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At the Supreme Court Sitting as the High Court of Justice

HCJ 7932/08

Before:	**Honorable Justice E. Rubinstein** **Honorable Justice H. Melcer** **Honorable Justice N. Handle**
The Petitioner:	**Darar Al-Harub**
	v.
The Respondents:	**1. Commander of the Military Forces in the Judea and Samaria Area** **2. Legal Advisor for the Judea and Samaria Area**
Petition for *Order Nisi*	
Session date:	4 Tevet 5770 (21 December 2009)
Representing the Petitioner:	Att. Zaki Kamal
Representing the Respondents:	Att. Hila Gorni

Judgment

1. On March 3, 2005, the military court in Judea convicted the petitioner of membership and activism in the Hamas movement and a deliberate attempt to cause death. The latter offence involved the petitioner's dominant role in dispatching a suicide bomber to the "Kafit" café in Jerusalem. As a result of a technical malfunction, the terrorist was unable to operate the device and he was arrested. On March 3, 2005, the petitioner was sentenced, in a majority ruling, to life imprisonment (the minority opinion suggested a 27 year prison sentence). An appeal filed with the military appellate court was rejected on July 27, 2005. A petition regarding the severity of the punishment filed with this court was rejected later (HCJ 10416/05 **Al-Harub v. Judea Military Court** (unpublished), hereinafter: **the previous proceeding**).

Petitioner's arguments

2. The petition at bar was filed on September 17, 2008. It is seemingly directed at the **reasonableness** of security legislation in the Judea and Samaria Area. It was claimed that in contrast to the principle of penal uniformity, security legislation allows the imposition of a life sentence for a deliberate attempt to cause death, whereas in Israel the maximum penalty for attempted murder is a twenty year prison sentence (Section 305 of the Penal Code 5737-1977). It has been argued that identical penalties should be imposed for identical offences (CrimA 419/81 **Feibish v. State of Israel**, IsrSC 35(4) 701, 706), including when they are heard by different instances (inferring to HCJ 10720/06 **Farid v. Military Court of Appeals** (unpublished)). It was further claimed that the gaps between the penalty levels cause **discrimination** between defendants who are tried in the Area and defendants tried in Israel.

3. It was added that both the courts in Israel and the courts in the Area confront the phenomenon of terrorism and there is no factual justification for the different penal levels. It was also claimed that in effect, military courts issue life sentences in every case of deliberately causing death and therefore, it must be seen as an offence which bears a **mandatory sentence** (which does not come under Section 19 of the Order regarding Rules for Liability for Offences (Judea and Samaria Area)(No. 225) 5728-1968 whether in the version in effect at the time of the petitioner's trial or the current version). On the concrete level, it was noted that the suicide bomber himself (a resident of East Jerusalem) was sentenced by the court in Israel to 22 years' imprisonment only (Egregious CrimC (Jerusalem) 5021/02 **State of Israel v. Mash'al** (unpublished)).

Respondents' position

4. According to the respondents, despite the cloak of generality given to the petition, it is yet another attempt to reduce the petitioners' sentence and must be rejected out of hand. It was stated that the argument regarding the need for penal uniformity is general and as such, must not be conceded (HCJ 9242/00 **Physicians for Human Rights v. Defense Minister** (unpublished)). With respect to the specific claim regarding the need to set a more lenient maximum penalty for a deliberate attempt to cause death, it was claimed that this court has previously recognized the legitimacy of the differences between the law in Israel and security legislation, including differences in penal levels (HCJ 1073/06 **Masalmeh v. Military Court of Appeals in the Judea and Samaria Area** (unpublished)). It was argued that the military commander was of the opinion that the fight against terrorism in general and the phenomenon of suicide bombers and the persons dispatching them in particular, requires the setting of deterring penalties even for attempted offences, and there is no room for intervention in his discretion on this issue. On the concrete level, it was mentioned that the petitioners' other co-offenders were sentenced to life in prison; that a petition they filed with this court was rejected (HCJ 3450/06 **Dweib v. Military Commander** (unpublished)); and that others convicted in military courts for deliberate attempts to cause death were sentenced to the same penalty. As for the terrorist sentenced in Israel to 22 years' imprisonment, it was mentioned that the military courts referred to his case as well, and the military court of appeals ruled, *inter alia*, that the penalty of the person dispatching the terrorist must be stricter than that of the terrorist himself.

The hearing before us

5. Learned counsel for the petitioner noted in the hearing that: "this no longer concerns the specific matter of the petitioner who has earned his day and accepted the judgment. However, on the public level, the principle of penal uniformity must be given expression, such that that the penal outcome is not dictated by the judicial venue chosen by the prosecution". Counsel for the respondents argued that these are two legal systems and that security legislation is independent; the fact that a specific provision exists in Israel need not necessarily require its duplication in the Area.

Ruling – regarding power and discretion

6. Following the review, we decided not to concede the petition which turned from a personal challenge by the petitioner to a public petition, which is problematic. There is no dispute, and counsel for the petitioner declared as much at the hearing, that with respect to the petitioner in this case, the sentence is peremptory; it has been brought for scrutiny before this court and there is no reason or possibility to alter it. We shall further recall that this court ruled that in view of "the aggravated nature of the petitioner's actions as the instigator of the terrorist attack and the dispatcher of the suicide bomber, it seems that the difference between the petitioner's penalty and Mash'al's (the suicide bomber, A.R) is based, in this case, on appropriate reasons on the merits as well" (§7 of the judgment in the previous proceeding, by Justice Hayut).

7. We have also found no reason to concede the petition on the general level by ordering the military commander (who is the legislature in the Area; see HCJ 10104/04 **Peace Now – Sha'al Educational Projects v. Rut Yosef, Person in Charge of Jewish Settlements in Judea and Samaria** (unpublished); HCJ 2612/94 **Sha'ar v. IDF Commander in Judea**, IsrSC 48(3) 675) to amend the law in the Area such that it does not grant courts in the Area the power to issue life sentences for deliberate attempts to cause death. In the Masalmeh case, I had reason to state:

> The argument regarding the need for parity between the level of punishment in the Area and the level of punishment in Israel must not be conceded at all. This matter lies at the heart of the differences between the penalties set in Israeli law and those set in the security legislation which is in effect in the Area, and it stems from confronting the circumstances in the Area. The courts in the Area may, of course, consider the practice in Israel on these matters, but the law under which they operate is the law in the Area and if they act within its scope, there is generally no room for intervention.

This was corroborated in the decision of Justice Rivlin (as was his title at the time) dated July 17, 2006 to reject a motion for a further hearing HCJFH 3316/06 **Maslameh v. State of Israel** (unpublished) and in the decision of Justice Arbel dated February 5, 2007). This court has repeated this on other occasions (see, *inter alia*, HCJ 1969/07 **'Awias v. Military Court in Samaria** (unpublished) §6; [sic] 3944/08 **Sha'aban v. State of Israel** (unpublished) §10).

8. According to case law, the existence of a discrepancy between the law in the Area and the law in Israel does not, **of itself**, constitute grounds for judicial intervention and it stems from the various – historical and current – circumstances. Indeed, a wise person can clearly see that over the 42 years following the Six Day War, the legal systems in Israel and in the Area have become institutionally and substantively close and, despite being separate legal entities, there is natural diffusion from Israeli law to the law in the Area. The sight of the Israeli flag, Israeli judges, Israeli prosecutors and, of course, the legislator of the security legislation who is Israeli, are no small matter. Further still, this court may review arguments against the legality of the actions of the military commander, including the issuance of orders (HCJ 285/81 **Al Nazar v. Commander of Judea and Samaria**, IsrSC 36(1) 701; HCJ 69/81 **Abu 'Eita v. Commander of Judea and Samaria**, IsrSC 37(2) 197). Yet, having stated all this, a certain difference or another between the law in the Area and the law in Israel does not of itself justify intervention.

9. Moreover, isolating one section of a law and comparing it to the law in effect in Israel is not an appropriate manner of examining the reasonableness of the security legislation. In our matter, suffice it say that in this context, of the offences of killing, the law of the Area is not always stricter. Thus, the law of the Area does not include mandatory sentences even for the offence of deliberately causing death and as the court is granted broad discretion with regards to a committed offence, it is granted the same with regards to an attempted offence. Thus, merely pointing at a discrepancy between the

maximum penal level in Israel and the maximum penal level in the Area does not suffice to establish cause for intervention. Had the petitioner wished to challenge the concrete penal level set in the security legislation with respect to a given section, he would have had to demonstrate why this section is unreasonable or is not included in the military commander's power (compare with the hearing on CrimA 4424/98 **Silgado v. State of Israel**, IsrSC 56(5) 529); but this he did not do, and it is doubtful that there is a basis for arguments of this sort against a section which grants the court **discretion** to issue a life sentence for a deliberate attempt to cause death. Note, discretion is not a "mandatory sentence".

10. Thus, security legislation does not **dictate** a life sentence, but rather grants the court discretion to impose it. Indeed, the usual cases in which the argument regarding penal unity is made concern penalties imposed by courts in concrete cases rather than the general power under the security legislation. Thus, there have been cases in which the penalty imposed by the courts in Israel was harsher than that imposed by the courts in the Area and the defendants requested parity with the level of punishment in effect in the Area (see CrimA 902/06 **John Doe v. State of Israel** (unpublished); CrimA 11294/03 **Fuaka v. State of Israel** (unpublished)). On the other hand, there have been cases in which defendants requested the level of punishment prevalent in Israel be applied to them (e.g. HCJ 9225/06 **John Doe v. Military Court in Samaria** (unpublished); the **'Awias** case, the **Masalmeh** case). The rule in such cases – both the first and the second kind - is that the discrepancy does not, **of itself**, justify intervention. Thus we can see, it works both ways.

11. Indeed, in addition to the aforesaid, when issuing a sentence, military courts would do well to consider what is practiced in Israel:

> It is appropriate for the courts in the Area to consider the practice in Israel in such matters. This does not mean actually comparing, and, as stated in the **Masalmeh** case, the discrepancies between the law in Israel and security legislation stem from confronting the circumstances in the Area. However, even if these are two different sources of power and two different "sovereign" capacities, 'have we not all one father?' (Malachi 2:10), namely – in essence – Israel overarches all. Appearances also justify the military court often address parallel case law in Israel, even if it is not bound by it under the law in effect and considering the different circumstances. (the **Dweib** case).

This is dictated by logic as well as by the complex reality of legal and institutional separation, yet geographic and substantive proximity in different respects. And indeed, in 2003, the military court of appeals proclaimed, regarding itself, that it does not hasten to issue a life sentence for an offence other than deliberately causing death (A (Judea and Samaria Area) 120/02 **Nofal v. Military Prosecutor** (unpublished)). The reasoning provided was that: "the existence of a power to issue life sentences, even if coupled with a theoretical justification for doing so, cannot justify routine, broad use of this penalty **in every case** of deliberate attempt to cause death" (emphasis in the original). Among the reasons provided for refraining from issuing life sentences as the main method, the court of appeals also referred to parity with the law inside Israel:

> Despite the fact that Israeli penal laws do not apply in the Area, indeed everyone involved in criminal proceedings held in military courts is versed in the Israeli system which maintains that a life sentence is reserved for those who **actually** violated the most precious and protected value, **human life**. Even after amendment 39, which revoked the traditional distinction between a committed offence and an attempted offence, the offence of attempted murder remained an independent offence in Israel which bears a maximum penalty of 20 years' imprisonment only (Section 305 of the Penal Code, 5737-1977).

12. Indeed, there are cases where the military courts issue a life sentence to defendants who were not convicted of the offence of deliberately causing death (such as the case at bar) and guidelines for the same were stipulated in the **Nofal** case. However, what matters is that this is done with Israeli law **also** being considered along with the other considerations. In the case at bar, the military courts dedicated many sections of their verdicts to the question of how much weight is to be given to Israeli law (and the sentence already issued to the terrorist in the Jerusalem District Court), and gave it the appropriate weight. As for the result, it has already been upheld in the **previous proceeding** and in the **Dweib** case. I shall not refrain from stating, following on the dicta of Justice Hayut in HCJ 10416/05, that the actions of those who dispatch suicide bombers are graver that those of the persons dispatched, and one need not say more.

Conclusion

13. There is no cause to require the military commander to establish that courts would not be able to issue a life sentence for the offence of deliberate attempt to cause death. On this issue, as on other issues and other directions, the law in the Area differs from the law in Israel and there is no fault in this **per se**. This notwithstanding, the military courts in the Area have discretion and must use it, in the appropriate cases, while taking into consideration the law and maximum penalty inside Israel among the other circumstances relating to a specific defendant and the unique security situation in the Area. With respect to the specific petitioner, the penalty imposed on him was reviewed in the previous proceeding and was found to be warranted.

14. Therefore, and as follows, we cannot accept the petition.

Given today, 12 Tevet 5770 (29 December 2009).

President Justice Justice

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