circumstances that are capable of creating a real concern of bias in conducting the trial.'

The Criminal Procedure Law also addresses the issue of the fairness of the criminal trial in many of its sections. Thus, for example, s. 74 of the law provides that a defendant and his defence counsel may inspect the investigation material that was assembled by the prosecuting authority. The rationale underlying this provision is that a fair trial requires, *inter alia*, that a defendant is able to prepare his defence with reference to the evidence that has been accumulated against him (cf. CrimApp 4157/00 *Nimrodi v. State of Israel* [40], at pp. 632-633; CrimApp 1355/98 *Ben-Ari v. State of Israel* [41]; CrimA 400/84 *State of Israel v. Anjel* [42], at p. 487; CrimApp 2043/05 *State of Israel v. Ze'evi* [43], at para. 12).

Section 186 of the Criminal Procedure Law provides that where there is no provision to the contrary, 'a person should only be tried in criminal cases in his presence,' and s. 134 of this law requires the court to keep a record that will reflect everything that occurs in the courtroom during the hearings. These two sections are intended to guarantee the transparency of the criminal trial; transparency is also an aspect of procedural fairness. Section 145 of the law provides that 'During the trial, the court shall explain to the defendant, if it sees a need to do so, the rights that he has for his defence,' whereas s. 196 provides that 'When the reading of the sentence has ended, the court shall explain to the defendant his right to appeal against the judgment and shall notify him of the period for filing the appeal.' The purpose of these sections is to ensure that anyone standing trial is aware of his rights, so that the criminal trial is not conducted in circumstances where the prosecution, which has an advantage because of the information in its possession, has the upper hand. Another right that is merely another aspect of the right to a fair trial is the right given to the defendant in s. 61 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996, which provides that his trial should end within the time frame provided in the law. An additional facet is the right of the defendant to refrain from testifying or giving evidence that may incriminate him. This right is enshrined in s. 2(2) of the Criminal Procedure (Testimony) Ordinance, 1927, and s. 47 of the Evidence Ordinance.

Notwithstanding, the right to a fair trial, like every basic right, is not an absolute right. It takes its place alongside conflicting rights and interests. These include the interest that the criminal trial should be efficient, the ability to bring someone who has committed offences to justice, the desire to discover the truth, the intelligent use of the resources of the legal system, the sensible conducting of the trial and the desire to do justice to persons who unwillingly became victims of criminal acts. In the criminal trial, a proper

balance should be found between all the rights and interests that are involved (see also the remarks of my colleague, Justice Beinisch, in *Yissacharov v. Chief Military Prosecutor* [37], at para. 68; and CrimA 6613/99 *Smirk v. State of Israel* [44], at p. 554).

27. In my opinion, the Kinsey rule was intended for this very purpose. In the circumstances in which it was introduced, which, as I have already said, were completely different from the situation that prevails today with regard to the ability to realize the interest of efficiency, the rule was suited to achieving the goal for which it was created. The balancing point that was determined in the Kinsey rule originally allows the right to a fair trial and the interest of efficiency of the trial to be satisfied simultaneously. But since then, a significant change has occurred in circumstances, and the Kinsey rule is no longer able to satisfy the balancing point that was determined. Continuing today to apply the practice that was determined in that rule means a displacement of the balancing point in the direction of the fairness of the trial, and a weakening of the element of its efficiency, which cannot be accepted. A change in circumstances naturally makes it necessary to adapt the trial, including the criminal law with its procedural rules, to the prevailing reality (cf. HCJ 58/68 *Shalit v. Minister of Interior* [45], at p. 513; *Rosenstein v. State of Israel* [36], at para. 30). In such a situation, the remarks that I uttered earlier with regard to the Kinsey rule being merely a means, and not an end in itself, become clearer. Since this rule can no longer sustain the burden of balancing, it is clear that we must find another method that is capable of retaining the balancing point, notwithstanding the changing circumstances, in such a way that it will prejudice the fairness of the trial or give it less weight in relation to the status of the interest of the efficiency of the trial.

This leads us almost automatically to ask the question: what is this other practice that will combine with the other measures of which I spoke above and how can it ensure the realization of a proper balance between the conflicting values?

Protecting the right of a defendant to a fair trial

28. Of the variety of measures that our legal system provides to safeguard the right of a defendant to a fair trial, I think there are two that should be discussed in detail. The first is the requirement of the supporting evidence that is required by s. 54A(a) of the Evidence Ordinance:

'Verdict based on sole evidence in a criminal trial

54A. (a) The court shall not convict a defendant solely on the basis of the evidence of his accomplice in the offence unless it finds in the evidence something to support it.'

The purpose of this provision, like the idea underlying the Kinsey rule, is to contend with the concern that relying solely on the evidence of a person, who because he was the accomplice of the defendant in committing an offence may give false testimony, may lead the court to an erroneous result. The court therefore needs evidence of the truthfulness of the witness's statements, which is provided by additional evidence that constitutes 'support.' Naturally, when the restriction in the Kinsey rule is cancelled, attention will once again focus on this requirement of support.

In this regard, it should be emphasized that before the Kinsey rule was introduced, the requirement of additional evidence for the sole testimony of an accomplice in an offence was more stringent. Additional evidence that amounted to corroboration was required. This means evidence that implicates the defendant in the commission of the offence, as opposed to evidence that can merely authenticate the testimony against him. It was only in 1982, when the Kinsey rule was already in force, that the Evidence Ordinance was amended and stipulated the more lenient requirement of support (see the Evidence Ordinance Amendment Law (no. 6), 5742-1982). However, contrary to what was originally proposed (see the explanatory notes to the draft amendment (no. 6), *Draft Laws* 5740, no. 1477, at p. 396), it was provided in the amendment wording of the ordinance that the requirement of corroboration would continue to be required where a state's witness was concerned, since in such a case the personal interest that may affect the testimony of the witness who has been promised a benefit is very considerable. Notwithstanding, in view of the very real danger that relying on the testimony of an accomplice in crime may lead to a false conviction, case law recognized the existence of a 'scale' of supporting evidence on the basis of strength. The court trying a case is authorized to determine, at its discretion, what is the degree of the support that is required in the circumstances of the case before it in order for the prosecution to satisfy the requirement of support. When it has determined this, evidence that authenticated the testimony of the witness will be insufficient if it does not satisfy the required degree of support. The rule is therefore that 'the greater the credibility that the court attributes to the testimony requiring support, the lower the degree of the supporting evidence may be' (*per* my colleague

Justice A. Grunis in CrimA 1538/02 *A v. State of Israel* [46], at p. 598; see also CrimA 209/87 *Shahada v. State of Israel* [47], at p. 596; CrimA 348/88 *Abu-Assad v. State of Israel* [48], at p. 98; CrimA 2642/99 *Masaraweh v. State of Israel* [49], at para. 9 of the opinion of my colleague Justice Beinisch). Thus, where the court — on the basis of its impression of the witness-accomplice, his statements and the other circumstances — has grounds for concern that the witness before it has an especially strong interest to incriminate his accomplice and give a distorted account of events, it may determine that a high level of support is required. I think that at this point it is possible that the difference between the requirement of support and the requirement of corroboration will not be so great.

29. A second measure for the protection of defendants is derived from the provisions of s. 47 of the Evidence Ordinance, which I addressed earlier. The section, which is entitled 'Incriminating evidence,' says the following:

> 'Incriminating evidence
>
> 47. (a) A person is not liable to give evidence if it contains an admission of a fact that is an element of an offence of which he is charged or of which he may be charged.
>
> (b) If a person requests to refrain from giving evidence because it may incriminate him as stated in subsection (a) and the court refuses the request and the evidence is given, the evidence shall not be submitted against that person in a trial in which he is accused of an offence that is based on the fact that was revealed by the evidence, unless he consents thereto.
>
> (c) …'

This provision was intended to give a person a defence against the use of statements that he uttered, or made in any other manner, to incriminate him in a legal proceeding against him. The principle of immunity against self-incrimination has a direct ramification on the matter before us, first and foremost in the sense of the right of a person brought to trial to have a fair trial. As I have said, the Kinsey rule sought to protect a defendant against damage that he might suffer as a result of the testimony of his accomplice whose trial has not yet ended — testimony that may turn out to be untruthful because of the witness's interest in the outcome of the trial. Therefore, where

the procedural restriction introduced by the Kinsey rule has been removed, there is no longer any reason why testimony of this kind should not be heard. But then the witness may, by virtue of his right under the aforesaid s. 47(a), refuse to undergo cross-examination from the defendant, on the ground that what he might say in his cross-examination might incriminate him. The defendant and the court may then find themselves helpless in the attempt to discover the weight of the testimony that was given. This utterly contradicts the principle of seeking justice and discovering the truth in the judicial proceeding, a principle that attributes great importance to the legal tool of cross-examination. This was discussed by Vice-President M. Elon in CrimFH 4390/91 *State of Israel v. Haj Yihya* [50], at p. 694, where he says:

> 'This conclusion derives not only from the express language of the statute, but also from our accepted basic principles concerning the manner of conducting a fair criminal trial. The right of the accused to cross-examine the witness is one of his basic rights, both in order to discover the truth and also because every person has a right to argue that his fate should not be determined until he has been given an opportunity to know about the proceedings that are taking place with regard to him and against him and to be a party to them.'

See also FH 3081/91 *Kozali v. State of Israel* [51], at p. 478; CrimA 5329/98 *Dejani v. State of Israel* [52], at p. 281; CrimA 7450/02 *Eid v. State of Israel* [53], at para. 11).

In these circumstances, it is necessary to examine the proper interpretation that should be given to the provisions of the aforesaid s. 47, and especially to the relationship between the first two subsections thereof. An interpretation that would solve the problem that we have posed would be one that stipulates that in every case the witness-accomplice will be required to answer the questions directed at him in cross-examination, but when his replies contain anything that may incriminate him, it will not be possible to use them against him in a future trial. Are the language and the purpose of the section consistent with an interpretation of this kind? My answer to this is yes. According to this approach, the provisions of s. 47(a) should be read together with what is stated in s. 47(b), and the two provisions together are the basis for the court's power to exercise its discretion as to whether or not to grant the application of a witness not to reply to questions addressed to him on the grounds of self-incrimination. When the court refuses to grant it, the witness will be liable to reply, but he will be immune from being hurt by what he

says. This approach has some support in the case law of this court. Thus, in *Kinsey v. State of Israel* [1] itself Justice Shamgar said that 'Cross-examination, which is an important means of examining the credibility of a witness, may be restricted, unless the court exercises its authority under s. 47(b) of the Ordinance' (*ibid*. [1], at p. 489). In *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], Justice Strasberg-Cohen added that 'the court may reject the application of a person to refrain from giving evidence that may incriminate him, but if it does so, the incriminating evidence will not be brought against that person' (*ibid*. [10], at p. 764). This has also found expression in the case law of the trial courts; see, for example, SFC (TA) 1164/02 *State of Israel v. Ben-Yishai* [79], at para. 23; MApp (Naz) 2303/03 *State of Israel v. Masri* [80], at para. 6; MApp (BS) 20659/05 *State of Israel v. Abu-Sevila* [81], at para. 8; see also Sandberg, *Rights of Defendants: the Right to a Separate Trial*, at p. 178.

We therefore see that a departure from the Kinsey rule does not undermine the substantive right of a defendant to a fair trial, if it is accompanied by other measures that are capable of guaranteeing this right effectively. Cross-examination is one of the most important of these other measures, and it is numbered among the other measures that I discussed earlier. But we are left with the question whether the proposed interpretive approach sufficiently considers the rights of the witness. I will now turn to examine this question.

The right of a witness-accomplice to a fair trial

30. In *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], the court held that:

> 'An examination of the reasons underlying the Kinsey rule show that the rights of the witness whose separate trial for the same incident is pending, and especially the right to remain silent and the right not to incriminate himself, are not the reason for the rule. When formulating the rule in that case, the court was considering the interest of the *defendant* who objects to his accomplice testifying against him' (*ibid.* [10], at p. 759).

These perceptive remarks written by Justice Strasberg-Cohen emphasize that the question before us has an additional facet, which even if it was not addressed at length in *Kinsey v. State of Israel* [1] is directly affected by any reconsideration of that rule. This is because where the prosecution wishes also to indict the accomplice of a defendant who has testified for the prosecution, the witness may find himself in a situation where remarks that

he made in his testimony will be used against him. His right to refrain from incriminating himself, which as I have said is one of the elements of the right to a fair trial, will thereby be violated.

In an attempt to solve this problem, the legislature provided in s. 47(b) of the Evidence Ordinance, as we have said, a prohibition against using a witness's testimony to incriminate him. I will cite the wording of this provision once again:

> '(b) If a person requests to refrain from giving evidence because it may incriminate him as stated in subsection (a) and the court refuses the request and the evidence is given, the evidence shall not be submitted against that person in a trial in which he is accused of an offence that is based on the fact that was revealed by the evidence, unless he consents thereto.'

In this provision the legislature adopted a model of immunity against self-incrimination that is also known as 'use immunity.' This immunity gives a witness substantive protection with regard to statements that he made in his testimony, but it does not actually rule out the possibility that he will be indicted in that matter. Thus Israeli law rejected an alternative model of 'transactional immunity,' in which the nature of the protection given to the witness is that he may not be indicted at all with regard to the matter on which he was required to testify. Adopting the model of 'transactional immunity' would compel the prosecution authorities to decide which of the two — the defendant or the witness — should be brought to justice, and which should not be brought to justice because it would be procedurally impossible or because there is insufficient evidence.

Prima facie, the model of 'use immunity' offers a satisfactory solution that allows two central interests that are important to the case at hand to coexist: there is nothing to prevent *all* the persons involved in the criminal incident being brought to justice and there is a fitting solution to the right of a person not to incriminate himself. But implementing this model in practice gives rise to two questions: the first concerns the proper scope of 'use immunity.' Should it apply to any use of the protected evidence, even an indirect one, such as where it is used as a springboard for discovering new evidence or as support for the existing evidence? Or should it be limited only to direct use, meaning that the production of the protected evidence before the court alone is prohibited? The second question is: who has the burden of showing that the use of the evidence is consistent with the law, or

alternatively that it violates the principle of immunity from self-incrimination? On both of these questions we can learn several lessons from the experience of foreign legal systems that have encountered similar questions.

31. American law and Canadian law have both encountered the difficulty that arises in the circumstances that gave rise to the Kinsey rule. But, unlike in *Kinsey v. State of Israel* [1], in those countries the court did not focus on the right to a fair trial of the *defendant* who is brought to trial first, but on the right of the *witness* who will be brought to trial in the future after delivering his testimony in the trial of the defendant, his accomplice.

In American law, the normative basis for the witness's right can be found in the Fifth Amendment to the Constitution, which establishes the principle of due process. In the past, the accepted approach in the United States recognized the model of 'transactional immunity' (see *Counselman v. Hitchcock* [85], at p. 563). But later it transpired that this led to an abuse of the principle of immunity, since witnesses who were in danger of facing criminal proceedings hastened to testify against their accomplices in the same matter and thereby acquired for themselves an absolute immunity against being brought to trial. This was addressed by Justice D. Levin in CrimA 2910/94 *Yefet v. State of Israel* [54], at p. 292 (with regard to investigations of congressional committees):

> 'The opponents of the immunity argued, justly, that such a comprehensive immunity would in practice induce offenders to appear before Congress and thereby protect themselves from being indicted. This immunity even acquired the popular name of "immunity baths." Because it was abused, this position was unsatisfactory.'

Therefore, in the 1970s the Federal statute, the Witness Immunity Act, 18 U.S.C. §6002 (1970), was amended, so that American law adopted a model of 'use immunity' which naturally restricted the protection given to a witness. The Supreme Court of the United States held that this model was consistent with the provisions of the Constitution, provided that it included all uses, *both direct and indirect*, that could be made of the protected testimony (see *Kastigar v. United States* [86]). This means in practice that nothing stated in a person's testimony may be used either as evidence against him or in order to obtain evidence that is external to the testimony, and separate and independent evidence will be required for a conviction. In the words of the American court:

> '… [the "use immunity" rule] prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness' (*ibid.* [86], at p. 453).

In several cases the courts in the United States have addressed the question of what constitutes an indirect and prohibited use as evidence of something arising from the testimony. *Inter alia* it has been held that no use may be made of 'immune' testimony in order to refresh the memory of a witness by referring him to what he said in that testimony; in order to clarify other evidence that is not sufficiently clear; in order to reach a decision as to which witnesses to summon and in which order; and to aid in preparing skeleton arguments and concluding arguments (*United States v. North* [87], at p. 857). It was also held that a conviction may not be based on testimony that was influenced by statements made in the 'immune' testimony (*United States v. Hylton* [88], at p. 134). Moreover, the model of immunity that was adopted does not allow the testimony to be used to focus a police investigation; to decide whether to file an indictment; to decide whether to enter into a plea bargain; and to plan the cross-examination of witnesses (*United States v. McDaniel* [89], at p. 311; see also G.S. Humble, 'Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment,' 66 *Tex. L. Rev.* 351 (1987); K. Strachan, 'Self-Incrimination, Immunity, and Watergate,' 56 *Tex. L. Rev.* 791 (1978)). This list is not exhaustive. The rule is that where the evidence assembled by the prosecution, without relying on the privileged testimony, is insufficient for obtaining a conviction, the conviction should not be allowed to stand, since it violates the immunity against self-incrimination. American case law has further held that no weight should be attached to the question of the subjective intentions of prosecution authorities or their knowledge that they were making use of privileged information (*United States v. Hsia* [90], at p. 201).

On the question of the burden of proof, American law has held that the burden rests almost entirely with the prosecution. All that the witness needs to show is that he gave testimony that relates to the incident with regard to which he has been indicted, and when he has done this, the prosecution authorities need to prove that no use has been made of statements that he made (*Kastigar v. United States* [86], at p. 441; *United States v. Danielson* [91]). For this purpose, a kind of 'trial within a trial' is held in each proceeding in order to ascertain whether the principle of immunity has been

observed, and this may be done at any stage of the trial (*United States v. North* [87], at p. 854).

32. Canadian law has also adopted this model of immunity. In s. 5 of the Canada Evidence Act, 1985, and in s. 13 of the Canadian Charter of Rights and Freedoms, there is a similar rule to the one found in s. 47(b) of the Israeli ordinance. In the leading judgment of the Supreme Court of Canada in 1995, it was held, by a majority, that a witness may be compelled to reply to any question that he is asked, but no *direct or indirect* use may be made of his replies in order to incriminate him (*R. v. S. (R.J.)* [94]; see also *R. v. Primeau* [95]).

In my opinion, we should adopt this approach in our legal system. A narrow literal interpretation of s. 47(b) — 'the evidence shall not be submitted against that person' — might admittedly lead to the conclusion that only a direct use of the testimony is prohibited by law. But my opinion is that this expression should be interpreted in accordance with the purpose of the section, which is, as I have said, to give effective protection against self-incrimination. It follows that there is no reason, *a priori*, to prevent a person testifying against his accomplice even before the witness's trial has ended, provided that his testimony will not be used, *even indirectly*, to assist the prosecution authorities in proving the charges against him, and they shall not be allowed to make use of the witness's testimony to 'fish' for additional evidence against him.

Notwithstanding, as Dr Sandberg says in her book (*Rights of Defendants: the Right to a Separate Trial*, at p. 176), in the United States the prosecution authorities have on several occasions been confronted with a major problem in proving that no use had been made of privileged testimony, even indirectly, for the purpose of assembling evidence against someone who gave such testimony. This, I would imagine, is because, *inter alia*, it is inherently difficult to prove something that is essentially a negative, and because it is difficult to trace such a complex and prolonged process as the assembling of prosecution evidence (see also in this regard the remarks of Justice L'Heureux-Dubé of the Supreme Court of Canada in her minority opinion in *R. v. S. (R.J.)* [94], at p. 594. The result has been that sometimes the prosecuting authorities in America are compelled to forego bringing the witness to trial or, alternatively, to forego calling him to testify in his accomplice's trial before his own trial has ended. This result, in Dr Sandberg's view, is similar to the outcome of the Kinsey rule, and in her opinion the problem discussed at the beginning of my opinion arises once

again.

In my opinion, the problem described above should not lead us to reject the proposed model, especially since it is possible to limit the scope of this difficulty. This is because, first, as I have repeatedly said, we rely on the discretion of professional judges that try criminal cases, and they can be presumed to know how to distinguish between a remote or negligible use of the testimony and one that is capable of affecting the outcome of the trial. Second, even with regard to the issue of the burden of proof, I think that the witness who argues that there has been a prohibited use should be required to bear a slightly heavier burden, in the sense that he will be required to show not only that he gave testimony about the incident before his trial ended, but that there is a *prima facie* concern — which is more than merely hypothetical — that use was made of this testimony in a manner that may affect the outcome of the trial. When the witness is able to do this, the burden will pass to the prosecuting authorities, who naturally have better access to the evidence and can therefore prevent a violation of the rule of immunity. They will be required to satisfy the court trying the case that there is no basis for the *prima facie* concern that was raised, namely that the *other* evidence that they have, which is external to and separate from the testimony, was insufficient for reaching a conviction.

When weighing all the interests that are involved, and when one considers that in such complex circumstances any path that one follows will be the result of balancing and compromise, I think that the proposed solution is a proper one. Unlike the position that arises from applying the Kinsey rule, this solution gives the prosecution authorities a greater degree of influence, which is appropriate to their position, when determining the policy of indicting persons who are suspected of carrying out criminal acts jointly. This also respects the rights of the accomplices who are indicted, whether in their capacity as defendants or when testifying against one another.

Summary

33. At the beginning of my remarks I discussed the rationale that underlies the Kinsey rule. I went on to discuss the difficulties inherent in that rule — difficulties that not only grew with the passage of time, but now undoubtedly inflict an injustice on defendants who are under arrest, and result in an intolerable disruption to the administration of justice. I determined that the Kinsey rule was intended to propose a desirable practice and therefore it did not give a defendant a substantive right. I went on to determine that the cancellation of the Kinsey rule does not deprive the defendant of the right to

a fair trial. In doing so, I pointed to changes that had occurred in the law (s. 10A of the Evidence Ordinance), which together with additional provisions of statute (ss. 47 and 54A of the Evidence Ordinance and s. 155 of the Criminal Procedure Law) have recognized the possibility of calling a witness to testify against his accomplice in the criminal act, by using a control tool of 'support' or 'corroboration,' which were intended to assist the court when deciding questions of the credibility of witnesses. Finally, I discussed the witness-accomplice's privilege against self-incrimination, and my conclusion was that the broad interpretation of s. 47(b) of the Evidence Ordinance should be adopted.

34. What arises from all of the aforesaid is that there is no longer any justification for the existence of the Kinsey rule, first because the circumstances that prevailed when it was introduced have changed unrecognizably, and second because the court today has tools that, in addition to the impression that it obtains directly from the witnesses who appear before it, can enable it to arrive at the truth.

I therefore propose that we determine that the existing law *that originated in the judgment of this court in* Kinsey v. State of Israel *[1], according to which* an accomplice to an offence who is standing trial in a separate indictment may not be called to testify until his trial has ended, is no longer valid and therefore it should no longer be followed. Notwithstanding, I would emphasize that the court should exercise great caution when considering the credibility of the testimony of such a witness, and where necessary it should also insist that there is additional evidence of significant weight.

Postscript

35. I have read and reread the differing opinions of my colleagues, but I see no reason to change my position. The Kinsey rule does indeed reflect a need to contend with a complex situation, and striking a delicate balance between competing rights and interests. Unfortunately it would appear that it is impossible to find a perfect solution that is capable of solving all the problems that arise. Notwithstanding, I do not think that leaving the trial court with discretion is a proper way of contending with these problems.

First, I find it difficult to see a significant difference between the majority opinion and what is stated in the opinion of my colleague Justice A. Procaccia. My colleague proposes that 'there are clearly grounds for restricting the continued application of the rule' (para. 3 of her opinion), and it should be applied only as 'the exception to the rule' and 'sparingly in special cases' (para. 18). This approach, which advocates that 'the rule will

therefore become the exception, and the exception will become the rule' (*ibid*.) is not materially different from the majority opinion that holds that the Kinsey rule should be used 'very narrowly, in exceptional cases only and for special reasons' (para. 4 of the opinion of President D. Beinisch), and in 'very exceptional and extreme' cases (para. 3). Even though it would appear that each of the opinions relates to a different degree of refraining from applying the Kinsey rule — the majority is of the opinion that it should be applied less often than my colleague Justice Procaccia proposes — I doubt whether in the practical world a distinction of this kind has any significance.

As I have shown, even today the Kinsey rule is only used as a rule of practice, but although there was always a possibility of departing from it, the trial courts rarely made use of that possibility. Whatever the reasons for this, I fear that adopting the majority position will not lead to a real change in the manner in which the rule is currently applied.

Let us place ourselves in the position of a trial judge who is asked to hear the testimony of a witness whose trial has not yet ended. We have already emphasized that it is suspected from the outset that this witness will give self-serving testimony, and therefore the judge is likely to say to himself, with a considerable degree of logic: why should I address the question of the credibility of the witness and his testimony, when it is better that I wait until judgment has been given in the witness's trial, also for the reason that I will not end up making findings of fact that conflict with those that will be determined by the other court? This gives rise to the concern that the rule being made today by the Supreme Court will be undermined and the Kinsey rule will once again become the widespread practice. It will be hard to prevent this happening in view of the clear difficulty in carrying out judicial review of the decisions of trial courts in cases such as this, since they are interim decisions concerned with procedure in criminal proceedings (see in this regard what is stated in para. 5 of my opinion).

36. Second, I doubt whether the trial court will be able to assess correctly the content of the testimony and the degree of injustice that it is likely to cause, *before* it is heard. This is precisely the inescapable outcome of the rule that my colleagues wish to introduce, as can be clearly seen from the opinion of my colleague Justice M. Naor (in para. 5). At this stage of the proceedings, the court trying the case is likely to find itself, to a large extent, stumbling in the dark with regard to the as yet unheard testimony. Is it conceivable that the 'indications of the truth' (s. 53 of the Evidence Ordinance) that the court is required to seek will reveal themselves sufficiently before it has heard even

one word from the witness? In such a situation, every little concern, even if only speculative, is likely to lead the court to prefer taking the safe path and applying the Kinsey rule, rather than choosing the dangerous path of hearing the testimony during which it may discover that it is dealing with self-serving testimony. We should remember that even the witness's statement that was made to the investigation authorities before the trial began is not before the judge at this preliminary stage, since, according to s. 10A of the Evidence Ordinance — and these are first principles in the rules of evidence — the statement may be brought before the court only when difficulties are found in the testimony that has been heard.

37. My remarks above may *prima facie* imply an excessive restriction upon the discretion which is in principle the prerogative of the judges of the trial court in matters of procedure. My colleague Justice Naor touches upon this in the second paragraph of her opinion. But this is not the case. *De facto*, the prevailing practice, both before and since the Kinsey rule was created, is that the trial court in any case does not have discretion in determining the *order* of hearing the witnesses. This remains the prerogative of the prosecution authorities, and any departure from this requires the consent of the parties. What I said above is consistent with this approach, which leaves the prosecution authorities with the responsibility and the discretion for the whole task of bringing suspects to trial.

38. Finally, my colleague the president (in the fourth paragraph of her opinion) holds that it is not necessary to decide, in the case before us, the question of the other possible solutions for protecting the accomplice who testifies before his trial has ended, including the question of the scope of the immunity offered to him. My colleague, Justice Naor, agrees with this position and adds to it an unwillingness even to determine the extent of the additional evidence that is required, whose purpose is to protect the interests of the defendant. My opinion is that we cannot leave these questions until they arise. The issue before us is complex, both because of its nature and also because it is not likely to come before the court again. In my opinion it is therefore proper that we should propose a comprehensive solution now, and this is what I sought to do in my opinion when I presented a model that strikes a balance between the need to continue to protect the rights of the defendant and the need to ensure that, when a witness is compelled to testify, this does not lead to a violation of his right not to incriminate himself. A failure to decide the question of the protection for the witness is tantamount

to removing one of the foundations on which my proposal to cancel the Kinsey rule is based, and I cannot agree to this.

Justice A. Procaccia

Conflicting considerations

1. The renewed deliberation upon the question of the application of the Kinsey rule requires a complex balance between conflicting values: the value of holding a just trial that seeks to convict the guilty and acquit the innocent against the value of the efficiency and fairness of the criminal trial, which endeavours to protect the basic rights of the defendant and to ensure the deterrent effect of the norms of criminal law; this includes the value of protecting the right of a defendant who is under arrest so that his personal liberty is not violated disproportionately while he enjoys the presumption of innocence by a prolongation of the period of arrest as a result of a delay in the trial. This deliberation sets the right of the defendant to a fair trial, in which he will not be wrongly convicted on the basis of the false testimony of a biased witness-accomplice who is trying to obtain an indirect benefit in his own trial that has not ended, against the right of that same defendant to an effective criminal trial that will end within a reasonable time since he is being held under arrest until verdict is given. It raises an ethical question concerning the right of a witness-accomplice, who is called to testify in the separate trial of another defendant before his own trial has ended, not to incriminate himself when giving his testimony. It raises questions of the effect that this right has on the other defendant's trial and the witness's own trial. It highlights the conflict between the fear of a miscarriage of justice and the fear of a delay of justice in criminal trials. This ethical conflict exists when the Kinsey rule is applied and it exists to the same degree when it is cancelled. The solution to this dilemma lies in weighing the conflicting values and striking a balance that will harmonize them by making the most of their relative advantages while minimizing, in so far as possible, their shortcomings.

The solution to the complex conflict of values that arises with regard to the Kinsey rule was not simple or straightforward even then the case law rule was formulated at the beginning of the 1970s; the difficulty has become greater as a result of changes that have occurred in recent years in the nature of criminal trials and the tools that are available to the judiciary for contending with them. The continually increasing burden on the courts, together with the ever greater scope and sophistication of crime resulting

from the significant increase in organized crime and the larger number of defendants who are involved in serious and complex criminal offences all place special demands upon the resources of the legal system that have a direct effect on the prolongation of trials. This has a direct effect on trials where defendants are held under arrest until the end of proceedings, and it extends the periods of time during which they are held under arrest, sometimes to a very considerable degree; this reality violates the rights of defendants to their personal liberty while they enjoy the presumption of innocence; it undermines the efficacy of the criminal trial and weakens its deterrent effect. This changing reality has given rise to the need to reassess what role the Kinsey rule should continue to have in criminal trials in Israel.

2. My colleague Justice Levy concludes his comprehensive opinion with the following:

> 'I therefore propose that we determine that the existing law that originated in the judgment of this court in *Kinsey v. State of Israel* [1], according to which an accomplice to an offence who is standing trial in a separate indictment may not be called to testify until his trial has ended, is no longer valid and therefore it should no longer be followed. Notwithstanding, I would emphasize that the court should exercise great caution when considering the credibility of the testimony of such a witness, and where necessary it should also insist that there is additional evidence of significant weight.'

My colleague discusses the nature and purpose of the Kinsey rule and the complex considerations that conflict with its application. His conclusion is that thirty years after it was first introduced, the nature of criminal trials and the conditions and circumstances for applying it have changed to such an extent that they justify cancelling the rule in its entirety so that nothing remains of it. His position is based on the premise that, in the overall balance, allowing a witness-accomplice to testify in the trial of a defendant before his own trial has ended does not present any real threat to justice, the fairness of the trial and the protection of defendants' rights. At the same time, cancelling the rule will put an end to lengthy delays in the trial of a defendant who is usually held under arrest until the end of proceedings; he will no longer be compelled to wait until a witness's trial has ended so that the witness can testify in the defendant's trial. The court has the tools of common sense and professional expertise for assessing the credibility and weight of the testimony of a witness-accomplice who testifies in the trial of a defendant

before his own trial has ended. This is supplemented by the supporting evidence that is required to substantiate this testimony. That the evidence is assessed by a professional trial court and that it needs to be substantiated by supporting evidence are sufficient to safeguard against self-serving and unreliable testimony of a witness-accomplice who is seeking to obtain an indirect benefit from testimony that he gives before his own trial has ended. As for the possibility that the testimony of the witness-accomplice, when it is given in the separate trial of the defendant before the witness's own trial has ended, may violate the witness's right not to incriminate himself, my colleague is of the opinion that the solution to this lies in exercising the power of the court to order the witness to answer questions even when they may incriminate him, within the framework of s. 47(b) of the Evidence Ordinance [New Version], 5731-1971; according to this provision, this incriminating evidence may not be used against the witness in a separate trial of his own, and therefore it should not be regarded as a reason why the Kinsey rule should not be cancelled. When weighing the benefit derived by the defendant from the Kinsey rule against the considerable damage that is caused by its implementation to the effectiveness and fairness of the criminal trial, and especially the inevitable violation of the personal liberty of a defendant who is being held under arrest, the latter consideration clearly outweighs the former and therefore justifies the cancellation of the rule in its entirety.

3. The Kinsey rule was formulated in another era, when the ethical conflict that led to its adoption was of a different character and more pressing. Criminal trials were fewer, less sophisticated and less complex. They required less judicial resources and were consequently of shorter duration. I agree with my colleague's opinion that the passage of time, the significant changes that have occurred in the scale of criminal proceedings and in the nature and complexity of the matters brought before the court and the effect of these on the length of criminal trials require a reassessment of all the factors that are relevant to the Kinsey rule, in order to examine whether the rationale that underlies it is still valid, or whether it should be applied differently. But a reassessment of all the conflicting factors and interests that bear upon the matter, against the background of the changes that have taken place in criminal proceedings in Israel in recent decades, leads me to the conclusion that, although there are clearly grounds for restricting the continued application of the rule, there is no justification for cancelling it in its entirety. Confronting the conflicting considerations and values against the background of current needs does, admittedly, justify the determination of a

different balancing point today from the one that was determined when the rule was formulated three decades ago, but there is still a margin in which it should be left to judicial discretion to apply it, in order to achieve the main purpose of the trial — arriving at the truth — while protecting the right of the defendant to a fair trial and the character and effectiveness of criminal proceedings, as well as safeguarding the general public interest that seeks to give the court effective tools to realize these purposes.

Let me explain my reasons.

The rationale underlying the Kinsey rule

4. Two separate indictments are filed against two accomplices in crime, after the prosecution decides to hold their trials separately. The prosecution wishes to summon one defendant (hereafter — 'the witness-accomplice') as a witness in the trial of the other defendant (hereafter — 'the defendant'). The Kinsey rule provides that the testimony of the witness-accomplice in the defendant's trial should be take place after the witness's own trial has ended. The main reason for the rule derives essentially from the goal of maximizing the potential of the witness-accomplice's evidence from the viewpoint of its credibility and weight, in order to ensure 'the maximum degree of truthfulness of a person who is about to give testimony' (*per* Justice Shamgar in *Kinsey v. State of Israel* [1], at p. 489; *State of Israel v. Sha'ashua* [30]). The value of arriving at the truth in a judicial proceeding depends, *inter alia*, on exhausting the probative value of testimonies, and this includes hearing the testimonies at a time when the circumstances give rise to the greatest likelihood of the testimonies being presented in a reliable and truthful manner. Where the hearing of testimony at a certain time gives rise to an inherent concern of bias because of improper considerations that motivate the witness when giving his testimony, then, in so far as possible, the judicial proceeding will seek to schedule the hearing of the witness's testimony at a stage when the concern of bias is nullified, or at least reduced. In our case, the testimony of the witness-accomplice in the defendant's trial, before his own trial has ended, may be influenced in various ways by his desire to improve his own position in his trial that has not yet ended, since his criminal liability has not yet been determined and he has not yet been sentenced. The bias may be reflected in the witness's desire to please the prosecution in order to obtain a benefit, or in an attempt to exaggerate the role of the defendant in the offence and to distance himself entirely from it or minimize his own role in it, in the hope that this will result in his being treated more leniently in his own trial. The bias may also sometimes be reflected in an

attempt to portray the defendant and himself as entirely innocent, while placing the blame on others. Postponing the testimony of the witness-accomplice in the defendant's trial until after his own trial has ended may make the witness's testimony more credible, since he can no longer expect his testimony in the defendant's trial to be of indirect benefit to him in his own trial. The fear of a perversion of the truth and the desire to arrive at the truth are a major factor in the Kinsey rule (H. Sandberg, *Rights of Defendants: the Right to a Separate Trial* (2001), at p. 163). The value of arriving at the truth that the Kinsey rule is intended to serve seeks to prevent an erroneous conviction of an innocent defendant or an erroneous acquittal of someone who is guilty of a criminal act as a result of relying upon the self-serving testimony of a witness-accomplice. In this respect, the Kinsey rule was intended to further the general purpose of arriving at the truth in criminal trials, while safeguarding the rights of the defendant to a fair trial, which will protect him from the risk inherent in allowing incriminating evidence that is given for the self-seeking motives of the witness-accomplice.

An additional aspect of the Kinsey rule is the restrictions that are imposed on the testimony of a witness-accomplice before his own trial has ended, from the viewpoint of his right not to incriminate himself (s. 47(a) of the Evidence Ordinance). A witness-accomplice who testifies in the separate trial of a defendant before his own trial has ended has immunity against self-incrimination. Therefore he may refuse to answer questions in cross-examination that may incriminate him. This restriction naturally increases the risk inherent in allowing the self-serving testimony of the witness-accomplice, since it will be difficult to test it in cross-examination because of the aforesaid immunity. A possible solution to this problem lies in the provisions of s. 47(b) of the Evidence Ordinance, which gives the court discretion to order a witness to answer questions in cross-examination even on a matter that may incriminate him, but in such a case the evidence may not be used in the witness's trial unless he consents thereto. This provision raises a complex issue concerning the scope of the immunity given to the witness-accomplice in his own trial where he is required to answer incriminating questions in the defendant's trial before his own trial has ended. There are different schools of thought and approaches regarding the nature of the immunity given to a witness and its ramifications on the outcome of his trial. The conclusion that follows from the aforesaid is not only that the testimony of an accomplice before his own trial ends may be tainted by an inherent defect of improper considerations but also that the opportunity of testing it in cross-examination is limited, and the method that may be used to remove the

restriction on cross-examination as aforesaid has a direct effect on the witness's right not to incriminate himself in his own trial, to a greater or lesser degree.

The Kinsey rule is mainly a rule that concerns the *timing* for giving the testimony. In the circumstances described above, the timing may affect the reliability of the testimony, its weight and its probative value. The timing may affect the outcome of the trial and the purpose of arriving at the truth. The testimony of a witness-accomplice before his own trial has ended may result in erroneous convictions, and sometimes erroneous acquittals. Against this background, the rule provides that the timing of the accomplice's testimony in the defendant's trial should be after the accomplice's own trial has ended. In such circumstances, the fear of an extrinsic motive affecting the testimony is allayed, and the likelihood of him giving true testimony is greater. Moreover, at this stage the restriction upon the cross-examination of the witness is removed, since the immunity from self-incrimination is not longer relevant, and at this stage all the probative tools may be employed in order to examine the credibility of the testimony.

The Kinsey rule — a rule of procedure as distinct from a rule of evidence

5. The Kinsey rule is in essence a rule of procedure, as opposed to a rule of evidence. It is not intended to render the witness-accomplice incompetent to testify in the trial of his colleague before his own trial has ended, nor does it render his testimony inadmissible if he did testify. It is consistent with the general principle in s. 2 of the Evidence Ordinance that 'everyone is competent to testify in any trial' (*State of Israel v. Sha'ashua* [30], at p. 89). It is a procedural rule that seeks to exhaust the full probative potential of the witness-accomplice's testimony by determining that the time he should testify is after his trial has ended, thereby allaying the fear of an improper motive that may accompany this testimony as long as his trial has not ended (J.D. Heydon, 'Obtaining Evidence Versus Protecting the Accused: Two Conflicts,' [1971] *Crim. L. R.* 13, at p. 18; *Kinsey v. State of Israel* [1], at pp. 480-481; *Suissa v. State of Israel* [32], at p. 533). Since it is a procedural rule that is intended, *inter alia*, to protect the procedural rights of a defendant, he may waive his rights and agree to the witness-accomplice testifying before the end of his trial. This case therefore focuses on a rule concerning the *timing* of the testimony of a witness-accomplice whose is being tried separately, and the premise is that his testimony at every stage of the trial is valid and admissible. Therefore, as a practice direction, the Kinsey rule sought to outline a desirable procedural method of determining the time when

the witness-accomplice's testimony will be heard; since it was formulated, and as long as it is law, the rule does not exclude judicial discretion to depart from it in such circumstances where its application is unsuited to the purposes that it seeks to achieve.

The Kinsey rule is not a strict rule either in theory or in the manner in which it is applied *de facto*; it is a procedural guideline that leaves room for judicial discretion to determine when it should not be followed (*Kadosh v. State of Israel* [29]; *State of Israel v. Moses* [28]). In practice, the courts have departed from the Kinsey rule more than once where they thought that applying it in the specific case did not achieve its purpose (CrimC (TA) 3160/04 *State of Israel v. Levy* [82]; CrimC (Jer) 3088/02 *State of Israel v. Malca* [83]; CrimC (TA) 40056/04 *State of Israel v. Abramov* [84]; see also details of additional cases in the concluding arguments of the Public Defender's Office, at p. 12).

It should also be stated that over the years case law has restricted the scope of the Kinsey rule, as, for example, by determining that the rule does not apply to a witness-accomplice who has not yet been indicted (*Moyal v. State of Israel* [34]), nor to a state's witness (*Abeid v. State of Israel* [33]) nor to a witness-accomplice who is called to testify for the defence (*Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10]). We are therefore dealing with a procedural rule that can be applied by the court in a flexible manner in order to implement it where it is required to achieve its purpose. Nonetheless, it should be emphasized that in its everyday application the courts have implemented the Kinsey rule on a regular basis. Departures from the rule occurred sparingly and only in a handful of cases.

The Kinsey rule is a procedural rule that has no constitutional significance, and therefore any change to it does not require compliance with the limitations clause in the Basic Law: Human Dignity and Liberty, as argued by some of the respondents. When a procedural rule is formulated in case law it may also be changed in judicial proceedings, when this is required by the needs of both individuals and the general public that change with the times.

A reassessment of the Kinsey rule is not directly related to the general trend that is occurring at this time in the field of the rules of evidence, which seeks to replace rules of the admissibility of evidence with rules concerning its weight (*State of Israel v. Haj Yihya* [50], at p. 671). This is because this rule does not address the *admissibility* of the accomplice's testimony but only the proper *timing* for giving it, as a matter of procedure.

Although we are dealing with a rule of judicial practice, the Kinsey rule has considerable influence on the process of discovering the truth in criminal trials. It has an effect on whether the defendant is convicted or acquitted. It has an effect on the witness-accomplice's own case, not only with regard to the testimony given by him, but also with regard to the effect of his testimony on his own case, and on the scope of the immunity that he is supposed to enjoy in his own case. This rule has diverse repercussions — on the criminal trial from a general public viewpoint, on the defendant and on the witness-accomplice. We shall briefly discuss all of the conflicting considerations that arise with regard to the Kinsey rule, and thereafter we shall draw from this discussion the required operative conclusions, in so far as they concern the need to change the rule and are suited to the needs of the changing reality.

The considerations supporting the Kinsey rule

6. The Kinsey rule concerning the timing of the testimony of a witness-accomplice in the separate trial of the defendant, his accomplice, is a creation of case law. But the rationale underlying it has a basis in the statutory arrangement in s. 155 of the Criminal Procedure Law [Consolidated Version], 5742-1982, concerning accomplices in crime that are charged jointly in one indictment. According to that provision, where one defendant pleads guilty to facts that are sufficient to convict him, and counsel for the prosecution or the defence wish to summon him to testify in the trial of a defendant who has not pleaded guilty, then the defendant who has pleaded guilty should not testify until he has been sentenced. The following is the language of the section:

'Sentencing of a defendant who pleads guilty

> 155. (a) If several defendants are charged in one indictment and some of them plead guilty to facts that are sufficient for them to be convicted and others do not plead guilty, the court shall not sentence the defendants who have pleaded guilty before the trial of the defendants who have not pleaded guilty has been held; but
>
> (1) If a defendant does plead guilty in this way, and the prosecutor or defence counsel give notice that he will be called to testify in the trial of the other defendants, he shall not testify until he has been sentenced;

> (2) In special circumstances that the court shall record, it may sentence the defendant who has pleaded guilty before the trial of the others has ended.'

The purpose of this statutory rule is to ensure that a defendant who has pleaded guilty shall not testify in the trial for or against his accomplice before he is sentenced, because of the concern that his testimony will be biased because of the improper consideration of obtaining a benefit for himself in the sentence that has not yet been handed down. The probative interest in exhausting the reliability potential of the accomplice's testimony led the legislature to depart from the general guiding principle that all the accomplices in the offence who are tried together should be sentenced at the same time, and it saw a justification for creating an exception that the sentence of a witness-accomplice who has pleaded guilty should be handed down before he gives testimony for or against his accomplices in the same indictment. The rationale underlying this provision was that the law should not allow a situation in which an accomplice who has pleaded guilty testifies when he has an expectation of receiving a benefit from his testimony, 'where because of an expectation of that kind there are grounds to fear that the testimony will be false' (*per* Justice H.H. Cohn in *Kadouri v. State of Israel* [12]).

It should be noted in parenthesis that s. 155 is limited to a case where the defendant who is summoned to testify has already pleaded guilty and his liability has been proved, in which case he should be sentenced before he gives his testimony with regard to his accomplice. But where he has not pleaded guilty, the rule is that accomplices in one indictment are not competent to testify as prosecution witnesses against one another in the same trial; but an accomplice may testify as a defence witness on his own behalf or on behalf of another of his co-defendants. In such circumstances, his testimony may also be used to incriminate another co-defendant. Thus, where an accomplice testifies as a defence witness in a trial in which the partners in crime are tried together, whether in his own defence or in defence of another defendant, his testimony may be used as evidence against another co-defendant. In such circumstances, it is also possible to submit in evidence his statement to the police, and to make use of it within the framework of s. 10A of the Evidence Ordinance, *inter alia*, for the purpose of incriminating the accomplice in crime who is his co-defendant in the same trial (CrimA 29/86 *Barrett v. State of Israel* [55]; CrimA 228/87 *Karmi v. State of Israel* [56];

Abu-Hatzeira v. State of Israel [14], at p. 152; CrimApp 1572/05 *Zuartz v. State of Israel* [57]).

There is therefore a difference between an accomplice who has pleaded guilty and may be sentenced before he testifies with regard to his co-defendant (whether as a prosecution witness or as a defence witness), in which case the testimony can be 'cleansed' of its defects by passing sentence before hearing the testimony, and an accomplice who does not plead guilty and is summoned as a defence witness, and in the process of testing the reliability of his testimony, his statement to the police is presented and he is cross-examined on his version of events. Here it is not possible to allay the concern that there is an improper motive in the accomplice's testimony simply by postponing the hearing of the testimony to a later date. This is because the witness's criminal liability has not yet been determined and splitting the trial of co-defendants by giving separate verdicts with regard to their criminal liability is regarded as an undesirable step that undermines the purpose of discovering the truth. Where it is possible from a procedural point of view to repair the 'defect' inherent in the accomplice's testimony because of the concern of an improper motive and to sentence him before he gives his testimony, the law requires this with regard to defendants who are tried together.

This rationale, *mutatis mutandis*, lies at the heart of the Kinsey rule, which concerns accomplices who are tried separately. The essence of the rule is that a witness-accomplice who is summoned to testify as a prosecution witness in the separate trial of his partner ought to testify in circumstances that allow the probative potential of his testimony to be maximized. These circumstances exist when the witness's trial has ended and there is no longer a concern that he is impelled by motives of self-interest in giving his testimony. In the absence of a statutory arrangement for this situation where partners in crime are tried separately, case law has filled the lacuna in the form of the Kinsey rule, which constitutes a direct offshoot of the rationale underlying s. 155 of the Criminal Procedure Law, which concerns partners in crime who are tried together.

The importance of the Kinsey rule should be examined from three different angles: *first*, the public interest in having criminal trials in which the truth is discovered, while giving the court the best tools for arriving at the truth; *second*, safeguarding the right of the defendant to a fair criminal trial that will protect him from an erroneous conviction; *third*, the effect of the immunity from self-incrimination that accompanies the witness-accomplice's

testimony both from the viewpoint of the defendant and from the viewpoint of the witness himself. Let us examine each of these angles.

The public interest in the Kinsey rule: discovering the truth and arriving at a correct result in criminal trials

7. The criminal trial is designed to enforce and apply the norms of criminal law in order to ensure proper standards in society and to protect the safety of the inhabitants of the state. The ultimate purpose is to achieve a determination of guilt or innocence — to convict the guilty and to acquit the innocent. In order to arrive at a correct result in a trial, the rules of procedure seek to discover the truth. Without truth there can be no justice, and without justice the main purpose of the criminal trial will be frustrated.

> 'The method whereby a trial achieves justice is by seeking after the truth. The trial is founded on the truth. Judicial proceedings are based on discovering the truth. Without truth there is no justice. Without truth there is no law. The truth — which judicial proceedings seek to discover — is reality as it truly is' (A. Barak, 'On Law, Dispensing Justice and Truth,' 27 *Hebrew Univ. L. Rev. (Mishpatim)* 11 (1996).

The purpose of the criminal law to discover the truth in order to arrive at a correct result is not its only value. There is another conflicting value, which is the right of the defendant to a fair trial that will take into account his rights as a human being and as a defendant, and a balance is always required between society's need to realize the purpose of the criminal law in ensuring the public interest and concern for the needs of the defendant so that no injustice is done to him in the course of seeking to discover the truth. The nature and main goal of the criminal trial was discussed by the court in CrimA 951/80 *Kanir v. State of Israel* [58], at p. 516, where it said (*per* Justice Barak):

> 'The criminal trial is a legal framework that seeks to realize the criminal law, namely to determine innocence or guilt. To this end, the criminal trial should reveal the truth, and this is its main purpose. Naturally, requiring compliance with rules and revealing the truth are not two conflicting tasks. On the contrary, the rules are intended to determine a standard for conducting a trial, which from experience will make it possible to discover the truth, and in this these two goals are compatible. But there are cases where a formal insistence upon compliance with the rules of procedure in a certain matter will cause a miscarriage of

> justice, whether by way of an innocent person being convicted or a guilty one being acquitted. In these circumstances, we should seek to have the rules themselves give the court power and discretion to do justice… The experience that has formulated the rules of procedure has determined a delicate balance between the needs of the defendant on the one hand and the needs of society on the other. The needs of the defendant are his real needs for a fair trial, whether at the investigation stage or at the trial stage. The needs of society are its real needs to convict the guilty and acquit the innocent.'

Discovering the truth in a criminal trial is intended to bring about the conviction of the guilty and the acquittal of the innocent. It is intended to prevent erroneous convictions and at the same time also to prevent erroneous acquittals. It embodies the public interest in proper law enforcement and proper norms of conduct, which are essential for the running of a civilized society; it is intended to protect the rights of the defendant not to be erroneously convicted and to prevent an improper violation of his rights as a human being. At the same time, its purpose is to bring the guilty to justice and to protect society from the risks inherent in allowing a felon to go free. Ascertaining the truth serves the main purpose of the criminal trial: establishing the guilt or innocence of the defendant (CrimA 639/79 *Aflalo v. State of Israel* [59], at p. 575; MApp 838/84 *Livni v. State of Israel* [60], at pp. 733-734; D. Menashe, 'The Ideal of Discovering the Truth and the Principle of Safeguarding against Erroneous Convictions — An Anatomy of a Complex Relationship,' 1 *Kiryat HaMishpat* (2001) 307, at pp. 307-308).

The main goal of the criminal trial — establishing innocence or guilt — and the value of discovering the truth that is intended to realize this goal have an effect first and foremost on the right of a defendant to a fair trial that will result in a just outcome and prevent his being convicted erroneously. But this goal does not end here. It is intended to serve a larger public interest of obtaining a correct result in criminal trials, which includes the prevention of erroneous convictions and erroneous acquittals. Protecting the rights of the defendant in the criminal trial is not necessarily the same as or as comprehensive as the goal of obtaining a correct result in the trial. An outcome of a trial that is not a correct outcome — whether an erroneous acquittal or an erroneous conviction — undermines justice and the public interest in discovering the truth in criminal trials, even where the right of a defendant from the viewpoint of the fairness of the criminal trial is not

violated. It is possible that the trial of a defendant will be conducted fairly and that all of his rights will be upheld, and at the same time it may arrive at a mistaken outcome of an erroneous conviction or an erroneous acquittal. The rules of criminal law seek to harmonize between the needs of the defendant to be given a fair trial and the public interest that the criminal trial should reach a correct outcome, even though these goals are not exactly the same and sometimes there is a tension between them that requires balancing and reconciling:

> 'An erroneous acquittal, and certainly a false conviction, harm both the doing of justice and the appearance that justice is being done, and it may undermine public confidence in the ability of the judicial authority to do justice to the individual and to society' (*Yissacharov v. Chief Military Prosecutor* [37], at para. 43 of the opinion of Justice Beinisch).

The value of discovering the truth in the criminal trial affects the rights of the defendant on trial, but it also goes beyond them and seeks to promote the general public interest of enforcing proper norms of conduct in society, a condition for which is that trials should reach a correct outcome. This value is indicative of the place of the law in the structure of government, and it realizes the values of the rule of law and law enforcement in a society that is built on a democratic system of government.

Within the scope of the goal of discovering the truth and arriving at a correct outcome in criminal trials, the rules of evidence have been built on two main foundations: the rules of admissibility, which determine *ab initio* what evidence is admissible in a trial and what is not, because of a concern that relying upon it will lead to an erroneous result, and the rules of assessing the reliability and weight of admissible evidence. The evolving trend of restricting the rules of inadmissible evidence and developing the sphere of assessing its probative reliability and weight makes it necessary to give the trial court tools to take full advantage of the probative potential of the admissible evidence that is brought before it. The general effect of the Kinsey rule on the judicial proceeding is that it improves the tools given to the court to reach the truth by taking full advantage of the reliability potential of the witness-accomplice's testimony. It is difficult to argue against the premise that the *timing* of the witness-accomplice's testimony in the defendant's trial, at a stage after the witness's own trial has ended, increases the likelihood that the full reliability potential of his testimony will be realized, which is not the case when his testimony is heard before his own trial has ended.

Those who support the cancellation of the Kinsey rule place their reliance on the 'support' that is required for the testimony of the witness-accomplice as a protective measure against relying on testimony that is biased and unreliable because of the interests of the witness whose trial has not yet ended. There is no doubt that the support that is required for the testimony of the witness-accomplice constitutes a protective measure against reliance upon false testimony as such. Notwithstanding, it should not be forgotten that we are speaking of a requirement of support for evidence that *exists*, which is intended to safeguard against a person being convicted when there is insufficient evidence to convict him. The requirement of support does not satisfy the need to realize the full potential of the evidence in order to arrive at the truth. It is not a substitute for evidence that does *not exist*. The supporting evidence that is required guards against the fear that reliance will be placed on unreliable and incorrect testimony. It is not a substitute for achieving the goal of discovering the truth in a criminal trial, which is realized by hearing testimony at a time when it is most likely to be reliable. The supporting evidence that is required will therefore safeguard against placing reliance on false testimony, and determining the outcome of the trial accordingly, but it will not satisfy the goal of discovering the truth that truthful testimony may provide. Relying solely on the requirement of support as a safeguard measure against erroneous convictions protects the rights of the defendant to a fair trial. It does not necessarily provide a complete solution for the need to discover the truth, which seeks to maximize the reliability potential of the witness's testimony that is achieved, *inter alia*, by determining the timing for hearing his testimony.

It has been argued on more than one occasion that the Kinsey rule, which determines the timing of hearing the witness-accomplice in an attempt to remove the defects of the testimony, is inconsistent with the prevailing legal system in which other 'defective' testimonies are allowed at any stage of the trial and are assessed in accordance with their value and weight, to the best of the judicial discretion of the judge trying the case. This is the case, for example, the defence testimony of a witness-accomplice who testifies in a joint trial with his partners, which may incriminate them; the same is true of the testimony of an accomplice whose trial is taking place separately, who is called as a *defence witness* in the trial of the defendant, to which the Kinsey rule has not been applied (*State of Israel v. Sha'ashua* [30]); the testimony of an accomplice who has been given the status of a state's witness and who is indebted to the prosecution can be heard at any stage of the trial. My colleague, Justice Levy (in para. 13 of his opinion) indicates a list of

testimonies which suffer from an inherent defect, but despite this the judicial proceeding 'suffers' them to be adduced in the usual procedural order and places its reliance on the professional court that will know how to evaluate and weigh their defects correctly. Thus, for example, children, persons suffering from mental illnesses, retarded persons and persons who have been convicted in the past of perjury are allowed to testify, and the inherent limitations of these witnesses does not prevent their testimony from being heard (cf. *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], at pp. 766-767). The Kinsey rule can answer these arguments in the following terms: there are defects that are inherent in evidence of various kinds and that do not affect their admissibility. In most of the cases, these inherent defects cannot be repaired or minimized by means of one proceeding or another, and therefore these kinds of evidence are brought in the normal way and in the usual procedural order, and they are assessed while taking their defects into account. This is the case with the defence testimony of an accomplice-witness in a joint trial with his partners; it is the case with the 'state's witness'; and it is also the case with other 'defective' testimonies whose defects cannot be repaired by the *timing* of hearing them. But where it is possible by procedural means to remove or reduce the defect, the position is different.

The 'defect' that accompanies the testimony of a witness-accomplice who testifies in the defendant's trial before his own trial has ended derives from the *timing* of his testimony. The Kinsey rule came into being because it was thought that the procedural order of hearing the witnesses could contend with this defect, remove it or reduce it. It may be assumed that if there were an effective and fair procedural method of realizing the full probative potential of testimonies with other inherent defects, the rules of evidence would have provided a solution to this, even if we assume that ultimately the task of assessing the reliability and weight of the evidence belongs to the judge who is trying the case. But even if we discover other testimonies with inherent defects whose probative value can be improved by procedural means, and the law does not mandate the use of these, this in itself does not justify the cancellation of the Kinsey rule, as long as this rule has its own important rationale concerning the testimony of a witness-accomplice in the trial of a defendant before his own trial has ended.

The Kinsey rule, as a rule of procedure, does not absolutely guarantee that the testimony of the witness-accomplice who testifies in the defendant's trial after his own trial has ended will be truthful. It is founded on a statistical analysis that is based on logic, common sense, experience and mainly an

understanding of the thinking processes of witnesses who were themselves involved in the offences with regard to which they are required to testify. Taking full advantage of the probative potential of testimony that is heard in a trial is an important goal in a judicial proceeding, and especially in a criminal trial in murder cases. It is consistent with the purpose of discovering the truth in a trial, which lies at the heart of the general social values of proper and correct enforcement of the law and the norms of the criminal law, and it is the essence of the protection of the rights of the individual (the defendant).

Notwithstanding the central importance of the value of discovering the truth, it is not the only value on which the criminal trial is based. Other values and goals that are worthy of protection compete with it and sometimes conflict with it. Some of these values are intended to protect the individual — whether it is the defendant, the victim of the offence or a third party that is unrelated to the offence — whereas others are intended to protect general interests of society, such as the security of the state, public safety or another important interest of society. The competition between the value of discovering the truth in a trial and other important values gives rise to a need to find a proper balance, which is based on an assessment of the relative weight of the competing values. Consequently, the value of discovering the truth is not an absolute value, but a relative value that should be balanced properly against conflicting interests (*Yissacharov v. Chief Military Prosecutor* [37], at para. 44; D. Menashe, 'Judicial Discretion in Fact Finding, Freedom of Proof and Professionalism of the Courts,' 43 *Hapraklit* (1993) 83, at p. 117). This competition is a factor in deciding the fate of the Kinsey rule, which mainly focuses on finding the proper balancing point between the value of discovering the truth in a criminal trial and the right of the defendant to a fair criminal trial, which will be completed within a reasonable time.

The importance of the Kinsey rule from the defendant's viewpoint

8. In addition to the importance of the Kinsey rule for discovering the truth and arriving at a correct outcome in a trial, it also has a value in that it protects the right of the defendant to a fair criminal trial. In this regard, the rule is intended to provide a solution, by procedural means, to the fear of an injustice to the defendant that may arise as a result of a distortion of the truth by a biased witness-accomplice, who is trying to use his testimony to obtain an indirect benefit in his own trial that has not yet ended. This distortion is likely to derive from a possible tendency of the witness to deny or minimize

his part in the offence, while increasing the role of the defendant as the party solely or mainly responsible for committing the offence. This tendency naturally increases where the trial of the witness-accomplice has not yet ended, and he hopes to derive some kind of benefit or a leniency in sentence as a result of giving such testimony.

The testimony of the witness-accomplice in a defendant's trial before the witness's trial has ended presents an additional difficulty from the defendant's viewpoint. This derives from the witness's right not to incriminate himself, which he has at this stage of the trial. This immunity significantly restricts the extent to which this witness may be subjected to cross-examination, which is intended to test the credibility of his evidence (s. 47(a) of the Evidence Ordinance). This restriction becomes even greater in view of the fear that the accomplice's testimony may be self-serving, and conducting a full cross-examination is therefore important in order to test the credibility and weight of the testimony. Alternatively, if the witness is required, despite the immunity, to answer questions that may incriminate him, this testimony will be privileged in his trial (s. 47(b) of the Evidence Ordinance). One way or the other, the testimony of the accomplice in the defendant's trial before his own trial ends causes difficulties both for the defendant and also for the witness-accomplice. From the viewpoint of the defendant, the testimony of the witness-accomplice before the end of his own trial also requires support, and because of the 'fragility' of that testimony because of its timing, which invites a possibility that it will be self-serving because of improper and self-interested considerations, real support of considerable weight will be required in order to counter the danger of the self-serving testimony. At the same time, from the viewpoint of the defendant, the repeal of the probative requirement of corroboration for the testimony of the accomplice that existed in the past and the possibility of being satisfied today merely with support increase the danger of an erroneous conviction. This danger, from the viewpoint of the defendant, is of particular importance when considering the factors relevant to the fate of the Kinsey rule.

It is important to point out in this context that the Public Defender's Office, the Israel Bar Association and the defence counsel who appeared on behalf of the defendants in this case all adopted the same position that supports the continued application of the Kinsey rule, on the ground that it protects the rights of the defendant in criminal trials and reduces the danger of erroneous convictions as a result of the false testimony of accomplices who seek to obtain a benefit from their testimony before their trial ends. This

position was adopted despite the heavy price that is currently paid by defendants who are held under arrest until the end of proceedings in serious criminal cases, since the Kinsey rule frequently results in their period of arrest being extended, sometimes for long periods, as a result of the need to wait until the end of the trial of the witness-accomplice, and despite the lengthy delays in trials as a result of the heavy burden of cases weighing on the court.

The importance of the Kinsey rule from the viewpoint of the witness-accomplice

9. Calling the witness-accomplice to testify in the defendant's trial before his own trial has ended raises a complex issue concerning the right of the witness not to incriminate himself.

Section 47 of the Evidence Ordinance provides:

> 'Incriminating evidence
>
> 47. (a) A person is not liable to give evidence if it contains an admission of a fact that is an element of an offence of which he is charged or of which he may be charged.
>
> (b) If a person requests to refrain from giving evidence because it may incriminate him as stated in subsection (a) and the court refuses the request and the evidence is given, the evidence shall not be submitted against that person in a trial in which he is accused of an offence that is based on the fact that was revealed by the evidence, unless he consents thereto.'

The significance of this provision is two-fold: the witness-accomplice has the right to refrain from giving testimony that can incriminate him (subsection (a)). If the court rejects his request not to deliver incriminating testimony and he is required to give it, that evidence may not be brought in the trial of the witness in which he is accused of an offence that is based on the fact that was revealed by the evidence, unless he consents thereto (subsection (b)).

The implementation of this provision may lead to one of the following: restricting the cross-examination of the witness-accomplice solely to matters that do not involve self-incrimination, or requiring the defendant to give full

testimony that does incriminate him, subject to the privilege against use of that evidence in the witness's trial for the same or a similar offence.

The first possibility protects the interest of the witness-accomplice, but harms the interest of the defendant. Restricting the cross-examination of the witness-accomplice solely to matters that do not incriminate him undermines the efficacy of the cross-examination as a main test of the witness's credibility. This harm is aggravated by the inherent fear that the witness's testimony against the defendant will be self-serving, when his trial has not yet ended. The restriction upon cross-examination as aforesaid increases the risk of harm to the defendant in the form of an erroneous conviction.

The second possibility gives the court a means of compelling the witness to answer incriminating questions in cross-examination, subject to his incriminating testimony being privileged in his own trial. This gives rise to a complex question of the scope of the immunity that is required in these circumstances: are we speaking only of a direct immunity with regard to the testimony that was given and with regard to the trial of the witness-accomplice on the same or a similar offence, or are we speaking also of an indirect immunity that extends to matters that may arise indirectly from that testimony and that tie the hands of the prosecution in investigations deriving from the incriminating testimony and in how they deal with the trial of the witness-accomplice (see, in this regard, the comprehensive research in Dr H. Sandberg, *Rights of Defendants: the Right to a Separate Trial* (2001), at p. 163 *et seq.*; U. Struzman, 'The King is Naked or the Jury that Controls the Court in Israel,' 13 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1988) 175, at pp. 207-211).

Prima facie, the immunity given to the witness-accomplice under s. 47(b) of the Evidence Ordinance is an immunity that is restricted to the incriminating evidence itself, for the purpose of his trial on the same or a similar offence only. The fear that the statements made in the incriminating testimony will be used indirectly in the witness-accomplice's trial may deter him from giving any testimony at all. This may lead to the witness-accomplice remaining silent because of a fear of self-incrimination. In these circumstances, it is to be assumed that the incriminating statement made to the police will be filed in accordance with s. 10A of the Evidence Ordinance, but the defendant will not have the effective tool of cross-examination in order to test the reliability of the witness's statement to the police. Reliance upon the statement of the witness-accomplice to the police presents a similar difficulty because of the fear that it is self-serving and tainted by the personal

motives of the person who was interrogated, who hopes to obtain some consideration or benefit for making a statement before an indictment is filed against him (N. Zaltzman, 'Co-defendants and Section 10A of the Evidence Ordinance,' 9 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1983) 660).

A witness-accomplice who testifies after his trial has ended is liable to answer fully in cross-examination and he no longer has a claim of immunity against self-incrimination. The cancellation of the Kinsey rule therefore has a direct effect not only on the defendant but also on the witness-accomplice and his fate, from the viewpoint of the scope of the immunity given to him in his own trial, which is pending at the time when he gives his testimony in the defendant's trial.

The witness-accomplice in American and Canadian law

10. In American law, the *de facto* position is similar *in its results* to the position in our legal system under the Kinsey rule, but the causes underlying this position are different: whereas the Kinsey rule places an emphasis on the protection of a defendant from the self-serving evidence of a witness-accomplice, American law emphasized the interests of the witness-accomplice and his right not to incriminate himself when he testifies in the defendant's trial before his own trial has ended. In the United States there is no prohibition against calling the witness-accomplice to testify in the defendant's trial before his own trial has ended, but the witness-accomplice's broad immunities from self-incrimination lead *de facto* to the same result, whereby there is a desire to separate the witness's testimony in the defendant's trial from the witness's own trial. The right not to incriminate oneself is a constitutional right in the United States and it is enshrined in the Fifth Amendment to the Constitution. Section 6002 of title 18 of the U.S. Code provides that self-incriminating testimony that a witness-accomplice is ordered to give is privileged, together with 'any information directly or indirectly derived from such testimony or other information,' which may not be used against the witness in his trial (Sandberg, *Rights of Defendants: the Right to a Separate Trial*, at p. 174). In practice, the prosecution in the United States is compelled to agree to give broad immunity to the witness-accomplice or is compelled to agree to his being a state's witness, and therefore it often prefers to wait to hear the testimony of the witness-accomplice until his own trial has ended (*Kastigar v. United States* [86]). The double immunity against direct and indirect use of the witness's incriminating testimony makes it very difficult to bring the witness to trial after he has incriminated himself, and therefore the prosecution is often compelled to

grant absolute immunity to the witness in return for his testimony. By granting such immunity, the testimony of the witness-accomplice in the defendant's trial is severed and disassociated from his testimony in his own trial. With regard to the testimony of the witness-accomplice, the rule in the United States is similar to the Kinsey rule, namely that the hearing of the testimony of the accomplice should wait until the end of his trial (*Byrd v. Wainwright* [92]; *U.S. v. Echeles* [93]; see also McCormick, *On Evidence*, 1999, at pp. 490 *et seq*; Sandberg, *ibid*.).

In Canada, the legal position is similar to the one in the United States (s. 13 of the Canadian Charter of Rights and Freedoms and s. 5 of the Canada Evidence Act). Here too the focus is on the immunity of the witness-accomplice against self-incrimination, so that compelling him to testify gives him direct and indirect immunity for his incriminating answers (*R. v. S. (R.J.)* [94]).

This analysis indicates that even though the law in the United States and Canada focuses on the witness-accomplice from the viewpoint of the risk of self-incrimination, the practical result in those legal systems is similar to the one reached in our legal system by applying the Kinsey rule, namely the aspiration to separate, in so far as possible, the testimony of the witness-accomplice in the defendant's trial from his testimony in his own trial, notwithstanding the difference in the centres of gravity lying at the heart of the various legal systems that lead to this result.

'Speaking with two voices'

11. Indicting two accomplices in crime separately may sometimes lead to differences in the factual findings and legal determinations in the separate trials of the accomplices. Every trial is a separate proceeding and each of the verdicts stands on its own and is based on the evidence that was adduced in that trial. A court's findings of credibility with regard to a witness are inadmissible as evidence in another trial in which the witness is testifying, even if the subject of the testimony in the two trials is the same (CrimFH 4971/02 *Zagouri v. State of Israel* [61]; CrimA 4391/91 *Hawaja v. State of Israel* [62], at p. 51; CrimA 2309/90 *Sabah v. State of Israel* [63]). Notwithstanding, conflicting verdicts with regard to different defendants are likely to create a special difficulty when they concern the same case and where they are irreconcilable with common sense and basic logic. The existence of such an inconsistency may lead to a feeling of injustice and a lack of confidence in the law and justice system (CrimA 3427/91 *Salah v. State of Israel* [64]). Thus, for example, a judicial result whereby one

defendant is convicted of being an accomplice of another person in committing an offence, and the other person is acquitted of that offence, may constitute 'speaking with two voices.' Indeed —

> 'In an offence of conspiracy, which by its very nature requires the existence of an agreement between two or more persons, it is difficult to imagine a situation in which one person will be convicted of a criminal conspiracy while the other persons who are indicted for the conspiracy are acquitted, so that only one person is convicted of an offence which, by its very nature, requires the criminal involvement of several persons' (CrimA 4391/03 *Abu Ria v. State of Israel* [65], at para. 16; CrimA 573/72 *Habura v. State of Israel* [66]; CrimA 144/92 *Cavalero v. State of Israel* [67]).

An inconsistency between verdicts that is irreconcilable in accordance with objective criteria must be harmonized. In general, it will be difficult to reconcile two separate verdicts that deal with two accomplices in crime who are charged with the same offence, when the acquittal of one and the conviction of the other were decided on the same probative basis (*Abu Ria v. State of Israel* [65], at para. 16; CrimA 474/75 *Salem v. State of Israel* [68]; *Zagouri v. State of Israel* [61], at p. 379).

The concern of conflicting verdicts in separate trials of two accomplices may increase if the Kinsey rule is cancelled. The testimony of a witness-accomplice in the trial of a defendant before the witness's trial has ended may be self-serving evidence, which exaggerates the role of the defendant in the commission of the offence and minimizes the role of the accomplice. The restriction on the cross-examination of witness-accomplice before his trial ends because of the immunity against self-incrimination restricts the possibility of ascertaining his role in the case. Even if he is required to answer incriminating questions in the cross-examination, his answers may not be used against him in his own trial. The defendant may be convicted as a result of this testimony. The testimony of the witness-accomplice that minimizes his own role or distances himself from the offence, together with the immunity given to the evidence that incriminates him in his testimony in the trial of the other defendant may result in his being acquitted of the offence that is based upon a criminal conspiracy between accomplices in crime. It is even possible that the probative status of the witness's statements to the police in the defendant's trial will be different from their status in the witness's trial. A situation may arise in which only one conspirator will be

convicted, whereas the other conspirators will be found to have no criminal liability. The difficulty in reconciling the contradiction in which there is only one conspirator who is liable for a criminal conspiracy may require the conviction of the defendant to be overturned in order to equate his position with that of the witness-accomplice, in order to prevent an irrational outcome. The defendant's procedural rights will be entitled to protection in such circumstances, but it is questionable whether this proceeding is best suited to discovering the truth. A similar outcome of speaking with two voices may occur even with the Kinsey rule, when two courts in two separate proceedings arrive at different assessments of the evidence that is brought before them and draw different conclusions from it. But the risk of this phenomenon happening is likely to increase, so it would seem, where the testimony of the accomplice in the defendant's trial is self-serving and may affect the outcome of the defendant's trial in a way that is inconsistent with and cannot be reconciled with the outcome of the accomplice's own trial.

The Kinsey rule — in the spirit of English case law

12. The Kinsey rule was formulated in Israel in the wake of the English common law (*R. v. Pipe* [98]; *Winsor v. R.* [105]). The principle that was held in *R. v. Pipe* [98] is still valid in England (*Tillett v. R.* [106]), even though over the years the scope of the rule has been limited to those cases in which it is strictly applicable and it is not a binding absolute rule, and it has been held that it does not apply to a witness-accomplice who testifies as a defence witness (*R. v. Richardson* [99]). It is also not applied today to a witness-accomplice who is a state's witness (*R. v. Turner* [100]). See further: C. Tapper, *Cross & Tapper on Evidence* (ninth edition), at pp. 199, 225-229.

Legislative attempts to change the Kinsey rule

13. It is important to point out that in the past two government-sponsored legislative proposals were tabled in the Knesset to cancel the Kinsey law (the draft Evidence Ordinance Amendment Law (no. 10), 5752-1992 (*Draft Laws* 5752, no. 2103, at p. 170); the draft Evidence Ordinance Amendment Law (Amendment no. 13) (Testimony of Accomplice), 5759-1999 (*Draft Laws* 5759, no. 2788, at p. 314)). These proposals did not become law. This fact may indicate the difficulty and complexity involved in a cancellation of the Kinsey rule in its entirety without creating a set of proper balances for this purpose.

The price of the Kinsey rule — its significant contribution to the prolongation of criminal trials, its adverse effect on the efficiency of criminal trials and its violation of the liberty of the defendant who is under arrest

14. The Kinsey rule is a procedural rule that affects the procedural rights of both the defendant and the witness-accomplice. It constitutes an important factor in the criminal trial and it can be seen to affect who whole criminal trial. An outlook that seeks to divorce the role of the Kinsey rule artificially from its effect on the criminal trial, including its length, the extended periods during which defendants are held under arrest or the possibility of releasing dangerous defendants on bail with the accompanying concern of the possible harm to public safety is an outlook that splits the criminal trial into unrelated parts without examining the relationship that they necessarily have on one another. An outlook that examines this relationship in order to create a harmony between the various components of the criminal trial and in order to reconcile them in a rational manner is the one that is likely to achieve the proper solution. It is therefore necessary to examine the effect of the Kinsey rule on the whole criminal trial, and especially its consequences for the length of the trial and the defendants who are held under arrest for its duration.

15. The Basic Law: Human Dignity and Liberty determines the constitutional right of a human being to personal liberty. It provides in s. 5 that a person's liberty should not be taken away or restricted by imprisonment or arrest; this provision is subject to the limitations clause in s. 8 of the Basic Law, which permits a violation of a constitutional right given under the Basic Law if it is within the framework of a law that befits the values of the state, is intended for a proper purpose and is not excessive. The Criminal Procedure (Enforcement Powers — Arrests) Law and the arrangements thereunder today fall within the scope of the limitations clause and they require a continual examination of the question whether the arrest of a person and the length of time he is held under arrest before his case is decided are proportionate, in view of all the values and interests that are relevant to the case (CrimApp 537/95 *Ganimat v. State of Israel* [69], at p. 414; CrimA 4424/98 *Silgado v. State of Israel* [70], at pp. 539-540; A. Barak, 'The Constitutionalization of the Legal System following the Basic Laws and its Ramifications on (Substantive and Procedural) Criminal Law,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* (1996) 5, at pp. 21-25; E. Gross, 'The Procedural Rights of the Suspect or the Accused under the Basic Law: Human Dignity and Liberty,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* (1996) 155; D. Dorner, 'The Effect of the Basic Law: Human Dignity and Liberty on the Arrest Laws,' 4 *Mishpat uMimshal* (1997) 13; Y. Karp, 'The Criminal Law — A Janus of Human Rights: Constitutionalization in the light of the Basic Law: Human Dignity and Liberty,' 42 *HaPraklit* 64 (1995), at p.

64; B. Okon and O. Shaham, 'Due Process and a Judicial Stay of Proceedings,' 3 *HaMishpat* (1996) 265, at pp. 265-267).

With respect to criminal trials, the arrest laws carry the full weight of the value of protecting the liberty of the individual (the defendant) before his guilt is proved — a liberty that is violated by the burdensome constraints of arrest — and they determine limits and restrictions upon the power of the court to order the arrest of the defendant before his verdict is pronounced, and also to extend the period during which he is held under arrest (ss. 21, 60-62 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996; *Zada v. State of Israel* [19]).

The prolonging of the criminal trial until a verdict is pronounced gives rise to serious questions where the defendant presents a considerable danger that justifies his being removed from society until his trial ends. This dilemma, which is the result of the problematic tension between the defendant's right to his personal liberty while he enjoys the presumption of innocence and the public's right to be protected from the harm that can be expected from releasing a dangerous person, becomes continually more acute as the burden on the court increases and leads to the prolonging of the criminal proceedings. This prolongation is also caused by the changes that have occurred in criminal activity, which has become far more complex and sophisticated, involves more participants and has a more widespread effect on the public. *Inter alia*, there has been an escalation in organized crime, which sometimes goes beyond the borders of the state, and is especially complex and dangerous.

The application of the Kinsey rule demands a heavy toll in the prolonging of criminal trials. When the rule was introduced thirty years ago, the burden of cases before the courts was incomparably smaller than the current burden, and the scope and complexity of crime were very different. The burden of trials currently weighing upon the court is unbearable. We are dealing not only with a change that has occurred in the number of trials brought before the court, but in their level of complexity and severity, and the scope of the events involved. Frequently trials are held before the courts with regard to serious and wide-ranging criminal activity, which involve huge amounts of evidence and require considerable amounts of judicial time. Often these serious cases involve a large number of defendants who need to be held under arrest until the end of the trial because they are so dangerous. This situation means that a trial cannot end without prolonged proceedings for hearing the evidence. In such circumstances, ending a trial within the

statutory arrest period of nine months, as stipulated in the Criminal Procedure (Enforcement Powers — Arrests) Law, is a very difficult target to reach, and serious tension is created between the rights of defendants to their personal liberty while they have the presumption of innocence and the general interest of protecting public security by preventing dangerous defendants from being released before their trial has ended and the question of their guilt has been decided. When criminal proceedings are drawn out because of the complexity of the issues before the court, the Kinsey rule becomes a part of this conflict between the right of the defendant who is under arrest to his personal liberty as long as his case has not been decided and the public interest to protect its security, which operates to prevent the release of a dangerous defendant, and it becomes an additional factor that prolongs the criminal trial. The need to wait until the witness-accomplice's trial has ended to hear his testimony directly affects the length of the defendant's trial and the period during which the defendant is held under arrest, and it leads in practice to repeated extensions of the period during which defendant are held under arrest until their trial ends, sometimes far in excess of the statutory period prescribed for finishing a trial when the defendant is being held under arrest. Sometimes, this prolonging of the trial results in dangerous defendants being granted bail, which endangers the security of the public. The heavy price for applying the Kinsey rule is paid both by the defendant and the public: the defendant who is in custody while he waits for the trial of his accomplice to end amid prolonged and complex judicial proceedings, and the public when a dangerous defendant is released on bail because of the length of the trial, which constitutes a danger to the safety of the public.

Sometimes applying the Kinsey rule encourages accomplices in crime to adopt manipulative measures in the relationship between them, whereby the witness-accomplice is induced to drag out his trial in order to create pressure in the defendant's trial and strengthen his demand to be released on bail.

The prolonging of the criminal proceedings and the tension that this creates for all the parties involved sometimes leads the prosecution authorities to take significant short cuts in prosecuting the defendant, which may take the form of making plea bargains of various kinds, waiving prosecution witnesses, amending the indictments, reducing the charges, and so forth.

The prolonging of the proceedings also has a deleterious effect on the victims of the offence, who expect the defendant who committed a crime

against them to be brought to justice and begin to serve his sentence within a reasonable time.

Finally, the prolonging of the trial proceedings to an unreasonable degree undermines the efficacy and deterrence of the criminal trial. The prolonging of the criminal trial does not merely harm the defendant who is waiting for his trial to end while he enjoys the presumption of innocence. It undermines society's recognition of the need to finish trials efficiently in order to preserve the deterrent effect inherent in them. This has a direct effect on the ability of the law enforcement system to fight crime effectively and to contend with the important task of protecting public safety. Defendants and the prosecution authorities pay a heavy price for the application of the Kinsey rule and the consequent prolonging of proceedings. The public interest that criminal trials will be effective and serve as a deterrent is also undermined.

The defendant's dilemma — the benefits of the Kinsey rule as compared with the prolonging of the trial and the extended period of arrest

16. Applying the Kinsey rule against the background of procedural realities at the current time affects the duration of the loss of liberty of a defendant who is held under arrest during his trial. On the other hand, it is precisely defendants, including the Public Defender's Office that represents them and the Israel Bar Association, that emphatically oppose the cancellation of the Kinsey rule because they are concerned that a witness-accomplice will utter self-serving testimony in their trial, which may lead to their being convicted on the basis of false testimony. In the dilemma between the harm to their interests that may arise from the cancellation of the rule and the price that they may pay as a result of the prolonging of the trial and the possibility that their period of arrest will be extended, they give decisive weight to the first consideration. Even though they did not give their consent to the prolongation of their period of arrest, the defendants in the case before us adopted a definite approach that is opposed to the cancellation of the Kinsey rule, and, as we have said, so did the Public Defender's Office and the Israel Bar Association. Notwithstanding, they emphasized the need to adopt administrative measures expeditiously to improve the way in which the courts contend with the burden of cases in order to shorten proceedings, provided that it is not at the cost of cancelling the Kinsey rule.

The position of the defendants and the institutions that have the responsibility of defending them is very important. Notwithstanding, giving a defendant the choice of waiving the Kinsey rule or insisting upon its application in his own case, while implicitly also acquiescing in the

possibility of the prolonging of the trial and the risk of an extension of the period of arrest, is a difficult choice that a proper judicial process should not delegate to a defendant. The legal system requires a proper solution to the dilemma that has arisen: should the Kinsey rule be allowed to remain, should it be cancelled or is it perhaps possible to reconcile the conflicting values by means of a relative balancing that is not based on either extreme? This balancing should take into account, on the one hand, the interest of maximizing the full probative potential of the testimony of the witness-accomplice, which is realized by calling him to testify in the defendant's trial after his own trial has ended, and, on the other hand, the harm caused to the constitutional right of the defendant as a result of the prolonging of the trial while he is held under arrest, and the damage caused to the public interest by the prolonging of the trial in general, which undermines its efficacy and the deterrent effect. In this balance, the interest of maximizing the probative value of the existing evidence in order to discover the truth and protect the defendant from being convicted erroneously competes against the harm to the defendant's personal liberty, which is the price that he is required to pay while waiting from the trial of the witness-defendant to end before he testifies in the defendant's trial. There is no magic formula for reconciling these values. The proper solution lies in the approach that the competing values are not absolute, but only relative, and they should be reconciled by means of a degree of compromise on each side. Just as there is a need to balance the conflict between the right of the individual to a fair trial against the rights of society and its individual members to an effective war against crime and, in so doing, to refrain 'from paying too dear a price, whether because of an eagerness to succeed in the war against crime or because of the opposite desire to overprotect suspects and defendants' (*Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], at p. 761), so too the interest of society and its members to realize the goal of a just trial should be balanced against the essential need of the individual and the public to have effective criminal trials.

The methods of balancing the competing values

17. The Kinsey rule has an important probative purpose of seeking to maximize the probative potential of the accomplice's testimony that can be obtained after his trial has ended, when the motives arising from his own trial that may lead him to give false testimony no longer exist. This rule is consistent with the general purpose of a trial, which is to discover the truth; it serves the purpose of giving the defendant a fair trial; it prevents the

possibility that the witness-accomplice's right not to incriminate himself will be violated and that restrictions will be imposed on the witness-accomplice's trial because of his privilege against self-incrimination which is given by the court in the defendant's trial. On the other hand, the cost of this rule in prolonging trials is considerable, since the ever-increasing burden on the courts, the complexity of trials, the number of defendants and the sophistication of modern crime lead to a violation of the liberty of defendants, who wait a long time for their trials to end while they are being held under arrest. The violation of the liberty of defendants as a result of this delay is exacerbated by the Kinsey rule; releasing dangerous defendants on bail because of the length of the trial may undermine the security of the public; the rule has on more than one occasion resulted in significant shortcuts being taken by the authorities in prosecuting the case in order to reduce the hardship caused to defendants; there is a major conflict between the fear of a miscarriage of justice and the danger of such hardship. The prolonging of the trial harms victims of crime who expect an effective legal process; the deterrence of criminal trials is undermined, and this affects the image of the judicial system and public confidence in the efficacy of the law enforcement process.

The Kinsey rule was formulated in an age when its advantages clearly outweighed its disadvantages. The advantage of maximizing the probative value of the witness-accomplice's testimony by having him testify in a defendant's trial after his own trial has ended did not at that time entail such a substantial cost in terms of the prolonging of criminal proceedings in the defendant's case, sometimes for a period of years, which is the result of applying it today. Times have changed, and today the benefit arising from the application of the Kinsey rule, namely its contribution to discovering the truth and arriving at a correct verdict, is mitigated by the harm that it causes to the right of defendants that are being held under arrest to their personal liberty as long as they have not been convicted, and to the image of criminal trials in general. Were it possible to assume that the social reality could be changed overnight and the overburdening of the judicial system could be overcome by major structural changes and the allocation of additional resources, it is possible that the dilemma would be solved. But the likelihood of a complete and swift solution of the problem of overburdening and the prolonging of trials, with all that this involves, is not great, and therefore a balance between the conflicting values is required. This balance does not, in my opinion, justify a sweeping conclusion that the Kinsey rule should be cancelled in its entirety as my colleague Justice Levy proposes. On the other

hand, it does not justify leaving the rule as it stands without any change, thereby ignoring the profound changes that have occurred in the holding of criminal trials. The proper solution requires a balancing of the conflicting values and a modification of the rule to fit current needs, in a way that gives proper expression to the relative weight of the rule's advantages and its disadvantages in the light of prevailing realities. This court addressed this only a few years ago, when it said that 'we should not treat the rationale underlying the Kinsey rule lightly, and care should be taken not to cancel it without first considering all the consequences of doing so' (*Kadosh v. State of Israel* [29], *per* Justice Beinisch; see also the need to balance the interests affected by the Kinsey rule in Y. Ginat, 'Has the Time Come to Re-examine the Kinsey Rule,' 42 *HaPraklit* (1995) 376, and cf. A. Kamar, 'Towards a Cancellation of the Kinsey rule,' 42 *HaPraklit* (1995) 548).

When making the balance, introducing a rule that deprives the judge in every case of the discretion to order the testimony of a witness-accomplice to be heard after his trial has ended and that compels him to hear the testimony even when his trial has not ended gives the value of the efficiency of the criminal trial and the value of the defendant's liberty that goes with it an absolute pre-eminence over the value of arriving at the truth and protecting the defendant from an erroneous conviction. On the other hand, a rule that would usually prevent the testimony of a witness-accomplice in the defendant's trial before his trial has ended gives decisive weight to the value of arriving at the truth and protecting the defendant from an erroneous conviction, while minimizing the weight of the value of the efficiency and proper conduct of criminal trials, including the right of a defendant who is held under arrest to his personal liberty prior to the verdict. It is therefore essential to combine the purposes inherent in these two extreme possibilities in a way that will create a relative balance and a rational harmonization between them (D. Wiener & N. Harduf, 'Has the Time Really Come to Cancel the Kinsey Rule?', 33 *HaSanegor* (1999) 3).

The balancing when applying the Kinsey rule

18. The proper balance between the conflicting values will be achieved by a selective cancellation of the Kinsey rule, which will leave the trial court judicial discretion, in exceptional cases, to order the witness-accomplice's testimony to be heard only after his trial has ended. The fate of the defendants who are held under arrest, in the light of the prolonging of the trial and the general harm to the efficacy of the criminal trial and its deterrent effect, tip the scales in favour of justifying the cancellation of the Kinsey

rule, while leaving the trial court discretion to apply it in special circumstances and for special reasons. This discretion ought to be exercised in a small number of cases where the advantages of applying the rule clearly outweigh the disadvantages. Whereas until now the judicial practice has tended to apply the rule broadly while allowing departures from it in a very small number of cases, today the position should be reversed because of the significant cost in terms of the length and cumbersomeness of the criminal trial. The purpose of doing justice when considered as a whole will be undermined if the present position continues. Notwithstanding, changing the balancing point as aforesaid does not absolutely rule out judicial discretion to apply the Kinsey rule in appropriate cases, but these should only be exceptional and unusual cases. The rule will therefore become the exception, and the exception will become the rule. This is the essence of my proposal.

Before we outline possible examples of special reasons for applying the rule, we should say as a general principle that the testimony of a witness-accomplice should usually be heard in the defendant's trial, in so far as possible, *after* all or at least most of the prosecution witnesses have testified. Thereby there is the greatest possible chance that the witness-accomplice's trial will have ended before he testifies in the defendant's trial, without this involving any special delay caused by waiting for the witness-accomplice's trial to end. If, notwithstanding, the witness's trial has not ended when his testimony is required, then there may be special reasons to exercise judicial discretion and to apply the Kinsey rule, *inter alia* in the following situations (subject to the special circumstances of the specific case):

(a) Where the court is of the opinion that the weight of the accomplice's testimony, in relation to all the other evidence that has been adduced, has a 'critical mass' for the fate of the trial, and the timing of this testimony at the stage after the trial in the accomplice's case has ended is likely to make a *significant* contribution to maximizing the probative potential of that testimony and arriving at a correct verdict in the trial;

(b) Where a defendant is not being held under arrest, or where he is being held under arrest but he is also simultaneously serving a sentence of imprisonment for other offences, so that the delay in ending his trial is not the direct cause of his loss of liberty;

(c) Where the defendant applies to have the testimony of the witness-accomplice in his case postponed until after the witness's trial has ended, on the understanding that this application is likely to lead to an additional extension of the period during which he is held under arrest pending

judgment in his trial. Within the scope of the judicial discretion, this application should be considered from a broad perspective, with reference *inter alia* to the proper management of the criminal trial from the viewpoint of the general public interest.

(d) When the witness-accomplice's trial will end in a short period of time, relative to the total amount of time required for a trial, so that the probative advantage arising from a short delay outweighs the harm that may be caused by merely a short delay in the defendant's trial, the court may exercise its discretion to wait until the witness's trial ends to hear the testimony.

These scenarios are not an exhaustive list, but the assumption that underlies this proposal is that henceforth the application of the Kinsey rule will be the exception to the rule, and it will be applied sparingly in special cases in which the advantages of the rule outweigh the disadvantages, in view of the special circumstances and characteristics of the case.

19. I am not troubled by the concern, which has been expressed on several occasions, that giving judges discretion to depart from a procedural rule for special reasons may lead to the exception becoming the rule and to an excessive use of the margin of discretion that is supposed to be used sparingly. Judicial experience shows that the needs of reality and the needs of the law are so varied, so complex and so multi-faceted that the application of strict procedural rules without any possibility of departing from them and without any means of adapting them to special situations may cause damage that is often greater than the benefit that they bring. A judge may be presumed to exercise his discretion prudently and reasonably and to apply the exception to the rule with restraint and with an understanding of and respect for the limits of judicial power. The trial court has judicial discretion to depart from procedural rules for special reasons in many matters, and I do not see any good reason why it should not have it in this matter also, on the assumption that it will be exercised properly. This is especially true in circumstances where the Kinsey rule has existed for thirty years, and the time has come to change it. A moderate and gradual change is consistent with the conflicting needs and with the approach that supports moderate changes in the hope of benefiting from the experience that is accumulated, and it is better than the extreme sweeping approach that seeks to cancel existing arrangements in their entirety in order to remove their disadvantages, while giving up their advantages entirely, without any possibility of foreseeing what will be the cost of the change.

Only recently this court held in *Yissacharov v. Chief Military Prosecutor* [37] that the court should be left with discretion to decide in which circumstances evidence that was obtained unlawfully should be inadmissible, in view of the circumstances of the case and the criteria outlined in this regard. In that case the court (*per* Justice Beinisch) said the following:

> '… giving discretion to the court as aforesaid is consistent with the general theory of checks and balances that characterizes our legal system and it is consistent with the values of the State of Israel as a Jewish and democratic state… Moreover, the adoption of a relative doctrine that gives the court discretion on the question of the admissibility of illegally obtained evidence is consistent with our duty to act moderately and carefully when changing a case law rule that has existed in the matter under discussion until now…' (*ibid*. [37], at para. 62).

I think that these remarks are also remarkably appropriate in the case before us.

20. It is to be hoped that the efforts in the field of judicial administration that are intended to make the criminal trial more efficient and adapt the tools required for the changing needs in this field will bear fruit and will also have an effect on the complex issue before us. After all, the more efficient the criminal trial is, the more the Kinsey rule will be able to realize its benefits in a natural manner without its disadvantages causing any harm, so that it will be possible for the witness-accomplice to testify after his trial has ended without this requiring any special delay in the trial of the defendant and without this causing a disproportionate violation of the personal liberty of the defendant who is waiting for his trial to end while he is still being held under arrest.

Conclusion

21. It is the duty of a civilized society to strike a balance between protecting the rights of the defendant, supporting the war against crime, discharging its duty to the victims of crime, preventing the conviction of innocent persons and ensuring that the guilty are not acquitted (*per* Justice Strasberg-Cohen in *Hachmi v. Justice of Tel-Aviv-Jaffa Magistrates Court* [10], at p. 761). This gives rise to a need to strike a balance between discovering the truth and the effectiveness of the criminal trial, to protect the right of the defendant not to be held under arrest for a prolonged period and to reconcile the fear of a miscarriage of justice and the danger of causing undue hardship to the defendant. This balance is not simple. It is not achieved

by a radical solution but by a balanced formula that gives proper weight to the competing values and interests.

22. If my opinion is accepted, we will return the case to the Beer-Sheba District Court, so that it may decide whether to hear the testimony of the witness-accomplice Yaron Sanker (the fifth respondent) in the separate trial of the defendants (the respondents) before his own case is decided, or whether in this case there are special reasons, according to the criteria proposed in this opinion, that justify postponing Sanker's testimony until his trial has ended.

President D. Beinisch

1. We have before us a petition by the state to cancel the rule known as the Kinsey rule, which prevents an accomplice in crime from testifying as a prosecution witness in the trial of his partner who has been indicted separately, as long as the witness's own trial is still pending.

My colleagues Justices E. Levy and A. Procaccia have given us comprehensive and profound opinions, each of which, in its own way, discusses the purpose of the rule, the reasons underlying it and the rights, interests and values that are the focus of the decision as to whether the Kinsey rule should remain the law.

The distance between my colleagues' approaches is not so great and wide as it seems at first glance. My two colleagues agree that the Kinsey rule is a procedural rule, a rule of practice that was formulated in a judgment that was given thirty years ago and has become an all-encompassing and rigid rule. They both are of the opinion that the rule in its all-encompassing scope is no longer suited to present conditions and the legal reality in which we live. The rule today constitutes an obstacle to holding effective criminal trials. My colleagues agree, therefore, that the time has come to depart from the all-encompassing rule and to determine a new point of balance between the competing values that lie at the heart of the Kinsey rule; they also agree that the rule as it is interpreted today can no longer stand. The main argument is whether the trial court should be allowed discretion as to whether it should have a possibility of not hearing the testimony of a witness who is himself standing trial for the same incident until his trial has ended. Should the court be entitled, in appropriate circumstances, to postpone the continued hearing of the criminal trial merely in order to wait until the witness's trial has ended?

In the opinion of my colleague Justice Levy, cancellation of the rule leads to the conclusion that today the court has no reason to postpone a trial simply because the prosecution wishes to call an accomplice, whose trial has not ended, to testify. By contrast, Justice Procaccia's approach sees a need for a selective cancellation of the Kinsey rule, 'which will leave the trial court judicial discretion, in exceptional cases, to order the hearing of the witness-accomplice's testimony only after his trial has ended' (at para. 18 of her opinion). In her opinion she says that the overall balance justifies the cancellation of the rule, while leaving the trial court discretion to apply it 'in special circumstances and for special reasons' (*ibid*.).

2. In the disagreement between my colleagues, my path is an intermediate path. I accept the opinion of Justice Procaccia that the court trying a criminal case should not be deprived of the discretion to postpone the hearing, and I also think that there may be rare cases where the reason for a postponement will be the need to wait for the witness-accomplice's trial to end. It would appear that, according to the approach of Justice Levy, he too will agree that the court should not be deprived of all the discretion that it has to conduct a trial, but he is concerned that any loophole that is left will allow the Kinsey rule to continue in full force. I will confess that I too fear that perhaps the proposal put forward by my colleague Justice Procaccia with regard to the nature and scope of the circumstances and situations in which there will be a justification for waiting for the witness's trial to end is capable of undermining the trend of cancelling the Kinsey rule and it may gradually lead to this rule remaining unchanged.

I do not belittle the rationale for the Kinsey rule and especially the proper purpose of discovering the truth in criminal trials, which Justice Procaccia discussed extensively in her opinion. But the aforesaid purpose is in any case no longer protected by the Kinsey rule. This is because of the difficult situation with which the courts are contending today when they conduct criminal proceedings and the effort required to achieve the goal of discovering the truth. Serious crime has become widespread in Israel, and with it the phenomenon of intimidating witnesses to prevent them testifying. In order to overcome witnesses' fears and the pressures that have been and are being brought to bear on prosecution witnesses in order to deter them from testifying truthfully, the 1979 amendment to the Evidence Ordinance was enacted. Within the scope of this amendment, s. 10A was added. According to this, it is possible to prefer, in certain circumstances, the statement of the witness during his interrogation by the police to his testimony in court. From that time until the present, the reluctance of

witnesses, when they are testifying in court, to repeat their original story that they gave in their police interrogation has increased. This phenomenon is common with the testimony of accomplices in crime, both before their trial has ended and after their trial has ended. The result is that in a large majority of cases, when accomplices in crime are called to testify for the prosecution, their testimony does not coincide with the story that they told during their interrogation; the prosecution requests that the court prefer the incriminating version told to the police, pursuant to the aforesaid s. 10A, and the court is compelled to arrive at the truth on the basis of a version of events that was given before the trial of the accomplice in crime took place. It is self-evident that if and in so far as the version of events given by the witness before he is tried is self-serving, this will have an effect on the amount of supporting evidence that is required in order to assist the court in arriving at the truth.

Moreover, our adversarial system does not usually allow the court to evaluate in advance the importance of the testimony to the trial, and in particular it does not give him tools to determine whether the witness will give incriminating testimony when he is called to the witness stand. As I have said, the likelihood that the witness will testify as the prosecution expect from the police interrogation is usually small. In most cases, assessing whether the witness will indeed testify in accordance with his incriminating statement can only be assessed by the parties who are familiar with the interrogation material, and not by the court which has not yet heard the evidence.

The test that my colleague proposes, whereby obtaining the consent of the defendant to suffer the consequences of the prolonging of his period of arrest and the violation of his right to liberty in order to wait until the witness's trial has ended, cannot serve as a justification for postponing a trial. Postponing a trial in circumstances where the defendant is being held under arrest for a prolonged period certainly violates the rights of the defendant, which he may waive for his own reasons. But prolonging the trial also undermines the effectiveness of the criminal trial and the public interest that the criminal trial will provide a proper means of law enforcement. Furthermore, the serious nature of criminal cases concerning organized crime and the most serious offences in the statute books, for which the sentences are heavy, increases the interest that the defendant has to prevent the prosecution witness from testifying; prolonging the proceedings may encourage unlawful acts to the point that there may be grounds to fear for the life of the witness and the possibility of conducting proper trials.

3. Because of the small benefit to discovering the truth that may arise from postponing the trial, and because of the concern that allowing broad judicial discretion in this matter may reinstate the Kinsey rule, I would not allow the trial court to have such a broad basis for postponing the trial until the end of the witness-accomplice's trial, as my colleague Justice Procaccia proposes. But in view of my outlook that the court should always have discretion with regard to the manner of conducting the proceedings before it, I believe that the court should be entitled to decide in certain circumstances, which should be very exceptional and extreme, that it is justified to wait until the end of the separate trial of an accomplice in crime before he is called to the witness stand. Thus, for example, in those cases where the trial of the witness is being conducted efficiently and is almost finished, and the parties have real grounds to believe that the witness does indeed intend to testify as a prosecution witness in accordance with his incriminating statement. The decision on this issue in these exceptional circumstances is to be made by the court. But it should be made only after the parties to the trial have obtained the relevant information and made an informed and specific assessment of the position. In this matter, the prosecution position should be taken into account when it applies to summon the witness to testify only after the trial has ended in order to allay the concern of self-serving evidence, and weight should also be given to the consent of the defendant to extend his period of arrest for this purpose until the trial ends. The court should give reasons for such an exceptional postponement of the trial.

4. In concluding my remarks, I shall say a few words concerning my position on the question of the privilege given to a witness who is required to testify before his trial has ended, which was addressed at length by my colleague Justice Levy. My two colleagues discussed how in other legal systems — in the United States and Canada — the reason for not calling an accomplice to testify when his trial has not ended is not based on the defendant's right to a fair trial but on the witness's right not to incriminate himself. In our legal system, the provisions of s. 47(b) of the Evidence Ordinance [New Version] provides a solution to the protection required by a witness from self-incrimination when giving the testimony. The question of the scope of the privilege given to evidence that arises from the testimony of the witness who may incriminate himself is complex and is not required in the petition before us. The case before us focused on other questions and this issue was not addressed sufficiently. The approach of my colleague Justice Levy gives a broad interpretation to the privilege in the aforesaid s. 47(b), which goes beyond the evidence that arises directly from the testimony of the

witness and includes also anything that arises indirectly from it. I would point out that I doubt whether this interpretation is consistent with our legal system in so far as the case law doctrine of declaring evidence inadmissible is concerned. This is an issue that requires separate consideration in order to find the proper balancing point between the need to protect the witness and the need to discover the truth in court proceedings, and it would be best that we leave it to a later date. In any case, it is clear that the prosecution may in a specific case declare that it intends to grant a witness a broader scope of privilege than what is granted by law, whatever the interpretation of the latter may be.

I will therefore summarize my position by saying that the time has come to cancel the rule of practice formulated in the Kinsey rule. The discretion given to the court to postpone the trial in order to wait for the witness's trial to end should be exercised very narrowly, in exceptional cases only and for special reasons that the court should state, in accordance with what I said in para. 3 above.

Therefore I agree with the opinion of Justice E.E. Levy that an absolute order should be made to the effect that the decision of the Beer-Sheba District Court is set aside.

President Emeritus A. Barak

I have carefully read the comprehensive and profound opinions of my colleagues Justice E.E. Levy and Justice A. Procaccia. My colleagues' opinions agree more than they differ. With regard to the points on which my colleagues differ, I agree with the intermediate position, as it is expressed in the opinion of my colleague President D. Beinisch.

Vice-President E. Rivlin

As stated in the opinions of President D. Beinisch and President Emeritus A. Barak, the opinions of my colleagues Justice A. Procaccia and Justice E.E. Levy agree more than they differ. They both agree that the Kinsey rule is not longer suited to the legal reality of today and that it often stands in the way of conducting a proper criminal trial, to such an extent that the sweeping rule should be abandoned. The difference of opinion concerns the degree of discretion given to the trial court to continue to apply the Kinsey rule in special circumstances. On this question I agree with the intermediate position as expressed in the opinion of my colleague Justice D. Beinisch.

Justice A. Grunis

1. I agree with the opinion of my colleague Justice E.E. Levy. I will add a brief comment on the tools that are intended to allay the concern of erroneous convictions based on the testimony of an accomplice and to prevent the witness-accomplice suffering as a result of what he says in his testimony.

2. There is no doubt that there is a real concern that the testimony of the witness-accomplice will be self-serving or even false if he is required to testify before his trial ends. As my colleague Justice E.E. Levy says, in many cases where the witness testifies only when his trial has ended, the prosecution has no choice but to make use of his statement to the police, under s. 10A of the Evidence Ordinance. It may be assumed that this will also happen if the accomplice is compelled to testify before his trial has ended. Therefore, both in the case of using a statement made to the police and also when the Kinsey rule is cancelled, the additional evidence required is of very great importance. It is well known that it is not possible to convict a defendant on the basis of the sole testimony of his accomplice unless there is additional supporting evidence (s. 54A of the Evidence Ordinance). In the past, until 1982, additional evidence of greater weight was required, namely corroboration. I wonder whether the time has not come to return this requirement to the statute books. Even if this requirement is not reintroduced, we should insist that the additional evidence that constitutes 'support' does not become negligible, marginal and insignificant. In my opinion, there is a persistent erosion in the interpretation of this requirement, and perhaps even more in its concrete application. My colleague Justice Levy rightly said that the court may 'determine that a high level of support is required' and that 'it is possible that the difference between the requirement of support and the requirement of corroboration will not be so great' (para. 28 of his opinion). My agreement with the cancellation of the Kinsey rule is based, therefore, on the assumption that the courts will require the existence of considerable 'support,' for otherwise the concern that defendants will be convicted erroneously will increase. In other words, we should support a more substantial requirement of 'support.'

The additional tool to which I refer, following the remarks of my colleague Justice E.E. Levy, is the privilege given to the statements made by the witness-accomplice, so that they may not be used against him (pursuant to the provisions of s. 47(b) of the Evidence Ordinance). Just as it is essential to ensure that the additional supporting evidence which is a condition for a

conviction is not insignificant, so too it is essential to adopt a strict approach towards the prosecution authorities, in order to ensure that they do not make use of the statements of the witness-accomplice in his trial.

Justice M. Naor

1. I agree with the opinion of my colleague, President D. Beinisch.

2. The Kinsey rule 'places obstacles in the path of criminal trials' (*Turk v. Attorney-General* [22], at p. 672). It is frequently abused. Today, in view of the significant changes that have occurred over the years in the manner in which criminal trials are conducted and in view of the judicial experience that has been acquired from implementing it, the conclusion is that the Kinsey rule causes more harm than good, and it should be cancelled. But cancelling the rule does not deny the trial court discretion to order the postponement of the testimony of the witness-accomplice until after the witness's own trial has ended. The question is how the discretion should be exercised.

3. Like my colleague President Beinisch, I am of the opinion that only in very exceptional and extreme cases should the court decide, for reasons that it should state, that there is a justification for waiting until the end of the accomplice's separate trial before he is called to testify.

4. The Kinsey rule is applied when a witness, who is being tried separately (the witness-accomplice), is called to testify for the prosecution in the trial of a defendant (the defendant). The reason why the witness-accomplice is included among the prosecution witnesses in the defendant's trial is that the witness-accomplice made a statement to the police that incriminates the defendant of the offences attributed to him or that contains certain facts that are mentioned in the indictment. Sometimes the witness-accomplice incriminates both himself and the defendant, whereas in other cases he only incriminates the defendant.

5. There are two common scenarios (but these are not the only ones) where the question of postponing the timing of the witness-accomplice's testimony arises. The *first* scenario is where the witness-accomplice adheres in his own trial to the statement he made to the police. The *second* scenario is where the witness-accomplice goes back on the incriminating statement he made to the police both in his own trial and in the defendant's trial. Often it is possible to 'detect' at a relatively early stage what direction the witness-accomplice will choose and what his intentions are, in view of how he pleads to the charges or other steps that he takes in his own trial. When the witness-accomplice has also incriminated himself and he adheres in his own trial to

the statement that he gave to the police and pleads guilty, all that remains is to wait for him to be sentenced at an early date. By contrast, when the witness-accomplice in his own trial retracts his statement to the police, this is a possible indication that the defendant's trial will be drawn out if it is postponed until the witness's trial ends. If there is a reasonable expectation, taking into account all of the circumstances of the case, that the witness-accomplice's trial will *end within a short time*, the court will be inclined to postpone the defendant's trial (or to hear the other witnesses in the interim). But if the likelihood is that the witness-accomplice's trial will be drawn out, there is no reason to postpone the hearing of the defendant's trial. The trial courts have sought and found various ways of 'overcoming' the Kinsey rule and preventing a delay in hearing trials. One of the ways is to allow the witness-accomplice to be called to testify (where there is an expectation that he will not incriminate the defendant) while giving the parties an opportunity to invoke the Kinsey rule during the testimony, when necessary. Judicial experience shows that in many cases it transpires, in this way, that the rationale of the Kinsey rule has no application.

6. In my opinion there is no need at this time to determine rigid guidelines for the exceptional and extreme cases in which the court will decide to exercise its discretion to postpone the hearing of the witness-accomplice's testimony until his own trial has ended. This is a matter for the discretion of the trial judge, who should make his decision in a rational manner. He should hear the parties' assessments with regard to the witness-accomplice's trial and rely upon his expertise as a judge.

7. In this spirit I agree with the *fourth* of the special reasons listed by my colleague Justice Procaccia as justifying in her opinion the postponement of the hearing of the witness-accomplice's testimony (para. 18 of her opinion). But the three other reasons are in my opinion too broad. They are inconsistent with the clear message that arises from our decision today with regard to the very narrow scope of the discretion for postponing the hearing of the witness-accomplice's testimony. As my colleague the president says, they are 'capable of undermining the trend of cancelling the Kinsey rule' (at para. 2 of her opinion). I particularly disagree with the third reason, in which the defendant requests that the testimony of the witness-accomplice is postponed on the understanding that there will be an additional extension of the period during which he is held under arrest. I think that this reason gives the defendant control over how his trial is conducted. This is an undesirable situation. In this matter too I agree with the remarks of my colleague the president, that this reason 'cannot serve as a justification for postponing a

trial,' since sometimes it 'may encourage unlawful acts to the point that there may be grounds to fear for the life of the witness' (*ibid*.).

8. I therefore agree, as I have said, with the intermediate position of the president that 'The discretion given to the court to postpone the trial in order to wait for the witness's trial to end should be exercised very narrowly, in exceptional cases only and for special reasons that the court should state' (at para. 4 of her opinion).

9. I would also propose, like the president, that the question of the scope of the privilege against self-incrimination given to a witness who is required to testify before his trial ends is left undecided. The position of the Israeli legal system until now, in related contexts, has not been as my colleague Justice Levy proposes in our case (see *Yefet v. State of Israel* [54], at pp. 291-316 *per* Justice D. Levin and at pp. 462-464 *per* Justice Kedmi). In my opinion uniform guidelines should be established in this matter, but in the petition before us a decision on this issue is not required.

10. I would also propose that the question of the *amount* of the additional evidence that is required in our case is also left undecided.

11. To sum up, in this judgment we are freeing the trial courts from the shackles of the Kinsey rule in conducting criminal trials. The rule is cancelled but the judicial discretion remains. But the margin of discretion to postpone the testimony of the witness-accomplice is narrow, so that ultimately I agree as I have said with the position of President Beinisch. There is no need at this time to determine strict guidelines with regard to the exceptional and extreme circumstances in which the discretion should be exercised. For the moment it is sufficient that I say that the more likely it is that the witness-accomplice's trial will end within a short time, the greater the inclination to postpone the hearing of the defendant's trial.

Petition granted.

16 Tishrei 5767.

8 October 2006.