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The District Court in Jerusalem
CA 2163/01 (M. Jerusalem 2899/98)
Abu Rian v. The State of Israel
Opening date: 1 April 2001

Type of matter: 21 Procedure: Ordinary

At the District Court in Jerusalem

In the matter of:

Abu Rian

of Halhul, Hebron district

represented by attorneys Hisham Shabaita (Lic. No. 17362) and/or Eliahu Abram (Lic. No. 11851) and/or Yossi Wolfson (Lic. No. 26174) and/or Raida Crouani (Lic. No. 20302) and/or Adi Landau (Lic. No. 29189) of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
4 Abu Obeidah Street, Jerusalem 97200
Tel. 02-6283555; Fax 02-6276317

The Appellant

v.

The State of Israel

represented by the Tel Aviv District Attorney's Office (Civil Department)
1 Henrietta Szold Street Tel Aviv 64921
Tel. 03-6970222; Fax 03-6918541

The Respondent

Appeal

An appeal is hereby filed from the judgment of the Hon. Justice R. Yaaqovi in CC 2899/98, issued at the Magistrates Court in Jerusalem on 11 February 2001 and served on the Appellant's counsel on 15 February 2001.

A certified copy of the judgment is attached to this Appeal.

The grounds for the appeal are as follows:

1. Introduction:

- a. On 8 November 1992, _____ close to the Appellant's house. According to the Appellant, the Appellant's claim concerns his injury by live IDF fire, having been shot for no reason at all when standing on the street

with numerous family members after leaving a wedding celebration. The Respondent's version is that the Appellant had taken part in stone-throwing at Halhul junction.

- b. The Trial Court dismissed the Appellant's claim, while basing its conclusion on two main rulings: "**a. No negligence by IDF soldiers against the Plaintiff was proven; nor any other tort against him. b. Even had I determined that the soldiers had committed a tort against the Plaintiff, under the circumstances of the case it would have been battery, for which there is no vicarious liability, hence the State should not be held liable. This is by virtue of Article 25 of the Torts Ordinance.**" (p. 4, Article 12, lines 7-12).
2. The Trial Court erred in ruling that the Appellant had thrown stones at Halhul junction, when no admissible evidence directly attributing such acts to the Appellant was presented. The only alleged evidence was a general report that the Defendant's witnesses had received from another force, at nighttime, and which contained general details on the color of a stone-throwing suspect's clothes. It should be noted that the report on the said suspect pertained to a location that is approximately 1 kilometer away from where the Appellant was injured. Since no testimony was given by the reporting force which could have verified the veracity of the report, as specified below, this is clearly hearsay which should be disallowed.
3. The Trial Court erred in the unreliability it attributed to the Appellant's version due to alleged discrepancies found therein, while drawing factual conclusions which are consistent with the Appellant's version, on the very issue in which the alleged discrepancies were found.
4. The Trial Court erred in determining that the testimony of the person known as "Benny" was unnecessary, and that the failure to call him to the stand should not be held against the Respondent, when even according to the Respondent it was "Benny" who had allegedly seen the Appellant throwing stones (several minutes before his injury!), and reported the same to the force that shot the Appellant and which did not see the Appellant throwing stones, even according to the Respondent. Benny's testimony is vital to the question of whether the Appellant threw stones and under what circumstances, and to the issue of the quality of the report that was given to the Respondent's witnesses (the force that shot the Appellant) and the quality of the Appellant's identification.

5. The Trial Court erred in determining that the evidence indicated that the Appellant took part in stone-throwing, when no evidence thereof was presented to the Trial Court, since the person who saw the Appellant throwing stones, if he saw him doing so at all, did not testify in court.
6. The Trial Court erred in ignoring the fact that the Appellant was neither arrested nor investigated on suspicion of stone-throwing in regard to this incident, and naturally not charged for the offense of throwing stones and/or another offense in regard to this incident, despite the fact that the law enforcement authorities were aware of the incident and the circumstances of the Appellant's injury.
7. The Trial Court erred by giving no weight to the doubts raised by the soldiers' version, and by explaining them with assumptions that have no basis at all in the evidence.
8.
 - a. The Trial Court erred in determining that **“it is not surprising at all that the Plaintiff abandoned the wedding in favor of throwing stones”** (p. 6, lines [sic] 27), thus aligning its positive finding whereby the Appellant had been present at the wedding (p.5, line 28) with its positive finding whereby the Appellant had thrown stones. This assumption has no basis in the evidence, and it is entirely rebutted by the circumstances of the incident that are not in dispute, by common sense and by the Plaintiff's testimonies, particularly the groom's testimony, which were not found to be unreliable.
 - b. The Trial Court erred in its assessment that there was nothing puzzling about the Appellant having blended in with an “innocent” group that included little children, women and elderly people as an act of camouflage, while, in the same breath, endorsing the Defendant's version whereby the Appellant had held stones in his hands. The Appellant shall claim that if this had indeed been an act of camouflage by the Appellant, there would have been no sense in the Appellant's holding stones.
 - c. The Trial Court erred in ignoring the puzzling version whereby the Appellant and others “held stones” on an internal road in Halhul, when no testimony was brought to the effect that there was also Israeli traffic on it, either civilian or military, and when even the force that shot the Plaintiff arrived on the scene in a *mesoarav* car [Translator's note: I suggest: sham Arab car], which could not have been a potential target for stone-throwers. The Court erred in

ignoring the implications of this puzzling “stone holding” argument on the Defendant’s version in general.

9. The Trial Court erred in ignoring the absence of any “genuine and immediate danger”, the existence of which is necessary as a condition for opening fire, as appears from the circumstances of the event and from the testimonies of the soldiers themselves.
10. The Trial Court erred in its interpretation of the open-fire regulations, which allow the opening of fire against a stone-thrower only when the detention procedure is “carried out immediately and promptly after the stone-throwing”. According to the interpretation of the Trial Court, the expression “immediately and promptly after” extends also to a shooting which, **according to the Defendant’s witnesses**, took place 7-10 minutes after having received a report on the stone-throwing, and at a distance of several hundreds of meters, up to one kilometer away from the road on which the stone-throwing had allegedly taken place.
11. The Trial Court erred in ignoring the Appellant’s claim whereby the soldier who shot him had no reasonable basis to suspect that this was a person who committed a serious crime, both under the circumstances of the matter and according to the soldiers’ version. The Trial Court erred in ignoring the Appellant’s claim that in the lack of reasonable suspicion, there was no room to conduct the suspect detention procedure, let alone use live fire.
12. The Trial Court erred in ignoring the Appellant’s claim that the soldiers had breached the open-fire regulations, which provide that “fire shall not be opened other than as a last resort for the detention of the suspect only, after all other means have failed”. The Trial Court erred in ignoring the fact that the soldiers could have seized the Appellant physically, without using fire.
13. The Trial Court erred in ignoring the Appellant’s claim that the soldiers had breached the open-fire regulations by carrying out the stages of the procedure consecutively, one after the other, without first verifying that the previous stage had failed.
14. The Trial Court erred in determining that even if the fire by which the Appellant was injured was negligent, the State is exempt from vicarious liability for the soldier’s acts:
 - a. The Trial Court erred in determining that the State has no vicarious liability for the tort of battery, even when the act is performed negligently;

- b. The Trial Court erred in ignoring the fact that the negligent shooting also fulfills the elements of the tort of negligence, as an independent civil wrong;
- c. The Trial Court erred in ignoring extensive case law in which the State was held liable for negligent shooting by its soldiers;
- d. The Trial Court erred in determining that the conditions for imposing vicarious liability under Article 25 of the Torts Ordinance had not been met, and this when the State had investigated the incident and endorsed the soldiers' behavior, both with regard to the conduct of disciplinary or criminal proceedings against them, and within the framework of the present trial.

It should be noted that this position of the Trial Court has far-reaching and even dangerous implications, of affording the State absolute immunity with regard to any negligent use of a weapon by soldiers, and imposing the liability in every case on the individual soldier only.

- 15. The Trial Court erred in determining that even had the Respondent been liable in torts to the Appellant, then one half of the damages determined should be reduced. This conclusion is based on the assumption (which the Appellant is challenging), whereby the Appellant threw stones on the road, feigned innocence and did not heed the soldiers' cries to stop (p. 13, line 41).
- 16. The Trial Court erred in assessing the Appellant's damage, which is considerably lower than what is appropriate for a person who was injured by a gunshot wound, hospitalized, suffered pain and was unfit to work for weeks.

The Honorable Court is therefore moved to reverse the judgment and to charge the Respondent with payment of trial expenses and legal fees for this appeal and for the proceeding in the Trial Court.

Jerusalem, Today, 1 April 2001

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Counsel for the Appellant

Att. Hisham Shabaita

(O.F. 3504)