LCA 3202/03

State of Israel

v.

1. Haggai Yosef

2. Tali Yosef

3. Dana Yosef

4. Yafit Yosef

5. Mustafa Sarsour

6. Motti Ben-Ezra

The Supreme Court sitting as the Court of Civil Appeal

[4 March 2004]

Before Justices J. Türkel, A. Procaccia, E. Hayut

Application for leave to appeal the decision of the Jerusalem District Court (Justice Y. Hecht) on 26 March 2003 in Civil Case 735/94. The application was heard as an appeal.

Facts: In an action for damages for wrongful arrest and prosecution, the plaintiffs wished to summon as a witness the person who had been the prosecutor in the criminal proceedings. The prosecutor had, in the meanwhile, become a judge. The District Court decided that the judge should be summoned to testify. The State asked for leave to appeal this decision, and leave was granted.

Held: A judge may not be summoned to testify on a matter relating to his judicial role, but on a matter unrelated to his judicial role, he may be summoned, and his testimony should be given in a way that does not harm his standing and the standing of the judicial system, in accordance with the rules set out in para. 12 of the judgment. The Supreme Court returned the case to the District Court to reconsider the matter in accordance with these rules.

Leave to appeal granted. Appeal allowed.

Legislation cited:

Civil Procedure Regulations, 5744-1984, rr. 134(c), 164, 168, 172, 240 *et seq*.

Criminal Law Ordinance, 1936, s. 131(1)(a).
Criminal Procedure Law [Consolidated Version], 5742-1982, s. 174.
Evidence Ordinance [New Version], 5731-1971, ss. 15, 17, 20.
Road Accident Victims Compensation (Experts) Regulations, 5747-1986, r. 15(b).
Road Accident Victims Compensation Law, 5735-1975, s. 6A(b)(2).

Israeli Supreme Court cases cited:

[1] HCJ 124/58 *Attorney-General v. Justice Conducting Preliminary Examination* [1959] IsrSC 13 5.
[2] CrimA 35/72 *Dayan v. State of Israel* [1972] IsrSC 26(1) 662.
[3] CrimA 406/78 *Bashiri v. State of Israel* 1980] IsrSC 34(3) 393.
[4] CrimA 685/81 *Aharoni v. State of Israel* 1983] IsrSC 37(1) 673.
[5] CrimA 364/73 *Seidman v. State of Israel* [1974] IsrSC 28(2) 620.
[6] HCJ 732/84 *Tzaban v. Minister of Religious Affairs* [1986] IsrSC 40(4) 141.
[7] HCJ 506/89 *Be'eri v. Head of Claims Department, Investigations Division, Israel Police National Headquarters* [1990] IsrSC 44(1) 604.
[8] HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [1993] IsrSC 47(2) 229; **[1992-4] IsrLR 19**.
[9] HCJ 2148/94 *Gilbert v. Chairman of Commission of Inquiry for Investigating the Hebron Massacre* [1994] IsrSC 48(3) 573.
[10] LCA 2508/98 *Matan Y. Communication & Detection Systems Ltd v. Miltal Communications Ltd* [1999] IsrSC 53(3) 26.
[11] CrimA 334/81 *Haginzar v. State of Israel* [1982] IsrSC 36(1) 827.
[12] CrimA 5329/98 *Dejani v. State of Israel* [2003] IsrSC 57(2) 273.
[13] HCJ 1199/92 *Lusky v. National Labour Court* [1993] IsrSC 47(5) 734.
[14] HCJ 2874/93 *Kamal v. National Labour Court* [1994] IsrSC 48(2) 673.
[15] LCA 600/96 *Edri v. Migdal Insurance Co. Ltd* (unreported).
[16] LCA 7265/95 *Gladstein v. Barel* [1996] IsrSC 50(3) 214.
[17] CrimA 2286/91 *State of Israel v. Eiloz* [1991] IsrSC 45(4) 289.
[18] CrimA 4133/93 S*tate of Israel v. Hir* [1996] IsrSC 50(4) 274.

Israeli District Court cases cited:

[19] Mot (Jer) 5915/97 *Yitzhak v. Weisglass* (unreported).
[20] CA (Naz) 335/98 *Ilboni v. Ilboni* (unreported).

American cases cited:

[21] *State v. Simpson*, 334 S.E. 2d 53 (1985).

[22] *State ex rel. Kaufman v. Zakaib*, 535 S.E. 2d 727 (2000).

[23] *Sansone v. Garvey, Schubert & Barer*, 71 P. 3d 124 (2003).

[24] *Guardianship of Hortense Clapp Pollard*, 764 N.E. 2d 935 (2002).

English cases cited:

[25] *Warren v. Warren* [1996] 4 All ER 664 (C.A.).

[26] *Buccleuch (Duke) v. Metropolitan Board Of Works* (1872) [1861-1873] All ER 654 (H.L.).

Jewish law sources cited:

[27] Rabbi Yosef Karo, *Shulhan Aruch, Hoshen Mishpat*, 8, 4; 28, 5.

[28] Maimonides, *Mishneh Torah, Hilechot Sanhedrin* (Laws of Courts), 25, 1 and 4.

[29] Rabbi Yehiel Michel Epstein, *Aruch HaShulhan, Hoshen Mishpat*, 28, 13.

[30] Maimonides, *Mishneh Torah, Hilechot Edut* (Laws of Testimony) 1, 2.

[31] E. Shochetman, *Legal Procedure – In Light of Jewish Law Sources — Procedure, Regulations and Rulings of the Rabbinical Courts in Israel* (1988).

For the appellant — T. Tzaban, Senior Assistant to Jerusalem District Attorney.

For respondents 1-5 — A. Feldman, M. Sefarad.

For the sixth respondent — A. Rom, A. Hernik.

JUDGMENT

Justice J. Türkel

Background and proceedings

1. On 14 July 1991, Mr Israel Djelusitzky, a money changer, was robbed and murdered. An indictment was filed against the first, fifth and sixth respondents (hereafter — the three respondents) in the Tel-Aviv District Court, charging them with an offence of murder. Eventually, because of the conviction of another person in this affair, the three respondents were acquitted. Following the acquittal, the three respondents and respondents 2-4, who are the daughters of the first respondent, filed a claim in torts against the State of Israel in the Jerusalem District Court, on the grounds that the State

had been negligent with respect to the three respondents in that it had brought about their arrest and trial on the indictment that was filed against them. During the hearing of the claim in torts, counsel for respondents 1-5 applied to summon as a witness the honourable Justice Y. Amsterdam, who had at the time been an attorney in the Central District Attorney's Office and had conducted the criminal proceedings against the three respondents. The applicant opposed the application. The District Court (the honourable Justice Y. Hecht) denied the application in its decision on 9 March 2003, because 'Ms Amsterdam does not have anything to add in oral testimony or in oral examination about what is in the file… and there is no reason to trouble an additional witness in order to quote… from the multitude of documents that were written ten years ago.' Counsel for respondents 1–5 applied again to the District Court to reconsider the aforesaid decision, and on the same day — 9 March 2003 — the District Court granted the application because it was of the opinion 'that fairness requires that she [Justice Amsterdam] is summoned to testify.'

On 20 March 2003, the applicant filed an application in the District Court to reconsider its last decision and to order that the testimony of Justice Amsterdam should be given by means of giving written answers in reply to written questions that would be presented to her by the parties, after the District Court approved them. The respondents opposed the application. The District Court dismissed the application in its decision of 26 March 2003 (hereafter — the decision).

The applicant applied for leave to appeal the decision. The respondents replied to the application. In our decision of 3 September 2003 we granted the applicant's application to allow it to appeal the decision, and we ordered that the application should be heard as an appeal.

Deliberation

The values under consideration

2. When we wish to decide the question whether it is appropriate to have a judge testify as a witness on the witness stand in a judicial proceeding, we place important values that are all interrelated on the scales, and each of these values tips the scales in its direction: discovering the truth, holding a just trial and the fairness of the judicial process are placed on one scale, and safeguarding the standing of the courts, the independence of the courts and maintaining public confidence in the courts are placed on the other. I said 'interrelated' because discovering the truth, the holding of a just trial and the

fairness of the judicial process all in themselves, and by their very nature, safeguard the standing of the courts, the independence of the courts and public confidence in the courts. It need not be said that the discovery of the truth, the holding of a just trial and the fairness of the judicial process require the witness to testify and to be cross-examined openly and publicly before the court, mainly for the reason that in this way his credibility and the reliability of his story can be examined. This is well established (see, *inter alia*, HCJ 124/58 *Attorney-General v. Justice Conducting Preliminary Examination* [1]; CrimA 35/72 *Dayan v. State of Israel* [2], at p. 664; CrimA 406/78 *Bashiri v. State of Israel* [3], at pp. 442-443; CrimA 685/81 *Aharoni v. State of Israel* [4], at p. 689; A. Harnon, *The Laws of Evidence* (vol. 1), at pp. 106-109). Notwithstanding, the testimony of a judge and his cross-examination as a witness on the witness stand may lead to contempt for the judge (see the remarks of Justice Berinson in CrimA 364/73 *Seidman v. State of Israel* [5]), at p. 627, and the remarks of Justice M. Ravid in Mot (Jer) 5915/97 *Yitzhak v. Weisglass* [19]), which are cited below) and will certainly compromise the standing and independence of the courts and the confidence of the public therein (see, *inter alia*, HCJ 732/84 *Tzaban v. Minister of Religious Affairs* [6], at pp. 148-149; HCJ 506/89 *Be'eri v. Head of Claims Department, Investigations Division, Israel Police National Headquarters* [7], at pp. 610-611; HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [8], at pp. 265-266 {69}; HCJ 2148/94 *Gilbert v. Chairman of Commission of Inquiry for Investigating the Hebron Massacre* [9], at pp. 581-582).

3. To the best of my knowledge, the question of whether it is appropriate for a judge to testify as a witness on the witness stand has not yet been decided in the case law of the courts in Israel. Below we will consider several cases in the case law of the courts in Israel, England and the United States, in which the question has been raised. We shall also consider Jewish law sources in this regard. On the basis of all these, we will be able to choose the best path to follow.

Israeli experience

4. It is well known that the adversarial method, as practised in common law countries, was adopted in Israel; according to this, the right of a party to cross-examine the witnesses of the other party in the courtroom, before the judge who is trying the case, is an essential element of the judicial proceeding (S. Levin, *The Theory of Civil Procedure – Introduction and Basic Principles*, at p. 68; Y. Kedmi, *On Criminal Procedure* (vol. 3), at p. 1111). The legal basis for cross-examination is s. 17 of the Evidence Ordinance [New

Version], 5731-1971 (see also s. 174 of the Criminal Procedure Law [Consolidated Version], 5742-1982; rr. 164 and 168 of the Civil Procedure Regulations, 5744-1984). In addition to oral testimony — in examination-in-chief and cross-examination — the law also recognizes written testimony. Thus, it is possible to file the examination-in-chief in an affidavit (s. 15 of the Evidence Ordinance; r. 168 of the Civil Procedure Regulations). This is also the case for expert opinions and medical opinions; if the court 'sees no danger of a miscarriage of justice, it may accept as evidence, in writing, an expert opinion on a question of science, research, art or professional knowledge… and a physician's certificate with respect to a person's state of health…' (s. 20 of the Evidence Ordinance). Interim petitions are also usually filed in writing and not by way of a motion, which is an oral petition (rr. 240 *et seq.* of the Civil Procedure Regulations). Similarly, by virtue of case law and practice, the right of cross-examination has been restricted in certain matters, such as in the High Court of Justice and the Labour Court (Levin, *The Theory of Civil Procedure – Introduction and Basic Principles*, at p. 132). Of the special nature of the Israeli system, it has been said, *inter alia*:

> 'The laws of evidence in Israel largely remain laws in which findings are made on the basis of oral evidence, while the litigant has the right to put the evidence of his opponent to the test in cross-examination. As the late Justice Agranat said in *Attorney-General v. Justice Conducting Preliminary Examination* [1], at p. 23:
>
> > "Cross-examination is regarded as the most effective instrument that has been invented to date for the purpose of enabling a litigant to discover the truth in a trial."
>
> We have come a long way in the years since the British Mandate ended, and it can no longer be stated that the system of evidence in Israel is entirely an oral system. We accept expert opinions in writing, and we may rely upon affidavits that are filed as evidence, in lieu of examination-in-chief; in other matters, too, we are prepared to rely on written evidence. Notwithstanding, the right in principle to conduct a cross-examination remains unchanged. This is how our legal system differs from the continental legal systems, in which the fate of the whole proceeding is likely to be determined on the basis of written evidence, without there being a right to conduct a cross-

> examination. From this perspective, we still belong to the family of common law countries, and it appears to me that this is, when viewed as a whole, the correct law…' (*per* Vice-President S. Levin in LCA 2508/98 *Matan Y. Communication & Detection Systems Ltd v. Miltal Communications Ltd* [10], at pp. 32-36. See also the remarks of Justice D. Levin in CrimA 334/81 *Haginzar v. State of Israel* [11], at p. 832; the remarks of Justice Procaccia in CrimA 5329/98 *Dejani v. State of Israel* [12], at pp. 280-282; Harnon, *The Laws of Evidence*, *supra*, at pp. 106-109; A. Barak, 'The Legal System in Israel — Tradition and Culture,' 40 *HaPraklit* (1991-1993) 197, at pp. 202-208).

Special arrangement

5. An illuminating example of the restriction of the right of cross-examination and the use of the practice of presenting clarification questions in writing instead of oral cross-examination is the arrangement that has been formulated in the Labour Court with regard to an 'expert medical consultant' whose medical opinion has been filed as evidence in the court. In this regard it has been said:

> 'The practice that developed in the Labour Courts many years ago is to appoint, when necessary, an "expert medical consultant" in order to obtain a medical opinion in the field of his expertise…
>
> In the decision appointing him, the court specifies the documents that will be submitted to the expert for his inspection and the questions that will be put to him. The parties are given an opportunity to address the questions that the court is about to present to the expert, before they are referred to him. A party may object to a question or its phrasing, or even suggest questions of his own that may be put to the expert.
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> …
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> An additional aspect of the practice in the Labour Courts with respect to a medical expert appointed by the court, as developed and enhanced in those courts, is the presentation of "clarification questions" with regard to the expert's medical opinion.
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> …
>
> In the practice that has developed in the Labour Courts, the parties' clarification questions are submitted to the court, and the court decides whether to allow them to be put to the expert. Such

> permission is granted whenever the question is relevant and intended to clarify or complete the opinion, and is not a question that is intended to test the degree of the physician's expertise or the scientific sources for his conclusion' (*per* Justice D. Levin in HCJ 1199/92 *Lusky v. National Labour Court* [13], at pp. 743-744). With regard to the procedure of "clarification questions" for an expert who is appointed by the court under the Civil Procedure Regulations, see r. 134(c) of the Civil Procedure Regulations. With regard to this procedure in claims for compensation for road accident victims, see s. 6A(b)(2) of the Road Accident Victims Compensation Law, 5735-1975, and r. 15(b) of the Road Accident Victims Compensation (Experts) Regulations, 5747-1986).

Also discussed there is the restriction of the right to cross-examine an 'expert medical consultant' who is appointed by the Labour Court:

> 'Section 11 of the guidelines [that were issued by the President of the National Labour Court]… provide as follows:
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> > "An expert medical consultant shall not be summoned to the court to answer questions relating to his opinion, unless the court so decides for special reasons that shall be recorded."
>
> Even according to the previous guidelines… the parties did not have an inherent right to cross-examine the medical expert. Admittedly, it was possible to ask the court to have the expert clarify his opinion orally, but the party making the application was required to set out in writing the questions that it wished to put, and the court decided if the expert would answer them in writing or orally.
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> The logic common to these guidelines, both in their original version and in their most recent version, is that the opinion of the expert who was appointed by the court is not testimony "for" one of the parties, and the expert is not a witness of either party. Naturally we must add to this that s. 26 of the Evidence Ordinance [New Version], which enshrines the right of cross-examination as dictated by the legislature, does not apply to the Labour Courts…
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> …

> The practice with regard to a medical expert who is appointed by the Labour Court, as described above, contains many safeguards that are intended to protect the rights of the parties, contributes to maintaining the credibility, expertise and objectivity of the expert opinion and, to a large extent, reduces the need to cross-examine him.
>
> We see from the aforesaid that neither of the parties has an "inherent right" to cross-examine the expert, neither according to law nor according to the rules of natural justice…' (*per* Justice D. Levin in *Lusky v. National Labour Court* [13], at pp. 746-747. See also E. Rivlin, *Road Accidents — Procedure and Calculation of Compensation* (third edition, 2000), at p. 595, footnote 155).

Elsewhere, the following was said on this subject:

> 'Expert medical consultants are appointed in the Labour Courts pursuant to the guidelines that are issued by the President of the National Labour Court, which constitute "judicial regulations"… in accordance with the procedural guidelines practiced in the Labour Courts… An expert consultant who is appointed has a special status. It is important to make the following points: an expert consultant is not a witnesses, and his opinion does not constitute testimony "for" one of the parties. The parties do not have an inherent right to cross-examine him thoroughly, and the court does not accede to a request to summon him for such an examination, unless there are special reasons that shall be recorded. Even putting clarification questions in writing to an expert is done through the court and is subject to its scrutiny. *In theory and in practice, an expert medical consultant is the trustee of the court*, which when ruling on a medical question attributes very great importance to his opinion. It follows that an appointment of an expert medical consultant gives the physician who is appointed a *public role of a quasi-judicial nature*…' (emphases not in the original) (*per* Justice Mazza in HCJ 2874/93 *Kamal v. National Labour Court* [14], at p. 680. Cf. my remarks concerning a medical expert who is appointed in compensation claims of road accident victims, who is a 'kind of long arm of the court… once the court has delegated its power to him' in LCA 600/96 *Edri v. Migdal Insurance Co. Ltd* [15], at para. 3, and in LCA 7265/95 *Gladstein v. Barel* [16], at p. 218).

6. The question whether it is appropriate to have a judge testify as a witness on the witness stand has arisen only in a few cases, in most of which the judge was summoned to testify about something *related to his judicial position*. In one case, an appellant was convicted in the Tel-Aviv-Jaffa Magistrates Court of an offence of defamation of a judge when carrying out his duties, under s. 131(1)(a) of the Criminal Law Ordinance, 1936. The appellant appealed against the judgment of the Magistrates Court to the Tel-Aviv-Jaffa District Court, and after the judgment of the District Court was given, he applied for leave to appeal the judgment, and this court granted his application. In his appeal, counsel for the Appellant challenged the decision of the Magistrates Court, which dismissed his application to summon for testimony the judge whom he was convicted of defaming. He argued that 'he recognizes the fact that, according to case law, a District Court judge cannot be compelled to come and testify about events that occurred in another trial. But, in his opinion, he should at least have been allowed to summon the judge, and it would have been her choice whether to accept or refuse the summons.' This argument was rejected by this court, while emphasizing the considerations of wasting the time of the judge who is summoned to testify, and the lack of respect for the court resulting from the cross-examination of a judge:

> 'This argument has no basis. It is an immutable rule that a judge cannot be compelled… to testify about a matter that he handled in his capacity as a judge, nor should he be summoned to testify about this… *the reason for this is that the judge's time should not be wasted… on such peripheral matters, nor should he be faced with the choice of accepting or not accepting such a summons. For if he chooses to testify and is cross-examined, this is likely to lead to a lack of respect for the court — something that cannot be permitted*' (*per* Justice Berinson in *Seidman v. State of Israel* [5], at p. 627; emphasis not in the original).

This rule was also adopted in another case where an applicant wished to have the vice-president of the Jerusalem District Court testify about events that took place during a hearing before him, which, according to the applicant, were not included in the court record of the hearing. The Jerusalem District Court (the honourable Justice M. Ravid) dismissed the application, in a detailed and well-reasoned decision, saying that it was 'irrelevant testimony, since nothing in this testimony of the judge… assuming it would be given, could make a contribution from which any conclusion could be reached…'

(*Yitzhak v. Weisglass* [19], at para. 32). The court added remarks concerning the various, even conflicting, considerations that are considered in this matter:

> 'Even if I am mistaken in my conclusion… it still appears to me that there are no grounds for summoning the judge… to testify. Society has an interest that trials are conducted properly and that the truth is revealed… on the other hand, there are also cases where the law prefers a conflicting interest, whether absolutely or relatively, and this prevents the revelation of the truth…
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> The accepted approach in Israel is that a judge does not testify on matters relating to his role as a judge…
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> … when a judge is required to testify, not only is doubt cast upon the court record that he made, but it also has implications as to his credibility as a judge. A cross-examination of a judge is likely to harm his standing, on the one hand, and, on the other hand, there is a real concern that precisely because of the respect given to the judge, there will be attorneys who will be afraid to cross-examine the judge, in order not to harm his standing, and so they will refrain from making use of this essential instrument for discovering the truth… while the first consideration is general and systemic, and may harm the judiciary as a whole, the second consideration mainly concerns the individual, insofar as it is likely to harm a party in whose trial the judge testifies, but here too the judiciary is likely to be harmed.
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> …
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> Great care should be taken when summoning judges to testify, so that the judiciary as a whole is not harmed by this, and so that judges are not harmed as individuals. We must prevent the collapse of the existing safety measures and allow only very few exceptions, so that a judge will give testimony only in rare and extraordinary cases… there may be exceptional cases where there is no alternative to summoning the judge to testify, and that is where an interest of a party in a trial is likely to be seriously harmed if the judge does not come to give testimony in his trial' (*per* Justice Ravid in *Yitzhak v. Weisglass* [19], at paras. 34, 36, 37, 42).

The question whether it is appropriate for a judge to testify on the witness stand in a matter that is *not* related to his judicial role was considered, to the

best of our knowledge, in one case only, where the parties agreed that the testimony of a judge should be given in an affidavit, without him testifying orally. The Nazareth District Court described the arrangement as follows: 'Here the involvement of the judge… in the case comes into the picture. The judge… is a friend of the respondent's family and was asked by her to help her in evicting the appellant from the apartment. The judge submitted… an affidavit… and answered questions… about his role in the negotiations with the appellant's brother-in-law… with the consent of the parties he did not testify at the trial' (*per* Justice N. Maman in CA (Naz) 335/98 *Ilboni v. Ilboni* [20], at para. 17).

A brief summary of the rules that have apparently been formulated in this matter — including the distinction between events related to the judge's judicial role and events that are not related thereto — is set out in Justice Kedmi's book:

> 'The case law is that a judge is not summoned to testify… — and the prevailing approach today refers to every judge — on a matter that he handled within the framework of his activity as a judge. Apart from this restriction, a judge is no different from any other person, although it is desirable — and even extremely desirable — to refrain from calling a judge to the witness stand, if only because of the anticipated damage to his standing and image as a result thereof' (Y. Kedmi, *On Evidence* (vol. 1, 2004), at p. 476. See also Harnon, *Laws of Evidence*, at p. 88; in his opinion, 'it is not desirable for a judge to be called as a witness.' As to the possibility of a judge testifying in writing on matters concerning his judicial role, see: CrimA 2286/91 *State of Israel v. Eiloz* [17], at pp. 307-308; CrimA 4133/93 *State of Israel v. Hir* [18], at p. 278).

7. It can be seen from the aforesaid that in Israeli experience, a judge should not be summoned to testify as a witness on the witness stand with regard to a matter that is related to his judicial role. The question whether he may be summoned to testify on a matter *that is not* related to his judicial role — whether it took place before he became a judge or whether it took place thereafter — has apparently not been the subject of a judicial determination in the 55 years of the State's history. Is this because there were no cases of this kind, in which there was a need for the testimony of a judge? Or perhaps it is because the need was satisfied in a different way — by an affidavit or a letter — as occurred in the aforementioned *Ilboni v. Ilboni* [20]? Or perhaps it

is because it was clear and obvious to the interested party that this is one of those things 'that simply aren't done'? I should point out in this regard that during the 36 years in which I have served as a judge in Israel, at all levels of the legal system, and in all the positions that I have held, I have never been asked to summon a judge to testify on the witness stand, nor have I ever heard that such an application was made in any other court. It need not be said that these remarks of mine are not, of course, 'judicial knowledge' or testimony…

English and American experience

8. The accepted approach in England is that a judge should not be called to testify as a witness on the witness stand with regard to a matter related to his judicial role, because of a fear of harm to the standing of the judge who is undergoing cross-examination, and because of a desire to protect the independence of the judicial system *(Warren v. Warren* [25]; *Buccleuch (Duke) v. Metropolitan Board of Works* [26]). Therefore it has been held that it is possible to call upon a judge to testify as a witness on the witness stand only with respect to events for which there is no other course that could replace the testimony of the judge as evidence within the framework of the judicial proceeding (J.H. Buzzard, R. May, M.N. Howard, *Phipson On Evidence* (thirteenth edition, 1992), at p. 279; R. Cross, C. Tapper, *On Evidence* (ninth edition, 1999), at pp. 492-493).

9. The accepted approach in the United States is that it is possible to call upon a judge to testify as a witness on the witness stand on a subject that is related to his judicial role, as long as he is not being asked to testify at a trial over which he is presiding ('Report of the Special Committee on the Propriety of Judges Appearing as Witnesses,' 36 *A.B.A.J.* (1950) 630). Notwithstanding, even in cases where the courts have allowed a judge to testify as a witness on the witness stand with regard to something related to his judicial role, they first examined the question whether there was a different means that could replace the testimony of the judge as evidence within the framework of the judicial proceeding (*State v. Simpson* [21]; *State ex rel. Kaufman v. Zakaib* [22]). It should be noted that in those cases where the courts in the United States have considered the question whether a judge may be summoned to testify as a witness on the witness stand, considerations of public procedure and the standing of the judge were also considered (*Sansone v. Garvey, Schubert & Barer* [23]). In one case, the Court of Appeals of the State of Massachusetts considered whether to allow the cross-examination of a judge on a report that she had written within the framework of her capacity as a guardian, before her appointment to the bench (*Guardianship of Hortense Clapp Pollard* (2002)

[24]). In that case, the court allowed the judge to be examined, saying that: 'We find no authority to support the assertion that a Probate Court judge who served as GAL [Guardian *ad litem*] prior to her nomination to the bench is automatically disqualified from being cross-examined upon her report in a guardianship proceeding prepared prior to her appointment' (*ibid.* [24], at p. 939; but it is possible that this position was influenced by the special nature of the proceeding and the special circumstances of the case).

The experience of Jewish law

10. Jewish law sources also discuss safeguarding the dignity of the judge and a 'community leader' — i.e., a person whose public standing is important — and safeguarding the dignity of the public, and from this we can find an answer also to the case before us. It was said on this subject:

> 'A judge shall not behave towards the public with arrogance and vulgarity, but with humility and fear. And any community leader who inflicts excessive fear upon the public that is not for the sake of Heaven will never have a scholarly son. It is also forbidden to treat them disrespectfully, even though they are ignorant … and he must endure the trouble and burden of the public. The community is obliged to treat the judge with respect, and they shall fear him, and he should also not degrade himself or act disrespectfully in their presence, for once a person has been appointed as a community leader, he may not perform labour before three people, so that he is not degraded before them, and he certainly may not eat and drink in public' (Rabbi Yosef Karo, *Shulhan Aruch, Hoshen Mishpat*, 8, 4 [27]). See also: Maimonides, *Mishneh Torah, Hilechot Sanhedrin* (Laws of Courts), 25, 1; 25, 4 [28]).

It follows that any act of the judge that injures his dignity or that may diminish his dignity is considered inappropriate. This concept can also be seen from the exceptions to the rule that witnesses must testify orally (Rabbi Yosef Karo, *Shulhan Aruch, Hoshen Mishpat*, 28, 11 [27]) at the place where the trial is taking place, i.e., in the court (Rabbi Yehiel Michel Epstein, *Aruch HaShulhan, Hoshen Mishpat*, 28, 13 [29]). The first exception is that the testimony of a scholar should be heard out of court, and the second exception is that the testimony of a scholar should not be oral, but in writing. According to the first exception, a scholar is exempt from appearing before the court, and his testimony may be given at his home, because of his dignity. In this respect,

Jewish law sources contain an illuminating distinction between the *subjects of the hearing:*

> 'If a witness is very learned and the court is less learned than him, since it is dishonourable for him to go before them, the positive duty to honour the Torah takes precedence, and he should not do so. When is this so? In financial testimony; but for testimony concerning religious prohibitions and for testimony in capital cases or cases involving corporal punishment, he should go and testify, for it is stated: "There is no wisdom or understanding… before the Lord" (Proverbs 21, 30). Wherever there is a desecration of God's name, one does not show respect to a rabbi' (Maimonides, *Mishneh Torah, Hilechot Edut* (Laws of Testimony) 1, 2 [30]).

The testimony of a scholar at his home shall be taken by three people, who shall be appointed for this purpose by the court (Rabbi Yosef Karo, *Shulhan Aruch, Hoshen Mishpat*, 28, 5 [27]. Cf. r. 172 of the Civil Procedure Regulations ('Testimony by the Head of a Religious Community')). Similarly, it is possible for a woman to testify at her home, out of respect for her (A. Carlin, 'Studies in the Laws of Evidence in Light of Jewish Law,' 11 *HaPraklit* (1955) 49, at p. 159. Cf. E. Shochetman, *Legal Procedure – In Light of Jewish Law Sources — Procedure, Regulations and Rulings of the Rabbinical Courts in Israel* (1988), at p. 282, footnote 86). According to the second exception, testimony by a scholar may be given in writing. 'The reason for this is that we rely on the opinion of Rabbeinu Tam (Rabbi Yaakov ben Meir), who allows witnesses to send their testimony in writing and therefore — in a special case where testimony is required of a scholar — we rely on his opinion in order to refrain from troubling him' (Shochetman, *ibid.*, at p. 291, footnote 137; Rabbi Yosef Karo, *Shulhan Aruch, Hoshen Mishpat*, 28, 5 [27]). We can apply this, by analogy, also to the case of religious and civil judges.

Summary and conclusions

11. As we have seen, Israeli experience shows that it is not appropriate to summon a judge to testify as a witness on the witness stand on a matter related to his judicial role. Nevertheless, the question whether to summon a judge to testify on the witness stand on a matter that *is not* related to his judicial role — whether it took place before he became a judge or thereafter — has not yet been the subject of a judicial ruling. We have further seen that the accepted approach in England is that a judge should not be summoned to testify as a

witness on the witness stand on a matter related to his judicial role, because of a fear of compromising the standing of a judge who undergoes cross-examination, and out of a desire to preserve the independence of the judicial system. On the other hand, it can be said that the accepted approach in the United States is that a judge may be summoned to testify as a witness on the witness stand on a matter related to his judicial role, as long as he is not being asked to testify in a trial at which he is himself presiding. In Jewish law also we have found that any action on the part of a religious court judge that injures his dignity, or that is likely to detract from his dignity, is considered inappropriate. We also learned of this idea from the exceptions regarding the testimony of a scholar, according to which testimony may be given at his home and it may even be given in writing.

12. The values of discovering the truth, conducting a just trial and the fairness of the judicial proceeding, on the one hand, and the values of the protecting the standing of the courts, their independence and public confidence therein are fundamental to the existence of the State of Israel as a Jewish and democratic state. Finding the proper balance in a situation like the one before us is neither simple nor easy; we must create a possibility of obtaining the required information, but we must take great care that harm does not ensue. Therefore it was not without hesitation that I have reached the conclusion that the solution to the question brought before us ought best be in the form of making rules, similar to the aforementioned rules that were made in the Labour Courts for 'expert medical consultants.' These rules should be as follows:

(a) A judge shall not be cross-examined as a witness on the witness stand with respect to a matter related to his judicial role.

(b) The court that is hearing a proceeding in which the testimony of a judge is required on a matter unrelated to his judicial role shall decide, on the basis of the material before it and in accordance with the arguments of the parties, whether to summon the judge to testify.

(c) When it has been decided to summon the judge to testify, the party who wishes him to testify shall submit to the court and to the other party the questions that he wishes to put to the judge, and the court shall decide which questions shall be put.

(d) The judge shall reply to the questions in writing.

(e) After the replies have been given, the parties shall be allowed to put clarification questions to the judge in writing. The questions shall be submitted

to the court and to the other party, and the court shall decide which questions shall be put to the judge.

(f) If, after receiving the replies, the court finds, upon an application of a party, that it is necessary to cross-examine the judge, the court shall summon him for examination. The court shall decide how the examination should take place: in the courtroom in a closed hearing, in the judge's chambers or in another manner.

(g) Before the court decides on the question of cross-examination, it shall give notice to the Attorney-General, who shall give notice to the Court of his position in this matter.

Outcome

13. I therefore propose that the decision of the District Court is overturned, and that the District Court shall act in accordance with the rules set out in para. 12 above. In the circumstances of the case, there is no order for costs.

Justice A. Procaccia

I agree.

Justice E. Hayut

I agree.

Appeal allowed.
11 Adar 5764.
4 March 2004.