The Courts

The Jerusalem District Court **MApp 4506/08**

Before: Honorable Justice Joseph Shapira **May 1, 2008**

In the matter of: Maher Ajaj, **ID. 949047096**
Represented by attorney Daniella Kedri

The Appellant

v.

State of Israel
Represented by Att. Yitzhak Hanoch

The Respondents

DECISION

Can one try a resident of the Judea and Samaria Area for an offense of possession of an asset suspected as stolen and obtaining property by felonious means, committed in the Palestinian Authority? Can one present a preliminary defense plea of abuse of process at the stage of arrest? These are the central questions that arise in this appeal.

Before me is an appeal against a decision of the Jerusalem Magistrates' Court (The Hon. Justice A. Ruben) of 16 April 2008, in CrimApp 10868/08 (published in Nevo), according to which the detention of the appellant was extended (Hon. Justice A. Ruben) until the end of the proceedings against him in a CrimC (Jerusalem Magistrates' Court) 6377/08 **State of Israel v. Maher Ajaj** presented on 10 April 2008**.**

General Background

1. The aforementioned indictment submitted against the appellant ascribed to him crimes of possession of an asset suspected as stolen, an offense under Clause 413 of the **Penal Code** 5737-1973 (hereinafter "**the Penal Code**), and the offense of obtaining a car and car parts by felonious means – an offense under Clause 413 of the Penal Code, due to use and possession of 66 cars, car parts, on-board computer systems and license plates from stolen cars, which were confiscated in a yard in

Beituniya, near Ramallah, used and owned by the appellant. In conjunction with the submission of the indictment, a request was submitted for the appellant's detention until the end of proceedings, a decision on which is the subject matter of this appeal.

The Decision of the Court of First Instance

2. The court of first instance discussed the appellant's preliminary arguments in the matter of the court's competence to discuss offenses committed outside the state, and the argument of abuse of justice.

In the matter of competence, the court rejected the argument and determined that the matters at hand were indeed "foreign offenses" as defined in Clause 7 (b) of the Penal Code. Since the appellant was a resident of the Palestinian Authority who is not Israeli, he was subject to Regulation 2 of the Emergency Regulations (Territories occupied by the Israel Defense Forces – Judgment of Offenses and Legal Aid) 5727-1967 (hereinafter "**the Regulations**"), Sub-Regulation 2(c). The court accepted the state's argument that an Israeli court was competent to discuss offenses attributed to the appellant by virtue of Clause 13(a)(4) of the Penal Code. The state submitted authorizations from the Deputy Attorney General, according to which, by virtue of the authority delegated to him by the Attorney General, he confirms the submission of the indictment, as required according to Clause 9(b) of the Penal Code. The application of Clause 13(a)(4) was required since the offenses attributed to the appellant, to the extent attributed to him, are offenses that harm the economy of the state, given that dealing with the problem of car theft requires many resources, hence the damage to the state. (See MApp (Jerusalem District Court) 7196/06 **State of Israel v. D'aas Hejazi** published in Nevo); CrimC (Nazareth) 1091/02, **Bilal Kahol v. the State of Israel** (published on the Nevo website).

The court rejected the abuse of process defense in the framework of the detention, hence saw no need to discuss it anew.

With regard to the issue of prima facie evidence, the court of first instance determined that the investigation material demonstrated that the stolen cars were located at two sites not connected to one another. One was called the "the Hangar Site", and the other "the Caravan Site". The Caravan Site, which, apart from a caravan, includes a yard and several storerooms on the first floor of a six-story building in which a guard by the name of Khalil al-Farukh was apprehended. He incriminated the appellant. At the Hangar site, a guard named Maher Allalda was apprehended. During his questioning he denied that the site belonged to the appellant and claimed that it belonged to a person by the name of Adel Ajaj. However, the investigation file contains a memorandum by Officer Oz Soroka, noting that he talked to the guard on the property, and that the latter told him the site belonged to "Maher Abu Ajaj Abu Charlie". The court found additional evidence for the link between the two sites - in one, the license plates of a Mitsubishi car (Item 25 in the indictment) were found, while in the other the chassis of the same car was found (Item 64 in the indictment).

The lower court rejected the appellant's explanations, finding that there was abundant evidence in the investigation file for the name by which the interrogee al-Farukh referred to the appellant. In light of all this, it determined that there was prima facie evidence.

As to the grounds for the arrest, the lower court determined that the offenses attributed to the appellant were property offenses, but due to their vast extent, they constitute grounds of arrest due to the danger posed by the appellant to the security of the public's property (see: CrimApp 5431/98 **Ruslan Frankel v. State of Israel**, [published in Nevo]; CrimApp 2819/00 **Jabara v. State of Israel** [published in Nevo]; CrimApp (Jerusalem Disrict) 9336/08 **Himoni Shaher v. State of Israel [**published on the Nevo website]. Possession of stolen property to such a large extent indicates determination, sophistication and also aid by others in carrying out the offenses and hence the extent of danger indicated the appellant's actions. The extent of danger is also indicated by the appellant's

criminal history, which includes security offenses and six offenses of trading in stolen cars or car parts. Moreover, in addition to the grounds for arrest due to extent of danger, the court also determined that flight risk is another grounds, as the appellant is a resident of the Occupied Territories. The issue involves a complex operation that cannot be carried out every day, and it is feared that if the appellant flees to the Occupied Territories it will not be possible to bring him to trial. The flight risk increases considering the punishment the appellant can expect if he is convicted of the offenses attributed to him, a punishment for which there is an incentive to flee, even at the cost of forfeiting bail.

Therefore the lower court did not examine a detention alternative, especially as no concrete alternative was proposed.

The Appellant's Arguments

3. Counsel for the appellant first argued that the indictment was not submitted on schedule, but rather subsequent to the expiry of the detention orders that were in force prior to the submission of the indictment, since she was unaware that his detention had been extended at the Judea Military Court until 10 April 2008, and when she learned of this on 9 April 2008, when she was on her way to the District Court, she was told that the military prosecutor would submit the indictment. The military court therefore extended the detention to 10 April 2008 at 12:00. But then, it became clear that the indictment was submitted at the Jerusalem Magistrate's Court, and at 11:20, the lower court extended the detention by means of an interim order.

On the Argument of Competence

4. The appellant argues that the lower court ignored the special application of the Law of Implementation of the Interim Agreement on the West Bank and Gaza Strip (Jurisdictions and other Instructions) (Legislative Amendments), 1996 (hereinafter: "the Implementation Law "), as well as the implementation of Regulation 2 of the Law to Extend the Validity of Emergency Regulations (Judea and Samaria and the Gaza Strip – Jurisdiction in Offenses and Legal Aid) 5737-1977, according to which an Israeli court is not authorized to discuss offenses attributed to an accused which were perpetrated in the area under Palestinian Authority Control by a resident of the Palestinian Authority. As such, the appellant repeats his argument of abuse of process, since the detention was contrary to orders and to the Detention Law.

   The accuser's behavior in transferring him from one instance to another, and in claiming there are 15 investigation folders when in fact only two exist, is outrageous.

The Respondent's Arguments

5. The respondent argues that the party under discussion is a terrorist who changed careers and turned into a stolen car dealer, owns property suspected as stolen, and receives all types of stolen property and car parts. The appellant has an onerous past, as a copy of his criminal record indicates (submitted and marked R/1)

   On the issue of abuse of process, counsel relies on remarks made in MApp (Tel Aviv 91835/07 (Grievous Offence File 1058/07) State of Israel v. Avraham Stoaar (published in Nevo), Hon. Justice G. Karra) (2 September 2007). Hence he argues that the chain of detentions was continuous and without defect.

   On the issue of competence, counsel for the respondent relies on a Major General's Order of 24 September 2007 expanding the list of offenses over which the military court has jurisdiction, and also

on Order No. 52, according to which any power granted to a "police officer" applies to every police officer.

Hearing

6. Indeed, a chain of events as described above is regrettable, however, from the law's point of view, the chain of orders of detention issued until now was issued lawfully, as I shall discuss later. In any event, in the matter of the appellant's argument concerning a severance of the chain of detentions, suffices it to refer to remarks in MApp (Tel Aviv District) 90842/04 **Israel Police v. Sabag Amir** (Hon. Justice A. Shoham**)** (Nevo website) (8 March 2004) as follows:

> In these circumstances, there is no impediment to asking the court which discussed the original request, to extend the detention within the boundaries of the five days designated in Clause 17(d). This procedure is similar in essence to a re-consideration of the previous decision, due to a change of circumstances that occurred since that decision was made. In the case before us, the additional request to detain the respondent is supported by the need to receive a laboratory report. I have already expressed my view that in our matter, the existence of prima facie evidence of possession of the drug is not disputed, even in the absence of a laboratory report (on this issue, see, inter alia, CrimA 6021/95 Miguel Octavio v. State of Israel, IsrSC 51(3) 769; CrimA 840/79 Gavrielli et al. v. State of Israel, IsrSC 35(2) 371; CrimA 242/85 Hazan et al. v. State of Israel, IsrSC 41(1) 512. …, I noted nevertheless that should a request for detention until the end of proceedings be submitted, together with an indictment against the respondent, no weight should be attached to the fact that the period of his detention was interrupted by virtue of the judicial decisions made in his matter (*Supra*, para. 4).

The implication is that even if there was a period during which a detention order was not in force, the matter is alleviated by subsequent decisions. In the case at hand, no appeals were lodged regarding the previous stages.

7. After perusing the court's decision and reasoning, it appears that it was indeed presented with prima facie evidence and that the grounds for arrest had been established. In fact, the appellant forewent these arguments in the statement of appeal and the hearing before me. The main argument is in fact that of competence. The appellant argues that he should be brought to trial by the Palestinian Authority, not the State of Israel. This argument should be rejected.

There is no question that in terms of the Penal Code 5737-1977 this is a foreign offense. Subsection 13 of Section 3, entitled **"Application to Foreign Offenses"** defines subjects that fall within in the scope this Section as follows:

> Offenses against the state or the Jewish people [Amendment: 5754, 5765 (2)]
>
> A. The Israeli Penal Code shall apply to foreign offenses against –
>
> (1) State security, foreign relations or state secrets;
> (2) The form of government in the state;
> (3) The orderly operation of state authorities;
> (4) State property, its economy or transportation and communication links with other countries;

(5) The property, rights or routine operation of an association or agency as described in Sub-Section (c). [The emphasis is not in the original -[J.S.)

The offenses committed by the appellant are therefore within the scope of Section 13(a)(4) as emphasized above.

All that remains is to examine whether, to quote counsel for the appellant, the Law of Implementation of the Interim Agreement takes precedence over existing legislation. The answer, though, is negative, in light of the proceedings held against the appellant in the Judea Military Court, whereby on 24 September 2007, Major General Gadi Shamni, Commander of IDF Forces in Judea and Samaria issued Order 162 - the Order regarding Security Provisions (Amendment 96 (temporary order) to the Order regarding Security Provisions (Judea and Samaria) (No. 378) 5730-1970.This order sets forth that:

> After Clause 7(d) the following shall be added:
>
> (e) A military court shall be entitled to sentence, as aforesaid in Sub-Clause (a), also whoever shall commit an offense in Area A according to Clauses 407 (d)(2), 407(9)-407(11) of Jordanian Criminal Code No. 16, as amended in the Order regarding Amendment of the Criminal Code (Amendment No. 6) (Judea and Samaria) (No. 1428) 5755-1995, and according to Clause 412 of Jordanian Criminal Code No. 16, as amended in the Order regarding Amendment of the Penal Code (stolen property and property suspected as stolen)(Judea and Samaria) (No. 771) 5739-1978, provided that the object of the offense is any motor vehicle lawfully registered in the State of Israel.

8. The order, as stated therein, originally came into force on 24 September 2007 and was valid for a year, i.e." until 24 September 2008. One may understand the background to its enactment from an update issued the same day by the office of the Legal Advisor in Judea and Samaria, which constitutes a form of "explanatory notes" for the order.

It states, inter alia:

> The amendment grants authority to military courts to sentence individuals who committed various offenses connected to trading in – and dismantling stolen vehicles registered in Israel. It even imparts, indirectly, powers of detention, search and capture, connected to trial powers, to IDF soldiers, and police officers of the Israeli Police, in appropriate circumstances.
>
> The amendment to the legislation was conceived after extensive administrative work led by our unit in cooperation with Israel Police officials, the Justice Ministry, the military courts, and the different military advocacy officials, with the aim of finding an appropriate legislative solution that would enable the arrests of individuals present in Area A who are suspected of trading in and stealing Israeli cars, in the context of coping with the widespread phenomenon of Israeli cars being stolen and brought to these areas.
>
> We would like to emphasize that this amendment contains a certain deviation from the provisions of the Interim Agreement, which granted powers to take

> action against non-security related offenses in Area A to the Palestinian Authority. We opined nevertheless, that in the absence of effective enforcement on the part of the Palestinian Authority vis-a-vis this criminal phenomenon, and the severe, continuing damage to the State of Israel, there is room for amending the legislation and granting the necessary powers, even temporarily.
>
> Against the background of the deviation from the provisions of the Interim Agreement, we asked for the consent of the political echelon for the legislative amendment. The issue was presented by the legal advisor of the Defense Ministry to the Deputy Defense Minister, who authorized the completion of the legislative amendment.
>
> [The emphasis is not in the original - J.S.]

As a result, in light of rising crime and harm to the social fabric of Israeli society, both from the economic and the security point of view, the Major General's order – and likewise the arrest of the appellant by security forces and the Israel Police and his being brought to trial in Israel, were justified, being based in law.

9. As for the abuse of process defense raised by the appellant: Following Amendment 51 to the Criminal Procedure Act, it is possible to raise this as a preliminary argument. Clause 149 (1) of the Criminal Procedure Act determines that it may be argued that:

> The submission of an indictment or the criminal proceeding fundamentally contradict the principles of justice and legal fairness.

Israeli law has indisputably recognized and developed the doctrine of abuse of process. The author Yisgav Nakdimon insisted on this in his book "Abuse of Process" (Nevo Publishing Ltd., 2003).

In the second edition (2008) currently being published, in Chapter 4: "From Yefet to Borowitz **": Expansion of the Test for Applying the Abuse of Process Defense,** the author analyzes this development. In Chapter 5 he refers to Amendment 51, commenting:

> The immediate question that springs to mind is if anything in this legislation might change the prevailing legal situation in the matter of "abuse of process" prior to the law's passing. My response is affirmative. After the Criminal Procedure Act, (Amendment 51) "abuse of process" is not what it was before, not only because it was previously a legal doctrine, whilst now we are dealing with statutory protection. As we shall seek to demonstrate in this chapter, the legislative history of the defense and the oral and concrete interpretation of the new law reveals that "abuse of process" has been expanded by the legislator beyond its previous boundaries. (*Supra*, 13)**.**

Hon. Justice **E.E. Levy** (with the consent of Hon. Justice **E. Rubenstein** and Hon. Justice **D. Berliner**) in HCJ 230/07 **Ahmad Atun v. State of Israel** (published in Nevo), refers to the issue. Since his words are also relevant to our matter I will quote them fully:

> I admit to being surprised by the decision of the Military Court in Judea to hear the petitioners' preliminary arguments in the framework of the detention procedure. True, it has been determined more than once that in preliminary arguments such as those raised by the petitioners, can and should be heard at the earliest possible opportunity, since their acceptance would obviate the trail. In my opinion, however, there was no room for discussing them in the framework

of a detention procedure. Rather, they should have been left to the panel of judges presiding over the indictment itself. (Compare, too, to Clause 149 of the Criminal Procedure Act [Incorporated Version] 5742-1982, which determines that the accused is entitled to raise preliminary arguments "after the commencement of the trial").These matters are reinforced when the subject matter is "abuse of process". This court has previously addressed the close linkage between this defense and the importance and severity of the charges, the strength of the incriminatory evidence, the personal circumstances of the accused persons, and the likes, information that is more familiar to the judges hearing the case than to the judge discussing the detention issue. (See MApp. 4855/02, State of Israel v. Borowitz 59(6), 776 of 31 March 2005 in Section 21).

In any case, in the framework of this petition, we are not required at all to determine whether it is possible to raise preliminary arguments at the detention stage, and whether in the present case, the petitioners may rely on the argument of abuse of process, since the appropriate forum for examining their arguments in this context is not the Supreme Court. This court has already determined this when it found that the abuse of process defense– if raised after the submission of an indictment, in the hearing instance where the criminal procedure itself is conducted, since ruling thereon naturally requires a thorough, in-depth examination of the facts, which this court is not equipped to conduct (HCJ 5707/97 Cogan v. the Chief Military Prosecutor, IsrSC 55(5) 67,94; HCJ 1563/96 Katz v. the Attorney General, IsrSC 55(1) 529,544, HCJ 5675/04 the Movement for Quality Government in Israel v. the Attorney General, IsrSC 59 (1) 199, in Section 10; HCJ 11099/04 Wurzberger v. the Attorney General [Published in Nevo] of 4 January 2005 (*Supra*, Section 5).

These remarks were adopted by Hon. Justice **S. Joubran** in **MCrimApp 9955/07, Avraham Stoaar v. State of Israel** [published in Nevo], and **HCJ 3307/07, Mishali v. Value Added Tax Netanya** [published in Nevo] by Hon Justice **E. Hayut** (with the consent of Hon. Justice **A. Grunis and Hon. Justice U. Vogelman).**

At this stage, therefore, the appeal on the grounds of abuse of process cannot be accepted.

With regard to the argument that the counts attributed to the petitioner contradict each other, with one requiring a mental basis of negligence and the other a mental basis of criminal intent, the place for this argument is likewise in the hearing of the main file.

I consequently, reject the appeal.

Granted on this day, 1 May 2008, in the presence of the appellant and his counsel, and counsel for the respondent.

Joseph Shapira - Judge

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