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At the Supreme Court

MCrimApp 4343/08

Before: **Honorable Justice S. Joubran**

The Appellant: **Maher Ajaj**

v.

The Respondent: **State of Israel**

Appeal against decision by the
Jerusalem District Court on 1
May 2008 in MApp 4506/08
given by the Honorable Justice J.
Shapira

Session Date: 24 June 2008

Representing the Appellant: Att. Daniella Kedri

Representing the Respondent: Att. Att. Yair Hamudot

Judgment

Before me is an appeal against a decision by the Jerusalem District Court (Hon. Justice **J. Shapira**) of 1 May 2008 rejecting the appellant's appeal against the judgment of 16 April 2008 of the Jerusalem Magistrates' Court (**Hon. Justice A. Ruben**), according to which it was decided to detain the appellant until the end of the legal proceedings being conducted against him.

1. An indictment was filed against the appellant in the Jerusalem Magistrates' Court (C 6377/08) attributing to him offenses of possession of an alleged stolen asset, in accordance with Clause 413 of the Penal Code 5737–1977 (hereinafter: the Penal Code); and offenses of receiving cars and car parts obtained by felonious means, in accordance with Clause 413j of the Penal Code.

According to the description in the indictment, on 25 March 2008, stolen cars and car parts were seized on a site in Beituniya, which was used and owned by the appellant.

2. In conjunction with the indictment, a request for the appellant's detention until the end of the legal proceedings against him was submitted to the Jerusalem Magistrates' Court (MApp 10868/08).

In its decision of 16 April 2008, the Magistrates' Court (Hon. Justice **A. Ruben**) accepted the request and ordered the appellant's detention until the end of the legal proceedings against him. In its decision, the court rejected two preliminary arguments made by the appellant; with respect to the court's lack of relevant competence to discuss his case, since the Palestinian Authority has jurisdiction over his case; and with respect to his argument of abuse of process, the court determined that there are grounds for detaining the appellant, and that it was not possible to transfer him to an alternative detention.

3. The appellant appealed to the Jerusalem District Court against the decision of the Magistrates' Court (CrimApp 4506/08).

On 1 May 2008, the District Court (Hon. Justice **J. Shapira**) rejected the appeal, determining that the Magistrates' Court was competent to discuss the appellant's case by virtue of Clause 13(4)(a) of the Penal Code, since the offenses with which the appellant was charged were offenses that harmed the economy of the state; it also determined that the appellant's argument regarding abuse of process be discussed in the framework of the main proceeding being conducted against him.

The appeal before me is as follows:

4. The main argument advanced by counsel for the appellant is that Israeli courts lack the relevant competence to discuss the appellant's case. She argued that the Israeli Palestinian interim agreement of 28 September 1995, the Interim Agreement on the West Bank and Gaza Strip, known as the "Oslo Agreement" (hereinafter: the interim agreement) created a new juristic reality in the Judea and Samaria Area. Accordingly, counsel argued, the area in which the commission of offenses is attributed to the appellant is in the jurisdiction of the Palestinian Authority, which is therefore the competent agent to bring him to trial. In this matter, counsel for the appellant argued that no particulars were brought forward to demonstrate that the offenses attributed to the appellant indeed harmed the economy of the state, and that the provisions of the law that anchor the agreement in Israeli law amount to a special and subsequent provision that takes precedence over the permanent arrangement in Clause 13(a)(4) of the Penal Code. Counsel for the appellant also argues that the indictment filed against the appellant is flawed, since it includes two legal provisions with different *mens rea*.
5. Rejecting this, counsel for the respondent argues that Clause 13(a)(4) of the Penal Code grants Israeli courts extra-territorial authority for offenses that harm the state's economy. He argues that this competence applies in any place and in any state beyond the area of the State of Israel, whilst supervision over the use of this competence is subject to the consent of the Attorney General, which was obtained in the case of the appellant. Counsel for the respondent adds that the provisions of the law that anchor the interim agreement do not limit the legal powers of the State of Israel, as determined in existing legislation, but only add to them.

After studying the appeal and the decisions of the instances that preceded it, and after hearing the arguments of the parties, I have concluded that the appeal must be rejected.

6. The basis for our review is found in the Criminal Procedure Act (Powers, Enforcement, Detention) 5756 – 1996 (hereinafter: the Detentions Act). Clause 2(2) of the Detentions Act determines that after an indictment is submitted, the relevant competence shall lie with "the court authorized to review the indictment". Hence, in order for the Jerusalem Magistrates' Court to acquire competence

to review the appellant's detention until the end of the legal proceedings against him, it must be demonstrated that this court has the relevant competence to review the actual indictment.

7. In our case, it is argued that the appellant, a resident of the Area, committed offenses in an area allegedly outside Israel's jurisdiction. As such, they should apparently be viewed as "foreign offenses" in the meaning conveyed by Clause 7(b) of the Penal Code. Although counsel for the appellant attempted to oppose this definition in the appellant's response to a summary of the respondent's arguments, in the statement of appeal, she did not dispute that the area in which the offenses attributed to the appellant were carried out is in the territorial area of the Palestinian Authority, and that Israel does not effectively control this area (except in security matters) (see Clauses 22 and 23 of the statement of appeal). Moreover, in view of the residual definition of "foreign offenses" in the Penal Code as "an offense that is not a domestic offense", if one does not state that the offenses in question are "foreign offenses", one inevitably deems them "domestic offenses" – such that the appellant cannot prevail in this manner either.
8. I also do not find much in counsel's argument that the provisions applying the interim agreement in public law create a special situation for the area in question, in which there is no competence other than that of the Palestinian Authority and the Israeli military commander, these being unique and subsequent legal provisions which take precedence over the permanent arrangement in the Penal Code. The absolute dichotomy between "domestic offense" and "foreign offense" determined in Clause 7 of the Penal Code creates a comprehensive arrangement, which has no equal, and which does not enable any "intermediate situation". The provisions of the law that anchor the interim agreement, and to which counsel for the appellant draws attention, do not detract from this agreement and are geared entirely towards giving Israel's courts **added** relevant competence to review matters involving Israeli citizens who committed offences in the Area, although these offenses are deemed to be "foreign offenses."

This aspect is also clarified by the language of the provision: Regulation 2 (a) of the Emergency Regulations (Judea and Samaria– Judgment of Offenses and Legal Aid) 5727 - 1967 (hereinafter: the judgment regulations), (as amended and extended in the Law to Amend and Extend the Validity of Emergency Regulations (Judea and Samaria– Judgment of Offenses and Legal Aid) 5767 – 2007, which instructs that:

Court Competence

2. (a) **In addition to what is stated in any law**, an Israeli court shall be competent to discuss a person present in Israel, according to law applicable in Israel, regarding commissions or omissions by him in the area of the Palestinian Authority, provided that the commission or omission were offenses that occurred in the area under the jurisdiction of Israel's courts.
- (b) ...
- (c) This regulation is not applicable to anyone who – at the time of commission or omission – was a resident of the Area or a resident of the areas of the Palestinian Authority, which are not Israeli.

...

As one can see, the aim of this provision is to apply Israeli law to offenses committed in the Area by Israelis and by persons present in Israel, by means of creating unique extra-territorial judicial competence concerning them, and this "in addition to what is stated in any law". This extension is

restricted with regard to persons who are not Israeli and who, at the time of the deed, were residents of the Area, or residents of the Palestinian Authority. On the other hand, this restriction only affects the aforesaid unique extension and imposes no limitation on the regular rules of legal competence prevailing in Israeli law (see Regulation 18 of the judgment regulations, which determines that the regulations do not detract from powers according to any other law.)

In view of the aforesaid, I found no grounds in the arguments of counsel for the appellant for not applying the general rules of competence determined in the Penal Code to the appellant's case.

9. Counsel for the respondent argues that the offenses attributed to the appellant are "foreign offenses" which harm Israel's economy and as such, the Jerusalem Magistrates' Court has acquired competence to discuss his case by virtue of the provisions of Clause 13(a)(4) of the Penal Code. On the opposing side, counsel for the appellant argues that the court was not provided with the evidentiary infrastructure needed to prove this circumstance, hence it cannot be said that the court is competent.

This argument cannot be accepted.

10. As in any case, replying to the question of a court's relevant competence requires evidentiary infrastructure, which grounds the abstract legal issues in reality. However, in the preliminary stage of reviewing the request for detention until the end of legal proceedings, the court has no "tangible" evidence which was submitted to it, and which was determined according to all the rules of evidence, and according to which it can make findings on the issue of competence. Thus, even at a time when the evidence required for a ruling on the issue of competence is being examined, there is no choice but to turn to a rule used whenever a court has to place a person in detention before his case has been concluded. According to this: "The question the judge must ask himself, in the matter of this evidence, is whether the nature of the evidence – against the background of the entirety of evidence available at this stage – is such that a reasonable possibility exists that at the end of the criminal proceeding, said evidence shall become standard evidence which, alone or together with other potential evidence, would enable a determination on the guilt of the accused. (MCrimApp 8087/95 **Zadeh v. State of Israel** IsrSC 40(2)133, 147, (1966). As part of this question the court must examine whether the evidence presented before it contains *prima facie* proof that the offenses attributed to the accused, under the circumstances in which it is alleged they were perpetrated, impart relevant competence to the court to discuss his case, as a preliminary stage with the possibility of his conviction at the end of the proceedings (see MCrimApp 8780/06 **Srur v. State of Israel** (not published, 20 November 2006). N.B. the subject matter is only a determination in the matter of *prima facie* relevant competence, which does not necessarily exhaust the discussion on the issue of competence in the framework of the main proceeding.
11. In our matter, evidence has been brought before the court, according to which the appellant was allegedly an extremely significant participant in the phenomenon of car theft from within the state to the Palestinian Authority. The court has referred to this phenomenon on more than one occasion as a "plague affecting the state," which caused severe harm to Israel's economy and whose damage could not be said to have declined in the years since the judgment in CrimFH 2316/95 **Ghnimat v. State of Israel**, IsrSc 49 (4) 589, (1995) (see MCrimApp 11194/05 **Sabit v. State of Israel** (not published, 15 May 2006) LCrimA 10116/06 **Cohen v. State of Israel** (not published, 17 December 2006), and HCJ 8780/06, **Mahdawi v. Attorney General** (not published, 10 December 2006).

The appellant is alleged to have been the "final station" of sixty six cars stolen from within Israel. A conservative calculation suggests that these offenses involve assets worth at least several million shekels. Moreover, not only do these circumstances *prima facie* show that the deeds attributed to the

appellant cause Israel economic harm, but they also shed light on the extent of the entire phenomenon.

To summarize the aforesaid, I have been persuaded that the Jerusalem Magistrates' Court's competence to hear the matter of the appellant has been proven to the extent currently required.

12. I found little substance in the arguments of counsel for the appellant regarding flaws in the indictment. Without making findings, the indictment contains nothing from which one can draw conclusions regarding the appellant's detention, and the argument made in this matter should be heard in the framework of the main proceeding against him.

In conclusion, the appeal is rejected.

Given today, 26 Sivan 5778 (29.6.2008).

Judge