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At the Supreme Court Sitting as the Court for Civil Appeals

CivA 7995/02

Before: **Honorable Vice President E. Rivlin**
Honorable Justice A. Grunis
Honorable Justice E. Hayut

The Appellants: 1. **Military Commander in the Judea and Samaria Area**
2. **State of Israel**

v.

The Respondent: **Muhammad ‘Abd al Karim Sha’anubi**

Appeal from the judgment of the Haifa District Court in CivC 993/98 of July 16, 2002, given by Justice Y, Cohen

Representing the Appellants: Att. Einat Gidoni

Representing the Respondent: Att. Meron Keen

Judgment

Justice A. Grunis

1. Appeal from the judgment of the Haifa District Court (Hon. Justice Y. Cohen) wherein the respondent's claim was accepted and the appellants were found responsible for causing his damages and liable for a compensation of 535,000 ILS for these damages. The appellants were also ordered to pay the respondent costs and legal fees in the sum of 80,000 ILS.
2. According to the factual findings of the District Court, the respondent was shot on August 27, 1991 by IDF soldiers in the village of Burqa in the Nablus area, which is the village where the respondent resided. The respondent was injured in the left leg by this shooting. Three different accounts of the circumstances leading up to the shooting were presented to the District Court, two of which were the accounts of respondent-plaintiff. According to the account given by the respondent in his Affidavit of Evidence in Chief, on the day of the incident he was in a wooded area in the eastern part of his home village and some time around 1 to 2 pm, a group of soldiers arrived at the place. The soldiers began shooting without warning and the respondent was injured in the leg by this shooting. According to the account the respondent gave under cross-examination, when he saw the

soldiers approaching the area, when they were about 100 meters away from him, he decided to put some distance between them and him in order avoid contact with them. After he began to move away, he was shot by one of the soldiers and hurt in the leg. The respondent refrained from describing his moving away as “fleeing”.

3. Officer D testified on behalf of the appellants and his account of the incident was different. According to his account, on that day, a unit of soldiers was dispatched under his command to apprehend suspected terrorists. The unit arrived at an area of the village where the homes in which, according to the intelligence information transmitted, the suspects were located. When they arrived in the area, the soldiers detected individuals who had begun fleeing and therefore suspected that these were the suspects they had arrived to apprehend. Officer D began chasing one of those individuals, who later turned out to be the respondent. Officer D testified that the respondent generally matched the description of the suspect they had come to apprehend with respect to “age, gender etc.” As stated by Officer D in his testimony: “The whole chase developed because the plaintiff (the respondent – A.G.) fled a location where he is supposed to be a wanted person”. According to Officer D’s account, he shouted a number of times to the fugitive-respondent, but the latter did not stop and continued to flee. Officer D shot in the air, but the respondent did not stop. Officer D testified “if the plaintiff hadn’t run I might have not even messed with him. I would have detained him for identification, checked the specifics and, as protocol was then and is now, I would have checked on the communications system and received orders whether to arrest him or not to arrest him.” The pursuit after the respondent lasted for many minutes, during which the respondent knew that it was a member of the security forces chasing after him and calling him to halt. He had ample time to respond to the calls to him. According to Officer D’s affidavit, after a long pursuit after the respondent, he executed selective shooting directed at his legs using a Glilon rifle of “a few bullets in a single, slow, relative and accurate shot, through the sight and while kneeling in order to make sure the injuries would be to the legs only, where he did eventually get hit”. Officer D testified that he opened fire at the respondent as he was suspected of a dangerous crime, membership in a terrorist organization, as “he was fleeing a location defined as an area where there is a high probability that a suspect/suspects are located and the very fact that he fled and did not respond to the orders to halt, the open-fire regulations allow shooting at him...”. Officer D testified that he stopped shooting after each bullet in order to check if the suspect had halted and only after he made sure that he had continued running, fired another bullet. Under cross-examination, Officer D testified that although a number of years had elapsed since the incident, he remembered it due to the long pursuit he conducted after the respondent. Shortly after the incident, the respondent was evacuated to hospital where his identity became known. It turned out that he was not one of the suspects the unit was dispatched to apprehend, though a day before the incident, an administrative detention order was issued against the respondent due to his being a member of the Fatah movement. The litigants did not dispute that the pursuit of the respondent was not conducted for the purpose of executing the order issued against him previously.
4. The District Court preferred Officer D’s account to that of the respondent and found that the respondent fled the area when he saw the soldiers, did not respond to the ‘halt’ calls directed at him and did not cease his flight even after shots were fired into the air. Despite this, the District Court saw cause to accept the claim and determined that Officer D breached the open-fire regulations as the shooting was carried out by him at an individual whose identity he did not know “and whom there was no reason to suspect of committing an offense”. The court found that the fact that it was later discovered that an administrative detention order was issued against the respondent the day before the incident was immaterial as “the question whether D was negligent in shooting toward the plaintiff (the respondent – A.G.) or not must be examined in accordance with the information in D’s possession at the time of the pursuit rather than that which came to be known later”. The District Court noted that not every breach of one of the open-fire regulations can be considered an act of

negligence, but believed that in the circumstances of the case there was no choice but to conclude that the shooting at the respondent was afflicted by negligence. The District Court added that Officer D's attempt to arrest the respondent was not connected to an offense of the crime class which the respondent had committed "although one would tend to deny the plaintiff (the respondent – A.G.) compensation due to his being a member of a hostile organization, the legal situation currently in effect does oblige, in my opinion, finding the defendants liable and changing this legal situation is at the hands of the legislature". The court later analyzed the evidence presented to it with respect to the damages and ordered the appellants to pay the above mentioned sums to the respondent (paragraph 1).

5. In my view, the lower court erred when it concluded, based on the factual findings it made, that the shooting executed by Officer D was afflicted by negligence. Officer D did not breach the open-fire regulations having aimed at the respondent's legs. It seems that the different conclusion drawn by the District Court on this matter stems from the definition of the term "suspect" in the relevant section of these regulations, which reads as follows:

4. "Suspect" – a person regarding whom there is reasonable cause to assume that he or she committed, aided and abetted, attempted or was en route to commit a dangerous crime. Attention! There must be suspicion based on facts, figures or reliable information, subject to conditions of time and place. Vague suspicions, feelings or guesses are insufficient.
5. "Dangerous Crime" – a crime which presents a real risk to a person's life or body such as: murder, illegal gun possession, membership in a hostile organization or activity in such in a manner which may pose a risk to human life or bodily integrity, stone throwing at a person or vehicle where actual danger is present and the arrest is made in real time, and deliberately causing damage to property in relation to security and in a manner which may risk human life or bodily integrity.

(emphases in the original, A.G.)

Officer D testified that the respondent fled a relatively small area of a number of houses in the village, in which the soldiers were provided with intelligence that there were suspects wanted due to terrorism, i.e., committing a dangerous crime. According to Officer D's testimony, the respondent's age and gender matched those of the suspect the military unit had arrived to the area to apprehend. When counsel for the respondent asked "what offense did you think he was suspected of?" Officer D replied: "that he was wanted and that he could have been the suspect we were searching for who belongs to a terrorist organization and that he was fleeing the area". Officer D testified that the respondent fled toward a clearing and noted that it was the longest pursuit of a suspect he had ever conducted, compared to hundreds of other pursuits, and that this was why the incident was etched in his memory. The cumulative significance of these particulars is that in the conditions of time and place relevant to the incident, there was "reasonable cause to assume that he or she committed, aided and abetted, attempted or was en route to commit a dangerous crime". At the point at which the shot was fired toward the respondent, he therefore came under the definition of "suspect" in the relevant section of the open-fire regulations. The fact that it later became known that the respondent indeed was a wanted person, but not the one whose arrest was sought, should not be held against Officer D in the specified circumstances. As the District Court itself wrote "the question whether D was negligent in shooting toward the plaintiff (the respondent – A.G.) or not must be examined in accordance with the information in D's possession at the time of the pursuit

rather than that which came to be known later”. This conclusion corresponds with the position expressed in a different matter, CrimFH 9263/99 **State of Israel v. Bakshi**, IsrSC 54(3) 556, according to which the phrase “reasonable cause to assume” which appears in statutes should not necessarily be interpreted as a basis for granting power to take action when the reasonable cause to assume was something that the acting competent agent saw (see paragraph 13 of Justice T. Orr’s opinion), as aforesaid, the text of the open-fire regulations itself demands the existence of a suspicion which is based on facts, data or reliable information, **all considering the conditions of time and place**. Particulars which came to be known post factum do not, in themselves, have power to undermine the reasonableness of the act, such as they cannot, in themselves, confer an air of reasonableness on an act that was unreasonable. Moreover, it has been previously ruled that not every breach of the open-fire regulations is necessarily considered an act of negligence (see, CivA 3889/00 **Lerner v. State of Israel**, IsrSc 56 (4) 304) and that “the soldiers should be allowed a reasonable margin of error which may be caused as a result of the conditions of time, place and turf in the background of the operational incident under dispute and which require quick decisions rather than legal consultation regarding what is permitted and prohibited at the moment” (remarks of Vice President S. Levine in CivA 3684/98 **State of Israel v. A-Khleil** (unreported), paragraph 5 of his judgment). If I had thought – and I do not – that Officer D breached the open-fire regulations in shooting toward the respondent’s legs, I would have found that considering the conditions of time and place in which Officer D acted, this breach is within the scope of this “reasonable margin of error”, and therefore it cannot be found that Officer D was negligent in carrying out this shooting.

The appeal is accepted. The judgment of the District Court is overturned and the claim is rejected. In the circumstances of the matter, no writ for costs is issued.

Justice

Vice President E. Rivlin

I concur.

Vice President

Justice E. Hayut

I concur.

Justice

Held as stated in the judgment of Justice A. Grunis

Given today 13 Tishrey 5768 (25 September 2007)

Eliezer Rivlin 54678313-7995/02

Vice President

Justice

Justice