Definition of "Investigation Material" for the Defendant's Inspection

Introduction

In accordance with the principle: any person accused of a criminal offense has the right to inspect the investigation material held by the plaintiff, in order to try to refute the evidence, which will be submitted in the framework of a criminal procedure against him, on which the plaintiff will base the lawful conviction of such person.

What is the extent of this right of inspection? Which types of documents fall within the scope of "Investigation Material" and which documents deviate from it?

Thus, for example, the question arises as to whether the plaintiff will have to disclose to the accused documents, which, as plaintiff claims, will not be used by him as a basis for the conviction of the accused and which plaintiff will not submit to the court for consideration. However, it is the aim and the duty of the prosecution to bring about the clarification of the truth and not necessarily the conviction of the accused. One can be confident that should the plaintiff hold any evidence acquitting the accused, the plaintiff would refrain from filing an indictment, in the first place, or he would submit such evidence to the court. However, is the accused entitled to examine as to whether the prosecution fulfilled its duty in this respect?

Another question is whether the right of inspection of the accused is limited in time and/or place.

This question and others will be dealt with in this paper.

The Legislative Regulation

Unlike the civil procedure, where the disclosure of all documents held by a litigant, as long as these are relevant to the dispute between the parties, is mandatory to a broad extent, in a criminal procedure the defendant is in no way obligated to specify his claims and his evidences, which will support his defense against the accusations, whereas in respect of the plaintiff, there are provisions for the disclosure of investigation material, being the subject of our paper.

The subject of investigation material is regulated in **Clause 74 of the Criminal Procedure Act (combined version),** 5742-1982 (hereinafter: "**The Act**"), which determines:

> ***"74. Inspection of the Investigation Material [67] [revised: 5770 (2)]***
>
> ***a) In the event that an indictment for a felony or a misdemeanor has been filed, the defendant and his counsel, as well as a person authorized by counsel or with the consent of the plaintiff, a person so authorized by the defendant, will have the right to inspect at any reasonable time, the investigation material as well as the list of all***

> ***the material collected or written down by the investigating authority and relating to the charge, which is held by the plaintiff, and to copy same.***
>
> ***b) A defendant has the right to apply to the Court to which the indictment was submitted,, with the request to instruct the plaintiff to allow him to inspect material, being, as he claims, investigation material, the inspection of which had been denied to him."***

The interpretation given in a court decision regarding the provision of Clause 74 of the Act

The courts considered the right of inspection of the investigation material a right derived from the fundamental right of the defendant to deploy his defense before the court as well as from his right to fair trial. Thus, for example, the criminal court determined in file 4157/00 **Ofer Nimrodi v. State of Israel**, Decision 54(3), p. 633:

> **"The purpose of the defendant's right of inspection of the investigation material is to allow him to realize his right of a fair trial in such a manner as to allow the defendant full opportunity to prepare his defense against the charges brought against him."**

On this background, the courts were inclined to give wide interpretation to the term "investigation material", and this trend increased.

Court Rulings in the past

In earlier court decisions, the right of inspection was more restricted and the courts were not ready to approve the defendant's attempt to inspect the documents in a more comprehensive manner.

Thus, for example, in Criminal Court File 1372/96, **Knesset Member Arie Deri et al. v. State of Israel**, Judgment N (I) 177, the Court allowed the claim of the persecution that concerning the ability of the defense to be aided by the respective details for obtaining "new" evidence – the defense must accept the assessment of the prosecution that those details will be of no avail to the defense, ruling:

> **"…. It is to be presumed that the prosecution applies, in this respect, its discretion in all fairness and proficiency in such a manner that, in the absence of any reason to contradict, the Court will not interfere with its decision (see: Criminal Appeal 400/84, M 486 (3), and High Court file 233/85 39 129 (4). "**

Truly, it is no easy matter to expect from the defense to rely on the ability of the prosecution to estimate the potential contained in the information, as said, in favor of the defense. However, as said, the starting point is that the prosecution carries out, faithfully and with professional skill, the duty imposed on it in this respect; and

only where circumstances require some other conclusion, the Court will check the merits of the prosecution's decision.

This is the situation as far as sorting the material before filing an indictment is concerned. However, it is also possible that in the course of the hearing, the material sorted by the prosecution will not be mentioned, being "material not within the framework of the investigation." And this is the situation when "additional material" exists, but the prosecution explains this to be "irrelevant" for the defense…"

As said, in my opinion, the premise is that the prosecution carries out with proficiency and in fairness the duty imposed on it, and as long as no other conclusion is required, there is no justification for any interference by the Court in this matter.

Curiosity for its own sake, the desire to obtain material for purposes other than the "defense of the accused", and the readiness to go on a "hunting trip" for finding, perhaps, something of help to the defense – will not suffice to unsettle the basis of said premise.

High Court File 233/85, **El Hosayel v. Israeli Police**, judgment 39 (4) 124, although the Court ruled that the term "investigation material" should be interpreted in detail, the detailed interpretation was restricted and it was determined that "***in the framework of using the discretion, as said, it is not necessary to go far and include in the term "investigation material" also evidence the relevance of which to the criminal prosecution under discussion is remote and marginal."***

Furthermore, it was ruled that the hope of the defense to find in the investigation file material which would be of help to it in censuring the police or the prosecution, will not justify including the documents requested in that respect, in the definition "investigation material".

In the High Court File 1885/97, **Eli Tsubari v. Prosecution of the District of Tel Aviv** et al., judgment 45 (3) 630, 634, it was ruled that the right of Defendant to receive investigation material applies only where Defendant pointed to a factual infrastructure apparently establishing grounds for his suspicion.

Change of Trend

From the time the aforesaid judgments were passed, Court decisions have come a long and significant way towards a facilitating and broadening approach.

See, for example, Criminal Court file 9322/99, **Masarwa v. State of Israel,** judgment 54 (I) 375, 381-382, where it was said:

"Prosecution orders to turn over to the defense any document being "investigation material", and widest meaning should be given to this term […] the prosecution shall not act at its discretion as to what is proper or not for Counsel to use for the

defense, and Counsel will have the possibility to require all the relevant material which might serve for his defense in accordance with his professional opinion".

The trend of broadening the limits of the term "investigation material" is consistent with the discovery of the factual truth being one of the super objectives in criminal law. Realizing this objective is not only for answering the private interest of the parties to the trial, but rather to respond to the comprehensive public-social interest. Only by fully uncovering the truth, justice can be done – find the accused guilty and acquit the innocent. In this connection, defendant's right of inspection of the investigation material overlaps fully with the public interest of finding the truth, as ruled in Criminal Appeal file 4765/98, **Nidal Abu Saada v. State of Israel**, judgment 53 (1) 823, 838 (1999):

"[…] Between the right of the defendant to inspect the investigation material and the public interest to detect the truth, there is fully overlapping jurisdiction, as the truth cannot be brought out if the defendant is not given the opportunity to refer to an incriminating evidence and to examine the trustworthiness thereof – either by cross-examination or by submitting evidences to contradict it – due to non-disclosure of relevant investigation material."

The broad interpretation of the term "investigation material" by the Court, is compatible with the opinion of the scholar Y. Kadmi, who believes that:

"Any material being "relevant" to an investigation or indictment – i.e.: which has the ability "to speed up" the circumstances of the investigation and "to contribute" to the clarification of the accusation the defendant is charged with – should be included in the "investigation material"; […] The meaning of this broader interpretation results from the trend to deal with this subject "in fairness" and out of the desire to spare the defendant from enduring "distortion of justice"; in case law it says: "There is no research of the prudence of a talented counsel and it cannot be guessed how he would have been able to utilize the material before him."

(Kadmi, **About the Rules of Procedure in Criminal Law**, second part (first book), ed. 5769-2009, p. 1004).

The widespread theory today is – the relation of the material to an accusation, with actual foundation of the claim for its impact on the clarification of the accusation

The broad interpretation of the Courts of the term "investigation material", as aforesaid, is not unconditional.

On the one hand, it was ruled that the material requested for inspection need not be directly related to the investigation material, and that an indirect connection and even a connection the existence of which was doubtful, would be sufficient.

On the other hand, the demand for a real factual basis for the assumption of the accused became entrenched, according to which the material would, indeed, assist him in his defense.

In the aforementioned case of **Ofer Nimrodi,** the Court clarified the double test for defining the term "investigation material", as follows:

"The Court determined a test for defining the term "investigation material", based on the purpose of Clause 74 (a), this purpose being safeguarding the right of the accused for a fair trial and the test for realizing this purpose, being the test relating the material to the accusation. In other words, any material relating to the accusation is "investigation material", which the defendant has a right to inspect - and not just direct or undoubted relation. In light of the great importance attached to the right of a defendant for a fair trial, even an indirect or doubtful relation will suffice to turn the material into "investigation material", provided there is real basis for the assumption or hope of the accused that the material will, in fact, have an impact on the clarification of the accusation against him."

(The underlining does not appear in the original – J.W.)

As a matter of fact, the Court repeated this theory in the High Court file 9264/04. **State of Israel v. the Magistrate's Court and the District Court in Jerusalem**, judgment 60(1) 360, 379:

"Therefore, in general, i.e. in the absence of special considerations, such as fear of violating the rights of some other person or some other protected interest, and when the material is controlled by the prosecution – it will be sufficient for Counsel to point to some clue which might show that "investigation material" is concerned, or any possibility, farfetched as it may be, that this is material relevant to the charge and might serve the defense of the accused, that the Court will instruct prosecution to submit the material to the inspection of Counsel, according to Clause 74 (d) of the Criminal Procedure Act."

According to this theory, there might be cases in which the Court turns down the request of the defendant for inspection of the material held by plaintiff, should the Court arrive at the conclusion that the requested material will not be of any assistance to the defendant.

Thus, for instance, in Criminal File (Magistrate's Court in H.) 2162-06, **Aviad Visuli v. The State of Israel**, *Takdin Magistrate's Court,* 2010 (3), 74248, 74257 (2010), the Court refused to allow the defendant to inspect material and documents collected by the plaintiff regarding a witness for the prosecution, ruling that the requesting defendant did not show any "clue" for the requested material being relevant to his defense.

A further example of a case in which the right of inspection was not allowed, appears in Criminal File (Magistrate's Court in Naz.) 9834-01-09, **The State of Israel v. Ala Hori**, *Takdin* Magistrate's Court 2009(2), 25135 (2009), where the defendant asked to inspect the instructions for completing the investigation given in the file by the investigating authorities and by the prosecution office. The intention of this request was to examine whether there were any omissions in the investigation, which might be useful for the defense of the defendant and which even might entitle him to compensation, if acquitted.

The Court rejected the request, ruling:

"The law does not explicitly define the meaning of "investigation material". However the Courts, interpreting the definition of "investigation material", which should be revealed to the defendant and his counsel, made a clear distinction between internal records and correspondence to be found in the investigation file, which do not constitute investigation material and other documents in the investigation file, which are relevant to the investigation of the charge or for managing the defense, and may have an influence on the considerations of the Court in determining the findings…

In light of the aforesaid, and having studied the documents, which Counsel wishes to inspect, I found that the documents marked 50, 45, 39, 30, 25, 17, do not constitute inspection material, as defined in court decisions, but rather internal correspondence, of no relevance in influencing the determination of findings of any kind, nor is it of any relevance to the defense of the defendant; therefore, I reject the request and determine that he has no right to inspect the aforesaid documents."

(The underlining does not appear in the original – J.W.)

Also concerning the Investigation Log in the investigation file, it was ruled that, in principle, this does not constitute investigation material, which has to be delivered.

See: Miscellaneous applications (Haifa District Court) 2469/08, **Mezel Rabie v. State of Israel**, *Takdin* District Court 2008(2), 8877, 8879, where the Court determined:

"***In the matter under reference, I am of the opinion that the log, which contains records, for the most part being material processed from the investigation material, as well as internal correspondence of the police and between the police and the prosecution, does not constitute investigation material. As concerns the investigation actions specified in the log, Respondent claimed that this material is to be found in parallel in the investigation material delivered to Counsels. This kind of delivery to Counsels is customary and without any fault. Beyond that, a list of planned investigation actions, part of which were carried out and Counsels have details of the investigations carried out, constitutes internal records and not investigation material, which the petitioner and the other defendants have a right to inspect or which is likely to assist them in their defense. Moreover, these documents are of no value as regards evidence – the thoughts of the investigator do not constitute evidence. If the investigation developed into evidence, then the outcome of the investigation is the evidence and not the thoughts or expectations of this or some other investigator. If no vital investigation action was made, this would constitute an omission in investigation, irrespective of whether the investigators planned to carry out such action and failed to do so or whether the investigators lost sight of the need for such investigation."***

It should be noted that the request for inspection of the investigation log was rejected in light of the fact that the material contained in the log is contained, in parallel, in the evidence material filed by the plaintiff.

In some other case, where the requested material was not contained, in parallel, in the evidence material, the Court agreed to discuss the request, saying:

"In those cases where it is feared that the litigant has no possibility to access the material held by the authority, the Court can – and must – inspect the documents and examine as to whether there is a possibility of arriving at a proportionate, creative solution, fully guarding the interests forming the basis of immunity, by delivering those details of information which are suitable for delivery. A diverse "tool box" – appropriate to be used."

See: Civil Appeal Authority 7867/06, **Assessing Officer of Haifa v. Moshe Lusky**, *Takdin* High Court 2008(1), 60, 64.

Documents Abroad

Another question to be decided is whether material outside the borders of Israel could be considered also as "investigation material", the defendant has a right to inspect.

In the past, the Courts did not allow defining material to be found outside the domain of sovereignty of the State, as "investigation material", and if only on the grounds that neither the plaintiff nor the police have power to order those holding such material, to cooperate with them and to place it at their disposal (Miscellaneous Criminal Applications 1153/98, **Zvi Ben Ari v. State of Israel**, dated February 22, 1998).

This situation changed following the legislation of the Legal Assistance to Foreign States Law, 5758-1998, designed to regulate dealing with applications for legal assistance submitted by a foreign State, as well as applications submitted by Israel to a foreign state.

In a court decision given after legislation of the law, it was determined that the Court is competent to order the plaintiff to seize material and submit it for inspection by the Court, for the purpose of deciding as to whether such material is "investigation material", even if it concerns material held abroad; however, the fact that it concerns material not being in the possession of the plaintiff, will constitute consideration which the Court will take into account in the framework of its discretion, whether or not to apply this authority.

See: Miscellaneous Criminal Applications 6237/06, **Henry Klushendler v. State of Israel**, *Takdin* High Court 2006(4) 4324.

Criminal File (Beer Sheba District Court) 8150/08, **Biton Ronit v. State of Israel**, *Takdin* District Court 2009(1), 16612, 16614 (2009)

Non-Existing Material

What is the law when a defendant is convinced that the plaintiff is holding certain material, while the plaintiff declares, however, that this material is not in his possession?

This issue arose in the aforementioned case of **Aviad Visuli**, The Court ruled that the object of Clause 74 is to hold a practical – legal inquiry concerning the definition of existing material, on the background of the issue as to whether the plaintiff will have to deliver such material or not. As a matter of fact, sometimes such material is not held by the plaintiff / the investigating authority, and the plaintiff will have to be ordered to get this material from somewhere else, where the material is held (Miscellaneous Criminal Applications 9322/99, **Masarwa v. State of Israel,** judgment 54(1) 376). However, the starting point is that such material does exist.

The Date for Filing the Application

Another issue concerning this subject is as to whether the defendant has the right to ask to inspect the investigation material at any time or whether his right is limited to a certain period?

In the aforementioned case of **Aviad Visuli,** it was mentioned that the legislator did not limit the time for filing requests according to Clause 74, based on the assumption that it is in the interest of the defendant to do so as early as possible. According to another assumption, supported by practical experience, sometimes the necessity of filing an application arises in dependence to various developments in the course of the case. Consequently, the Court was of the opinion that it would not be appropriate to allocate a period of time for filing the application.

However, when the application is filed with great delay, the Court may reject it for this reason (see: Miscellaneous Criminal Applications 3484/04, Mordechai Hasan v. State of Israel, *Takdin* High Court 2004 (2) 589).

Disclosure before Submitting an Indictment

Sometimes a suspect will have to react to accusations raised against him even before an indictment is filed. Such occurs in the framework of a procedure called “hearing”, in the course of which it will be decided whether or not to submit an indictment against the suspect. The “hearing” is an issue deserving separate reference, when many questions arise concerning this subject. However, in the framework of this paper, it is appropriate to cite remarks made concerning the extent of investigation material, which will be disclosed to the suspect before the hearing is held. The High Court ruled that the suspect should receive the “main part of the investigation material”. This definition in itself holds many issues.

In the framework of the High Court ruling 4388/08, **Uri Shmuel v. The Attorney General** et al., dated June 6, 2008, His Honor Judge Rubinstein considered this issue and ruled –

"Now therefore, here is the balance: Clause 60 (a) in itself, according to its contents and purpose, does not allow the suspect the right of inspecting the indictment draft; but for holding an effective hearing worthy of its name, it is appropriate that the suspect will know, in as much detail as possible, which charges he is facing and for which facts. The extent of information and the decision whether the case justifies or enables the submission of an indictment draft, will be determined in any case according to the circumstances thereof, the indicator being fairness to the suspect, without damaging any other civil interest. For my part, without determining rivets, the indictment draft being ready and present, and lacking any special ground to the contrary, it is appropriate that the plaintiff considers giving it to the suspect. However, in general, it is sufficient to send a specification of the main facts and the clauses of the offences, for which it is considered to file an indictment, together with the main part of the investigation material; this will enable the suspect to prepare himself for the hearing and to properly arrange his arguments.

Summary

As we tried to show in this paper, in the course of the years and following numerous decisions made by the courts, a rule developed, according to which the court considers the relevance of the requested material to the accusation being the subject of the respective file, as well as the influence of said material on the clarification of the indictment and on conducting the defense of the defendant.

In the aforesaid case of **Biton Ronit,** the Court summarized the rule, saying:

"The law does not define unequivocally the meaning of "investigation material." Casting the contents into the abstract term was, in practice, outlined by extensive judicial decisions, ruling that the term implies material relevant to a criminal charge, material gathered by the police in the course of the investigation and passed on to the prosecution (Miscellaneous Criminal Applications 9322/99*, **Masarwa v. State of Israel,** *judgment 54(1) 376, 381). Judicial decisions added to the term and extended the meaning thereof to include, besides the existing material, even material not being held by or known to the plaintiff, but at some other place within the power and control of the prosecution office to obtain it. While the prosecution, naturally, strives to restrict the meaning of the term to evidence passed on to it, such as messages, reports and objects, the defense strives to extend the meaning of the term and to obtain by means thereof and under its patronage, all material gathered by the police and may be of influence to the defense of the defendant, irrespective of such being legitimate or invalid evidence or if "messages and objects" are concerned, which might be used as evidence, or if any type of information is concerned, including opinions and internal evaluations of the investigating authority.

However, the question as to whether or not certain material is included within the scope of "investigation material", this, in fact, being the main question facing us, will be decided by the Court specifically in the framework of a case discussed, applying a flexible test determined by judicial decisions, based on the rules of common sense and on the trend to allow Counsel fair opportunity to prepare his defense. Such being the case, the Court examines the relevance of the material for charging the accused, the quality of the material, its nature and the extent of the relation thereof to the issues dealt with in the criminal proceedings, in the framework of which the material is requested.

In conclusion, the chances of the defendant's application for inspecting the material held by the plaintiff, claiming that investigation material is concerned, will be examined according to the circumstances of the specific case in question. As a rule, if the defendant is able to show that the material requested is relevant also to the matter being the subject of the indictment and may also assist him in his defense, the Court tends to allow his request.

As we know, legal proceedings are conducted by evidence and **the ability of the litigating party to get hold of the evidence**. Therefore, the defendant will be well advised to examine carefully which material presumably held by the plaintiff, would be of assistance in his defense and try to obtain such material.

The paper was written with the assistance of Mr. Naor Magen-Mamo.

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