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At the Supreme Court

H CJ 1998/96

Sitting as the High Court of Justice

In the matter of:

1. Abu Tabana

Detainee in the interrogation facility in the Shikma prison

2. HaMoked: Center for the Defence of the Individual

both represented by counsel, Att. Andre Rosenthal

Lic. No. 11864

33 Jaffa Street, Jerusalem 94221

Tel: 250458; Facsimile: 259626

The Petitioners

v.

The General Security Service

The Respondent

Petition for Order Nisi and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering it to appear and show cause:

- (a) Why it shakes petitioner1;
- (b) Why it holds petitioner 1 in a painful "shabach" position;
- (c) Why it deprives the petitioner of sleep.

As an interim remedy, the honorable court is hereby requested to order the respondent to cease using force against petitioner 1 pending a hearing of this petition.

The honorable court is also requested to schedule an urgent hearing on the petition. The honorable court is further requested to summon petitioner to the hearing of this petition.

The grounds for the petition are as follows:

1. Petitioner 1 was born in 1965 and is a resident of Hebron. Petitioner 1 was detained on March 3, 1996.
2. a. On March 10, 1996 petitioner1 was transferred to the interrogation facility in the Shikma prison, in Ashkelon, and was interrogated by the respondent.
 - b. His interrogation commenced on March 10, 1996 around 17:35 and ended at 18:25, when he was left to "wait": he was seated on a low chair, his hands cuffed behind his back, his legs tied and his head covered with a sack.
 - c. Petitioner1 remained in this position until his interrogation resumed the following day at 08:55. His interrogation continued until 12:30. When this interrogation ended he was left again to "wait" until 14:25, when his interrogation resumed and continued until 17:25. During that day petitioner1 was shaken on two different occasions: the first time in the presence of three interrogators and the second time by one interrogator. During the shaking his hands were handcuffed; his clothes were torn.

At the end of these interrogations he was left to "wait" again.
 - d. His interrogation resumed on March 13, 1996 at 10:15 and continued until 11:20, when it was stopped in order to bring him before a jurist military judge appointed by the commander of the area to hear the police request to extend his detention.
 - e. During the shaking his interrogators threatened petitioner 1 that he would end up like Abdel Samed Harizat, who died as a result of shaking, and that he would leave the interrogation in a wheelchair.
 - f. Petitioner1 did not sleep for 64 hours as indicated in the memoranda described above.
3. As a result of the shaking petitioner 1 suffers headaches.
4. During the interrogation, petitioner1 was ordered by his interrogators to kneel and remain in the same position for different periods of time. Furthermore, one of his interrogators pushed his head into a desk in the interrogation room after the shaking.

5. As a result of the interrogation methods the hands and ankles of petitioner 1 became swollen.
6. The affidavit of petitioner 1 is attached hereto and marked P1.
7. Petitioner 2 is a human rights organization that has taken upon itself to assist victims of violence, cruelty or deprivation of basic human rights by state authorities (including local authorities), especially those who need assistance in making their complaints to the relevant authorities. Petitioner 2 defends fundamental rights by other means as well, such as taking legal action including submitting petitions to the Supreme Court sitting as a High Court of Justice either on behalf of a person claiming that his basic rights were violated or as a public petitioner.
8. On March 13, 1996, a hearing was held before the military court in Gaza sitting inside Shikma prison near Ashkelon. Petitioner1 was detained under suspicion of being a member and activist in an illegal organization. His detention was extended by 21 days.

Petitioner1 further wishes to point out that he was held as an administrative detainee in 1994 for a period of five months.

9. The petitioners claim that the shaking and holding of petitioner1 in the position described above and in any other painful position are illegal. The acts committed against him by his interrogators are defined in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the state on August 4, 1991 and entered into effect vis-à-vis Israel on November 2, 1991. **Torture** is defined therein as follows:

"For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed..."

10. The respondent justifies the use of such inappropriate interrogation methods by relying on the provisions of Section 34(11) of the Penal Law 5737-1977, i.e., the necessity defense.

Section 34(11) provides that [such defense may be used] only when the act was "immediately" required and when there was a real danger of severe injury.

In this case petitioner1 was detained on March 3, 1996 and held for ten days during which he was not interrogated.

It was only upon his arrival at the Shikma prison around noon on March 10, 1996 that his interrogation commenced at around 17:00 and various violent interrogation methods were employed. Therefore, the petitioners will claim

that there is no immediate need for such a violent interrogation, based on the fact that petitioner 1 had been detained for seven full days without interrogation before he was brought to the Shikma prison. This indicates that there is no immediacy in this kind of interrogation.

On the one hand, a method intended to exhaust the interrogated person was employed, i.e., sleep deprivation, or as put by Gisli H. Gudjonsson, *The psychology of Interrogations, Confessions and Testimony*, "*There is considerable evidence that lack of sleep impairs mental functioning, especially if it continues for 2 or 3 days.*"

Copies of pp. 30 & 31 of said book are attached hereto and marked P2.

On the other hand, a violent and even extreme method was employed, the shaking, the implications of which are unknown.

A petition in this matter which was filed by the Association for Civil Rights in Israel is currently pending (HCJ 4045/95).

11. The honorable court has already held in the past, before Basic Law: Human Dignity and Liberty was enacted, that there was no authority to insert enema into a detainee's or prisoner's body in order to find drugs, even if there was a suspicion that he was holding dangerous drugs in his body.

See: **Katlan v. Israel Prison Service**, IsrSC 34(3) 294.

12. a. The petitioners wish to refer to **Hudson v. McMillan** 112 S.Ct 995 (1992) in which the supreme court of the United States had to decide whether in an incident in which McMillan, a prison guard, used force against Hudson, prisoner, severe pain or suffering were caused, or if the use of such force amounted to cruelty and inhumanity that infringed upon [Hudson's] rights.
- b. Honorable Justice Blackman who presided in in Hudson v. McMillan, held (ibid, p. 1002):

"The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with "significant injury", e.g., injury that requires medical attention or leaves permanent marks.

...

... I otherwise join the Court's solid opinion and judgment that the Eighth Amendment does not require a showing of "significant injury" in the excessive-force context."

13. The petitioners wish to point out that a copy of this petition, including its exhibits, was sent upon its filing, to the Department of Police Investigations at the Ministry of Justice. However, the mere submission of the complaint cannot, in and of itself, assist petitioner 1 who is currently subjected to a harsh and violent interrogation.
14. Therefore, the honorable court is hereby requested to grant the requested orders and render them absolute.

Jerusalem, today, March 13, 1996

Andre Rosenthal
Counsel for the Petitioners