The Courts

At The District Court in Jerusalem **CA 2163/01**
Sitting as the Court of Administrative Matters

Before the Hon. Justices: Dr. A. Habash, Moshe Ravid, Zvi Zilberthal

In the matter of: **_____ Abu Rian**
represented by attorney Hisham Shabaita

The Appellant

v.

The State of Israel
represented by the Tel Aviv District Attorney's Office - Civil

The Respondent

Judgment

This is an appeal from the judgment of the Magistrates Court in Jerusalem, the Hon. Justice Refael Yaaqovi, in CC 2899/98, dated 11 February 2001, in which the Appellant's complaint was dismissed, and it was determined that "the soldiers committed no tort against the Plaintiff", and that their conduct should be seen as being without blemish, or at least as being within the "reasonable margin of error".

On 4 October 1992, while the Appellant was attending a family event, along with many other guests, he went out to the reception courtyard after hearing that his cousin had been kidnapped near the courtyard.

A few minutes later, a civilian vehicle arrived, from which four IDF soldiers in civilian dress stepped out and started shooting. As a result of these shots, the Appellant was injured in the right thigh and the right hand.

The Respondent claimed in its defence that the injury to the Appellant was committed under circumstances which do not bring upon it a liability in torts. This is due to the "specific conditions" under which the Appellant was injured, which pertain to breaches of the peace

during the Intifada. According to the Respondent's claim, considering these conditions, no civil wrong was perpetrated against the Appellant by IDF soldiers.

Alternatively, the Respondent claimed that even were it to be determined that the specific soldiers committed a tort against the Appellant, the Respondent is not liable, in light of Article 25 of the Torts Ordinance, in the absence of vicarious liability. The Respondent further claimed that it was protected by the immunity for "acts of war" fixed in Article 5 of the Torts Law (State Liability), 5712-1952. The Respondent also relies on Articles 151-154 of the Penal Law [Consolidated Version], 5737-1977.

The Trial Court dismissed the Appellant's claim since, in its opinion, no negligence by IDF soldiers against the Appellant was proven; nor any other tort against him. The Court added that even had it determined that the soldiers had committed a tort against the Appellant, under the circumstances of the case it would have been battery, for which the Respondent has no vicarious liability, by virtue of the aforementioned Article 25.

The factual findings determined by the Trial Court, based on the Respondent's testimonies, are:

A. A wedding ceremony of the Appellant's cousin did take place, and was attended by the Appellant.

B. During the wedding, the news spread that the Appellant's cousin had been arrested.

C. This news generated unrest at the wedding, and people stepped outside.

With regard to the Appellant's injury, the Court accepted the version of the Respondent's witnesses, whereby soldiers had identified a group of stone-throwers who had entered the village. The soldier Noam received a report describing the members of the group. Noam's force moved into the village, where it identified a group of three persons holding stones in their hands, one of whom was the Appellant. Beside them stood an innocent group of people. Noam's force passed by where they were standing, intending to get closer to the three men.

The Trial Court accepted the soldiers' version of the course of events in which shots were fired, in the course of which the Appellant was injured. According to the said description, the soldiers arrived at a distance of approximately *one to two meters* away from the persons holding the stones. They got out of their vehicle while shouting "Freeze, police". The three men split, with two moving towards the group of people who had been at the wedding near a house in the area, and the third, namely the Appellant, running into the street and away from

the people. Two soldiers pursued the first group, and caught one of them outside the house and the other near the front gate to the house. A third soldier by the name of Paz pursued the Appellant, who was running down the street. The soldier (Paz) says in his affidavit (D/8), that since he was unable to catch the third young man, and the young man did not stop even though he had been called to do so, Paz stopped and fired once or twice toward the fleeing man's legs, hitting him.

The Trial Court adopted the opinion whereby, under the circumstances of the matter:

> **the soldiers should be left a reasonable margin of error which might be caused as a result of the conditions of the place, the field and the time constituting the backdrop to the operational incident, and which require a quick decision and not a legal consultation on what is and is not allowed in that incident** (CA 3684/98 *The State of Israel v. Ahalayel, Takdin Elyon* 99 (1) 1332).

The Trial Court proceeded to determine that:

> **[…] when the operation of the army forces is legitimate, they are not held liable even if an innocent passerby is unfortunately injured at the time of the use of force … and, consequently, anyone injured thereby can complain to no one but the rioters and stone-throwers.**

The Trial Court specified the three conditions for opening fire in stone-throwing situations: the existence of genuine and immediate danger, the risk to human life considering the field conditions, the size of the stones, the balance between the forces, and, additionally: "No fire shall be opened unless the detention procedure is carried out immediately and promptly after the stone-throwing. If the suspect is not detained immediately and promptly after the incident – weapons shall no longer be used as part of the detention procedure."

The Court dismissed the claims presented by the Appellant's counsel, whereby the shooting which took place was not "immediately and promptly after", and determined that the conduct of the Appellant, who was seen holding a stone, should be viewed as "a single stone-throwing continuum", against which there was no impediment to using weapons, and added that the Appellant's flight could have put the soldier in danger of the fleeing Appellant throwing stones at him.

The Trial Court examined the possibility of holding the Respondent liable, based on the assumption that the shooting violated the open-fire regulations. Even then, the Court came to the conclusion that the Respondent should not be held liable therefor, since the tort in question would have been that of battery, for which the Respondent has no vicarious liability, by virtue of Article 25 of the aforementioned law.

On the legal level, the Appellant's counsel raised several arguments, the most substantial of which were:

A. The soldiers' actions violated the open-fire regulations;

B. The State bears vicarious liability for negligent shooting committed by its soldiers.

On the factual level it was claimed that there was no evidence as to the Appellant's involvement in any act of stone-throwing. It was mainly hearsay, whereas the soldier who the Respondent claims *saw* the stone-throwing, was not called to the stand.

The matter of the State's liability in torts as a result of the acts or derelictions of IDF soldiers committed during the course of an "act of war", is regulated in Article 5 of the Torts Law (State Liability), 5712-1952 (hereinafter: the Torts Law). Article 5 provides that:

> **The State is not liable in torts for an act performed through an act of war of the Israel Defence Forces.**

In CA 5964/92, 6051/92, *Jamal Qasem Bani Uda et al. v. The State of Israel*, and counter-appeal, *Dinim Elyon* 61, 280, the Supreme Court discussed the interpretation of this Article.

In brief, the facts of that case were that at noontime on 18 August 1988, a civilian vehicle carrying IDF soldiers arrived at a locksmith's workshop in the village Tammun. When several soldiers stepped out of the vehicle, some of them in uniform, three people fled, including the Appellant. The soldiers pursued them and shot at them. As a result of the shooting, the Appellant was injured, whereas one of the other fleeing men was killed. The shooting took place very shortly after the soldiers' arrival on the scene and not in accordance with the "suspect detention procedure". It was not proven that the Appellant and the person who was killed were suspects, and the force faced no danger.

The Supreme Court determined that the force "faced no danger" and that it was a "policing" act aimed at detaining a suspect, which was performed in a neglectful manner and against the procedures. The shooting was committed only for the purpose of capturing suspects, and not for the purpose of fighting them. The risk created by the shooting, under the circumstances of

the matter, was "an ordinary risk, which is properly dealt with by the ordinary tort laws" (Section 11 of the judgment)

The Supreme Court devoted the judgment to a discussion of the term "act of war" and its various aspects.

It was determined there that all the circumstances of the event should be examined, including: "the purpose of the act, the location of the event, and the duration of the act, the identity of the operating military force, the threat that preceded it and was expected from it, the strength and scope of the operating military force, and the duration of the event. All of these shed light upon the nature of the special belligerent risk caused by the act."

In order to discuss the Appellant's claims, we shall bring the open-fire regulations that prevailed at the relevant times, and as quoted in the summary of the Appellant's main arguments:

> **Part C: Opening Fire as+ Part of the Suspect Detention Procedure**
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> **(…)**
>
> **Definitions:**
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> **4. "Suspect" – A person concerning whom there is reasonable cause to assume that he perpetrated, assisted in perpetrating, attempted or was on his way to perpetrate a terrorist act, or other serious crime.**
>
> **Pay Attention! The existence of a suspicion that is based on facts, data or reliable information is required. All in consideration of the conditions of the location and time. A vague suspicion, a hunch or a guess is *not* sufficient.**
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> **5. "Serious Crime" – Murder, attempted murder, illegal carrying of arms, belonging to a hostile organization and acting therein, stone-throwing towards a person or vehicle when genuine danger exists and the arrest is carried out immediately**

during the event, and the malicious infliction of damage to property in security-related circumstances "cold terrorist act").

Stone-throwing – Pay Attention!

a. Fire shall not be opened at a stone-thrower, other than as part of the suspect detention procedure, and only when the stone-throwing poses genuine and immediate danger.

b. Genuine danger shall be deemed to exist in a throwing of stones at a moving car, with the intention of hitting it; or stone-throwing in other circumstances that endanger human life - taking into consideration the field conditions, the size of the stones, the balance between the forces of the aggressors and our own, etc.

c. No fire shall be opened unless the detention procedure is carried out immediately and promptly after the stone-throwing. If the suspect is not detained immediately and promptly after the incident - weapons shall no longer be used as part of the detention procedure.

(…)

7. Fire shall not [sic] be opened only as a last resort for detention of the suspect and after all other means have failed.

The first question we must answer is whether or not what took place at the scene of the incident falls under the definition of an act of war.

According to the facts determined in the judgment, it is obvious that the event in question was not an act of war. The entering force neither pursued nor saw stone-throwers. It received notice from a third party regarding a group that was throwing stones. A significant period of time went by between the receipt of the notice and the force's arrival at the village, where two

groups of people were standing, an innocent group which had participated in the wedding, and a group of three men, who, it was claimed, held stones. Even when the force arrived and the three men fled, the situation in which the force was placed was that of **pursuer** and **pursued** (rather than a face to face encounter, in which the soldiers stand on one side and the stone-throwers on the other) with no confrontation between the two sides. The circumstances of the shooting, from which the Appellant was injured do not indicate that he was "fought" against, but that the shooting was committed "only for the purpose of capturing the suspects", in the language of the Bani Uda judgment. Under these circumstances, neither the shooting soldier nor the soldiers of his unit faced any genuine and immediate danger.

The shooting soldier's act stood in utter contrast to the provisions of the open-fire regulations with regard to the "suspect detention procedure". Regulation 5 of the "Soldier Regulation Sheet" (A/7) refers to stone-throwing and draws attention to the fact that "fire shall not be opened at a stone-thrower, other than as part of the suspect detention procedure, and only when the stone-throwing poses genuine and immediate danger."

The regulation proceeds to define "genuine danger", and finally determines unequivocally: "No fire shall be opened unless the detention procedure is carried out immediately and promptly after the stone-throwing. If the suspect is not detained immediately and promptly after the incident, weapons shall no longer be used as part of the detention procedure".

In the case before us, the Appellant fled from the soldier and drew away from him and did not heed the cries ordering him to stop. The soldier cocked his gun and fired two shots towards him and hit him. According to the facts determined in the case, not one of the circumstances mentioned in the said rules was present, and there is no doubt in our minds that the shooting soldier acted against the said regulations and in violation thereof.

Did the State Sanction the Shooting Soldier's Conduct?

The Appellant's counsel claimed, in Section 16 of his summary of main arguments, that following the Appellant's complaint an investigation was opened against the soldiers, at the end of which the Office of the Military Advocate determined that the shooting that was performed towards the Appellant was justified. The State's counsel confirmed in his Answer that no legal proceedings were conducted against the soldiers (Section 16 of the Answer). The Appellant's counsel seeks to infer from this position, taken by the State, as well as from the remaining sections of the Answer, especially from Section 17 forth, in which the State justifies the act, that the State has in fact sanctioned its soldiers' act, and did not prosecute any

one of them. In his opinion, since the shooting soldier was not prosecuted, this position can be seen as an endorsement of his actions and of the shooting that was committed. Therefore, the final part of Article 25 of the Torts Ordinance is applicable.

In CA 667/77 (*Dadon v. Atias*, *Piskei Din* 32(2), 169, 174) Justice Haim Cohn (as was his title then) decreed that if the State claims that the act was performed by a civil servant, in the course of lawfully fulfilling his duty, namely that he committed no civil wrong, then it is deemed to have sanctioned the assault and chosen to assert its legality. Also here, in our case, since the State chose to assert the legality of the shooting committed by the soldier that hit the Appellant, it is deemed to have sanctioned the act of the battery, and therefore bears vicarious liability for the injury and for the damage caused to him.

It is our opinion that the conclusion reached by the Trial Court is erroneous. The shooting soldier violated the open-fire regulations, he was not in a genuine life-threatening situation, which would have made the act an act of war, as defined in the Benny Uda judgment (see also the opinion of the Hon. Chief Justice Shamgar in CA 623/83, *Levy v. The State of Israel, Piskei Din* 40(1) 477, 479, quoted in the Bani Uda judgment).

In view of the foregoing, the State has, in this case, no defence in claiming that the shooting was an "act of war".

The final result is that we grant the appeal, and reverse the judgment.

The Trial Court decreed, in Section 47 of its judgment, that assuming that the State is found to be liable, the sum of the damages would amount to NIS 17,300, of which the Appellant would be entitled to one half due to his contributory fault for fleeing the scene. We did not deem to intervene in this determination, and we hereby decree that the compensation due to the Appellant is the sum of NIS 8,650, according to the value thereof on the date of the judgment that is the subject of this appeal.

In view of the foregoing, the Respondent shall pay the Appellant the aforementioned compensation, as well as trial expenses for both proceedings and legal fees for the appeal in the sum of NIS 5,000 as of today, plus VAT.

Issued today, 28 Tammuz 5762 (8 July 2002), in the absence of the parties.

The Office of the Court Clerk shall send a copy of the judgment to the parties' attorneys.

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Justice Dr. Uni Habash	**Justice Moshe Ravid**	**Justice Zvi Zilberthal**