HCJ 6504/95

At the Supreme Court Sitting as the High Court of Justice

Wajie Muhammad et. al
VS
The State of Israel

[1 November 1995]

Before the Justices: T. Strasberg-Cohen, Z. Tal, and D. Dorner

Petition for an *Order Nisi*

For the petitioners: Adv. A. Rosenthal

For the respondent: Adv. S. Nitzan

Judgment

Justice T. Strasberg-Cohen

1. The petitioners are residents of the Gaza Strip, under detention in Ashkelon. They are petitioning for their immediate release from detention, which is, according to their assertion, illegal. The illegality, according to the claim, stems from that the detention order was issued in Ashkelon without authority. The order was issued by a single military judge of the military court in the area, established by virtue of the Order Concerning Security Directives (Judea and Samaria) (number 378), 5730-1970 (hereinafter: the order). According to the petitioners, the jurisdiction of the military judge does not extend beyond the "area" and therefore the order issued in Ashkelon was issued without authority.

   The petition is dismissed.

2. Section 3 of the order sets forth those military courts that have judicial authority in the area.

   Section 6 of the order states as follows:

   "A. The place and time where the military court shall commence hearing a given case will be decided by the president of the court.

   Notwithstanding subsection A, a single judge will preside at times and places he himself will determine."

This is the only section that discusses the issue of the place of sitting of a military court that was established in the area pursuant to the order. From this section it arises that a single judge - as per our case - is authorized to decide upon the place of his sitting.

3. One should not hold the view, as the petitioner's attorney does, that the establishment of the courts in the area requires them being situated in the area and that only an order issued by them while sitting in the area is valid. From section 6B of the order it arises that the contrary is true. This was ruled in a case from which an analogy may be drawn to our matter.

   In HCJ 409/72 Hatar vs. the Druze Religious Court in Haifa 27 (1) PD 449 it was ruled that since according to an order issued by the military commander, the head of the Druze Court of Appeals was authorized to determine the place of sitting of the court, once he decided that the place of sitting of the Druze court of the Golan Heights established pursuant to the order of the military commander in the Golan Heights area (no. 238 dated 30 December 1970) shall be in Haifa, the court convening in Haifa has the authority to do so (ibid, pages 452,453).

4. The above-mentioned section 6B should not be given narrow interpretation whereby the president of the military court or a single military judge is authorized to determine the place of sitting within, but not outside, the areas.

   This interpretation is not called for by the language of the section or the purpose of the legislation, nor is the proper interpretation. It does not serve the legislation as it requires the judges of the military court of the area to always hold the hearings specifically in the area, even when this involves hardship or may even be impossible and harm the possibility of exercising subject matter jurisdiction on offenses and on those suspected of the perpetration thereof, as in the case at bar.

   Obviously, as the respondent's counsel noted, had the order indeed been issued without authority, the arguments regarding hardship or inconvenience would not have been on the agenda at all.

5. The petitioners' counsel refers to Israeli legislation dealing with the possibility of detaining residents of the areas in the State of Israel, found in the regulations included in the schedule to the Extension of Emergency Regulations Law (Jurisdiction over Offenses and Legal Assistance) (Judea, Samaria and Gaza), 5727-1967 (hereinafter: the regulations) and seeks to find in section 6(b) of the regulations support for his argument.

   Regulation 6(b) of the regulations sets forth as follows:

   "Anyone against whom a detention warrant or detention order in the area is issued by virtue of authority granted by proclamation or order of a commander, his arrest and detention may be performed in Israel, in the manner in which a detention warrant or detention order are performed in Israel, and he may be transferred to detention in the area in which the offence was committed."

6. Section 6(b) does not deal at all with the issue of the place of sitting of the military court of the area. All that the section states is that once a detention order has been issued in the area, the arrest and detention may be performed in Israel.

The section does not regulate a situation - as in the case at bar - in which a detention order is issued by a military court while sitting in Israel, and nothing should be concluded or inferred from such section regarding the jurisdiction of the military court in the area, while sitting in Israel. The judgment in HCJ 253/88 Sajdia vs. the Minister of Defense 42(3) PD 801, which broadly discusses the interpretation of section 6(b), does not support the argument of the petitioners' counsel and does not address the issue at stake here. It states, *inter alia*, that: "the instruction in section 6(b) applies, according to its language, to anyone detained, whether detained in the area or in Israel". From this one may infer the opposite of what the petitioners' counsel argues, and in any event it most certainly cannot be deemed as support for his argument.

7. The petitioners' counsel argued before us that his clients' rights had been prejudiced by the issuance of the order against them in Ashkelon. There is no dispute that had the order been issued without authority, it must be annulled, regardless of whether or not the petitioners' rights had been prejudiced. On the merits of the argument, no factual or legal foundation has been laid therefor. The law that applies to the petitioners is the law of the area, which applies also when the military judge exercises it while sitting in Ashkelon. They are not entitled – due to the military court's sitting in Ashkelon – to be subjected to Israeli law with respect to their detention, nor did their counsel so argue. As for difficulties in representation, not a shred of evidence has been presented to us for the existence thereof, except for a general and vague argument that the petitioners will not have representation because the hearing in respect of their detention is held in Israel. No other argument of harm to the petitioners has been raised before us. In any event, even if such harm existed, it is irrelevant, if there is authority.

8. The argument in respect of harm to the Israeli sovereignty by the holding of a hearing of the military court of the area, in the State of Israel, is not an argument in which the petitioners have any interest.

   This is an argument which would be expected to be voiced by the sovereign, when seeking to prevent a foreign court from operating in its territory. In this case, not only does the State see therein no harm to its sovereignty, it so desires. In this context, it was ruled in HCJ 94/75 Nasar vs. the Court of the Gregorian Congregation 30(2) PD 45, that there is nothing wrong with the religious court of the Armenian congregation which tries the residents of the areas according to the Jordanian law that applies in the areas, sitting and acting within the territory of Israel, for it is done with the consent of the government authorities of Israel.

   Therefore, the petition is dismissed with prejudice.

   Justice Z. A. Tal

   I concur.

   Justice D Dorner

   I concur.

   Issued today 8 Cheshvan 5756 (1 November 1995).