At the Supreme Court Sitting as the High Court of Justice

HCJ 2150/96

Before:	**Honorable Justice T. Strasberg-Cohen** **Honorable Justice I. Englard** **Honorable Justice E. Rivlin**
The Petitioners:	**1. _____ Harizat** **2. HaMoked: Center for the Defence of the Individual**
	v.
The Respondent:	**1. Attorney General** **2. "M"**
	Petition for *Order Nisi*
Session date:	14 Adar 5762 (26 February 2002)
Representing the Petitioners:	Att. Rosenthal Andre
Representing Respondent 1:	Att. Nitzan Shai
Representing Respondent 2:	Att. Peleg Eitan and Att. Yifat Arnon

Judgment

Justice T. Strasberg-Cohen

This petition concerns petitioners' request to order the attorney general to press criminal charges against the interrogators of _____ Harizat, deceased, for causing his death.

The Facts

1. On April 22, 1995 _____ Harizat, the late brother of petitioner 1 (hereinafter: **the deceased**), was detained and brought to an interrogation facility of the Israel Security Agency [formerly known as the General Security Service or Shin Beit, translator's note] in Jerusalem. The deceased's interrogation lasted a few consecutive hours and was carried out by a number of interrogators, intermittently. The Israel Security Agency (hereinafter: the **ISA**) had intelligence information which indicated that the deceased was in charge of an Izz-ad-Din al-Qassam cell in Hebron, which had committed several murders and terrorist attacks in the past and was going to commit similar acts in the future. The deceased's interrogation focused, first and foremost, on the whereabouts of cell leaders and members and on the additional terrorist attacks which were planned by them. The interrogation was carried out intensively, using – *inter alia* – an interrogation method known as "shaking". The interrogators used this method based on their assessment that there was an extremely important and urgent need to obtain information which, they assumed, was in the possession of the deceased and which was required in order to prevent terrorist attacks that , according to the same information, were about to be carried out. The deceased's interrogation was stopped as a result of a sudden deterioration of his health. Subsequent to an examination by a paramedic, who ordered rest which did not improve his condition, the deceased was brought to the Hadssah hospital, where he was admitted, unconscious, and unfortunately, passed away after three days. A pathological examination of the deceased indicated that the death was caused "*… as a result of a severe inflammation of the lungs with a multi system failure caused following extensive brain edema and head bleeding. The edema and bleeding were caused as a result of an angular acceleration of the head, without a direct and/or indirect injury to the head*."

2. Following the deceased's death, the Police Investigation Unit (hereinafter: the "**PIU**") conducted an investigation into the circumstances of his death. The urgency in obtaining the information from the deceased was examined and in view thereof the methods used to obtain such information were reviewed. The report submitted by the PIU to then State Attorney, Dorit Beinisch, included a recommendation, based on the entire evidence including expert opinions, not to press criminal charges against any of the interrogators, due to lack of sufficient evidence required to convict them of causing the deceased's death. Upon receipt of the PIU report, the investigation material was re-examined by the state attorney's office. Among other things, the testimonies of the ISA interrogators taken by the PIU and the medical opinions given to the PIU by the physicians of the Institute of Forensic Medicine were reviewed and consultations were held with expert neurosurgeons. In light of the above, the questions which were examined were whether criminal charges should be pressed against any of the persons who were involved in or in charge of the interrogation and whether there was a reasonable likelihood of establishing that any of the interrogators were guilty of causing the deceased's death. Following these examinations it was resolved that criminal charges should not be pressed against any of the interrogators. Nonetheless, the state attorney recommended to re-examine certain issues from which conclusions had to be

drawn and to take organizational and disciplinary measures. The decision was made with the consent of then Attorney General, Michael Ben Yair. With respect to respondent 2, it was resolved to initiate a disciplinary action against him before the Tribunal for Israel Security Agency Institute for Intelligence and Special Affairs Employees (hereinafter: the **tribunal**) due to the fact that this respondent was the last to interrogate the deceased and had used, during the interrogation, the "shaking" method in a manner that breached the guidelines provided to the interrogators in that regard. The tribunal, presided by Judge Dr. O. Mudrik, acquitted respondent 2 from most of the charges and convicted him of a disciplinary offense to which the tribunal referred as a "mere technical failure", sentencing him to a caution. The tribunal held that the deceased had the information required to locate the whereabouts of a "ticking bomb" which threatened the lives of innocent citizens.

On October 17, 1995, the petitioners contacted the attorney general with an appeal against the decision of the state attorney not to press criminal charges against the deceased's interrogators (hereinafter: the **appeal**). The appeal was rejected in a detailed decision dated February 6, 1996, along with a detailed and reasoned response submitted by the attorney general to this court within the framework of another petition concerning the deceased, which was withdrawn at the request of the petitioners in that case after the response of the attorney general was received (HCJ 5380/95 **The Public Committee against Torture in Israel v. the Attorney General**).

3. Following the rejection of the appeal, the petitioners filed the petition before us, in which this court is requested to order the attorney general to press criminal charges against the ISA agents who interrogated the deceased. In his pleadings before us, the petitioners' attorney specified the offenses which, in his opinion, may be attributed to the [interrogators] for causing the deceased's death. These are manslaughter, or causing death by negligence, or, at a minimum, causing severe injury.

   The hearing of this petition was postponed on consent pending the granting of a decision in another petition which was concerned with the ISA interrogation methods. Judgment in that petition, which concerned the legality of ISA interrogation methods and to which several other petitions were joined, was rendered on September 6, 1999 (HCJ 5100/94 **The Public Committee against Torture in Israel v. the Government of Israel**, IsrSC 33(4) 817 (hereinafter: the "**public committee**")). Following said judgment the attorney general was requested to submit to this court a supplementary notice referring to the developments which occurred following the submission of the original notice in this case, and mainly to the question whether the **public committee** judgment had any bearing on the petition before us. Having re-examined the investigation material, State Attorney, Edna Arbel, who replaced her predecessor, and Attorney General, Elyakim Rubinstein, who replaced his predecessor, concluded that criminal charges for causing the deceased's death should not be pressed against the ISA interrogators. It was further stated in the supplementary notice, that the **public committee** judgment had no bearing on its present decision.

The Arguments of the Parties

4. The main argument made by counsel for the petitioner, Attorney Andre Rosenthal, is that the attorney general's decision not to press criminal charges against the deceased's interrogators is extremely unreasonable and that it is influenced by extraneous considerations to such an extent which justifies the intervention of this court. According to counsel, the ISA interrogators were aware of the possibility that death or bodily injury would be caused to the deceased, and that any reasonable interrogator could have and should have foreseen such possibility as a result of the "shaking" which was used during the interrogation. Alternatively, he adds, that even if there is no sufficient evidence to prove the factual and mental elements required for a conviction of manslaughter, which requires awareness of the possibility that death could be caused, or a conviction of causing death by negligence, which requires that the possibility of causing the death was foreseen, then, at least, the offense of causing severe injury to the deceased chould be attributed to the interrogators. Counsel for the petitioners further argues that the interrogators cannot use the necessity defense, as defined in section 34(11) of the Penal Law, 5737-1977 (hereinafter: the "**penal law**"), either *ab initio* or retroactively, and that in any event, refraining from serving an indictment simply because the accused might invoke the "necessity" defense is unreasonable in and of itself. Furthermore, the mere assumption that the interrogators could rely on such a defense contains a latent assumption that criminal offenses were committed by them during the interrogation. Counsel continues to argue that the attorney general did not exercise independent discretion within the powers granted to him under the law, giving excess weight to the fact that the persons involved in this case were ISA investigators.

   On the other hand, Attorney Shai Nitzan claims, on behalf of the respondents, that the decision not to press criminal charges against the deceased's interrogators, was made based on appropriate and relevant considerations, and that the court should not intervene therein. He argues that it is only seldom and only in rare cases that this court intervenes in the attorney general’s decisions on whether or not to press criminal charges, and even more so when the decisions are based on considerations relating to sufficiency of evidence, and that the case at hand is not one of these rare cases. Therefore, based on the judicial policy of this court, its intervention in this case is not warranted. On its merits, the respondents argue that the factual and mental elements required for a conviction of manslaughter could not be established since this offense requires a mental state of awareness of the possibility that death could be caused, which cannot be attributed to the interrogators in this case. This also applies to the factual and mental elements required for a conviction of the offense of causing death by negligence, since neither subjective nor objective predictability of the possibility that death or serious injury would be caused as a result of the "shaking" may be attributed to the interrogators. The respondents further claim that there is a difficulty to establish the causal, factual and legal connection between the acts of any of deceased's interrogators and his death. They further claim that under the circumstances, the interrogators could have successfully used the necessity defense had criminal charges been pressed against them. According to them, the likelihood

that the interrogators or any one of them would have been convicted was very low. Therefore, criminal charges should not have been pressed against them.

Discussion

5. It has long been held and there is no dispute that the decisions of the prosecuting authorities, including the decisions of the attorney general, are subject, as are the decisions of any other administrative authority, to judicial review by this court:

> The discretion of a prosecutor is a governmental discretion with a judicial nature. It is limited within the boundaries of the criminal procedure law… the exercise of this discretion is governed – in addition to and in harmony with the provisions of the criminal procedure law – by the general provisions of administrative law. Therefore, a prosecutor must make his decision based on the relevant considerations and on such considerations only. He must act in good faith, fairly, without discrimination and reasonably (HCJ 935/89 **Uri Ganor v. the Attorney General**, IsrSC 44(2) 485, 508) hereinafter: **Ganor**)); and see also, for instance, HCJ 329/81 **Mira Nof v. the Attorney General**, IsrSC 37(4) 326, the judgment of Justice Barak (as then titled), 333-336).

In this case, we are concerned with a decision of the prosecuting authorities and of the attorney general in his position as head of the prosecution system. "First and foremost of the prosecutors is the attorney general" (**Ganor**, p. 507) and as such, he is afforded governmental authority which involves exercising discretion:

> Within the framework of his authority, the prosecutor exercises his discretion in accordance with the rules applicable to the exercise of discretion by a governmental authority. Within the framework of his discretion he decides whether or not criminal charges should be pressed and if criminal charges are not pressed, he determines the cause for closing the file (HCJ 2682/99 **David Appel v. the State Attorney**, IsrSC 55(3) 134, 137).

In making his decision whether or not to press charges against an individual, the attorney general must take into account two types of considerations: the first is the sufficiency of the evidence and the second – with which we are not concerned in this case - is the presence or absence of public interest, as provided in the first part of section 62 of the Criminal Procedure Law [Consolidated Version], 5742-1982:

> If the prosecutor to whom the investigation material was sent sees that the evidence is sufficient for indicting an individual, the prosecutor will press charges against that person, unless the prosecutor is of the opinion that there is no public interest in holding the trial… (emphasis added – T.S.C.)

According to the above section 62, in order to file an indictment, the attorney general should consider whether the evidence contained in the investigation material is sufficient for indicting an individual. The question whether such evidence exists is tested by the "reasonable likelihood for a conviction" test, or in other words "is there a reasonable likelihood that the court will hold that the accused committed the offense beyond reasonable doubt" (see HCJ 2534/97 **MK Yona Yahav v. State Attorney**, IsrSC 51(3) 1, 12 (hereinafter: **Yahav**). This test is used in the review of the investigation material and the admissibility, weight and quality of the evidence.

6. A decision to press charges or not to press charges is subject to judicial review. "The scope of judicial review of the attorney general's decisions not to press charges against an individual does not differ, in principle, from the scope of the review of any other administrative decision" (HCJ 8507/96 **Theodor Orin, Att. v. the State of Israel**, IsrSC 51(1) 269). Nevertheless, the court is not a prime-attorney general and does not replace the discretion of the attorney general with its own discretion: "Only if the attorney general's assessment of the weight of the evidence is clearly unreasonable, will this court intervene in his discretion" (HCJ 3846/91 **Att. Pinchas Maoz v. the Attorney General**, IsrSC 46(5) 423, 436). This is especially so with respect to professional decisions that lie at the core of the attorney general's authority as the head of the prosecution, including the decision whether or not to press charges (see, for instance, HCJ 292/86 **Elyakim Ha'etzni, Att., v. the Attorney General**, IsrSC 42(4) 406; HCJ 223/88 **Att. Yoram Sheftel v. the Attorney General**, IsrSC 43(4) 356). Intervention in such decision is limited and rare, especially when the decision is based on considerations concerning the sufficiency of the evidence:

> In general, this court should not judicially review the attorney general's decision concerning the sufficiency of the evidence. Intervention shall be very limited and rare…Hence, it is clear, that not every mistake made in weighing the evidence is regarded as extreme unreasonableness, but only a material, clear and significant mistake. (**Yahav**, p. 24).

And

> If, in general, the High Court of Justice does not intervene in the attorney general's decision whether or not to press charges. This applies, first and foremost, to the issue of evaluating evidence, an issue which should be clearly decided by the prosecuting authorities (HCJ 4736/98 **Maariv, Modiin Press Ltd. v. the Attorney General**, IsrSC 54(1) 659, 666).

This court reiterated this ruling by saying:

> "The court's inclination to intervene in the decision of the attorney general not to press criminal charges against an individual due to lack

> of evidence is very limited. The decision whether there is sufficient evidence to press charges in a certain case lie at the core of the attorney general's authority…" (HCJ 8121/99 **Israel's Media Watch v. the State Attorney's Office**, Dinim Elyon, volume 58, 81 paragraph 4 of the judgment (hereinafter: **Israel's Media Watch**); and see also HCJ 3425/94 **Uri Ganor, Att. v. the Attorney General**, IsrSC 50 (4) 1, 10 (hereinafter: **HCJ 3425/94**); and HCJFH 3865/97 **MK Yona Yahav v. Mrs. Edna Arbel, State Attorney**, Dinim Elyon, volume 54, 244).

7. Can it be stated, in this case, that the general attorney's assessment of the weight of the evidence is clearly unreasonable? Is this case one of these rare exceptions in which this court intervenes in the general attorney's discretion concerning the question of pressing criminal charges against an individual? My answer to these questions is negative based on two different levels of reasoning: The first pertains to the nature of the review and examinations conducted by the prosecuting authorities and the attorney general and the proceedings taken until the decision was made. The second pertains to the considerations which led the attorney general to make the above decision.

   With respect to the decision making process, we follow the rule, that the prosecution authorities are presumed to execute their missions in an appropriate manner:

   > In making such decision, the attorney general and the staff of the state attorney's office are presumed to have thoroughly and professionally examined all the evidence by comparing the testimonies of the various witnesses and evaluating their prima facie credibility and relative weight (HCJ 3425/94, p. 10).

   The decision making process in the present case reinforces and strengthens this presumption. The review of this case by the prosecuting authorities was professional, serious and comprehensive. The officials in charge of the matter, commencing with the PIU investigators, continuing with the review of two state attorneys and ending with the review of two attorneys general, examined and re-examined the evidence several times. Upon conclusion of these examinations they made their decision. Under these circumstances, wherein the decision making process was proper, professional and comprehensive, there is no room for intervention in the decision of the state attorney's office and the attorney general , (**Israel's Media Watch**, paragraph 4 of the judgment).

8. And from here, to the considerations that lead to said decision. As noted, the purpose of the deceased's interrogation was to ascertain the nature of his actions in connection with an Izz-ad-Din al-Qassam cell, which belonged to Hamas' military branch. Many murders and terrorist attacks against Israeli citizens were attributed to this cell. According to ISA information, this cell intended to carry out additional severe attacks, including suicide attacks, hence the great urgency in obtaining the information about it before additional murders and attacks were carried out. Due to the crucial need for the purpose of which the deceased was interrogated, the "shaking" method was used

during his interrogation. In their acts, the interrogators followed the instruction from their superiors, which were set out following the recommendations of the Landau Committee and affirmed by the Israeli government and a special ministerial committee for ISA interrogations. In the meanwhile a change occurred, and within the framework of the **public committee** case the court re-examined the legality of ISA interrogation methods including the guidelines pursuant to which the interrogators acted. The court held that the "shaking" method was inappropriate. This decision bears upon the legality of the use of this method, in retrospect, so that when the deceased was interrogated, the use of this method was inappropriate. However, the decision of the attorney general not to press charges against the ISA interrogators is not based on an argument relating to the legality of the use of the "shaking" method. It is based on other considerations, as specified below, in which intervention is not required.

9. The attorney general is of the opinion that in view of the circumstances of the case, taking into account the time, the place and the subject matter thereof, awareness of the possibility that the use of "shaking" would cause material damage to the person being interrogated, much less the possibility that the use of such method would result in his death, cannot be attributed to the ISA interrogators. Similarly, the ISA interrogators may not be held to have foreseen the possibility that death would be caused. His position is that the tragic outcome of the interrogation was the result of a rare coincidence which was not foreseen by the deceased's interrogators and could not have been foreseen by a reasonable interrogators. According to their testimonies, the ISA interrogators were not aware of the possibility that death would be caused as a result of the "shaking", and did not foresee such a possibility. This, in view of their accumulated experience in using the "shaking" method, which never caused material damage or death to the persons interrogated, and in view of the permission to use this method under certain circumstances. This position is supported by the medical opinions given concerning the circumstances of the deceased's death, and especially the opinion of Prof. Sahar, director of the department of neurosurgery at "Sheba" Hospital in Tel Ha-Shomer. This opinion, which also refers to the "shaking" carried out by respondent 2 in breach of the guidelines, provides that the deceased's death was caused "following an extremely rare complication… such complication is described in the medical literature as a complication suffered by only one in 1,000 people who suffer a head injury." It should be pointed out that a motion to disclose information was filed by the petitioners which was intended to impeach Prof. Sahar. We have reviewed the material and did not find anything which may undermine his expertise therein.

10. The first relevant offense is the offense of manslaughter. For the purpose of this offense, reference should be made to the Penal Law (Amendment No. 39), 5754-1994 (hereinafter: "**amendment 39**"). Pursuant to this amendment, in order to establish the offense of manslaughter under section 298 of the penal law, it must be proven that the accused was aware of the possibility that his action would cause the fatal outcome, i.e., the victim's death, and it is not sufficient to prove that he was aware only of the possibility that bodily damage would be suffered by the victim (CrimA 7159/98 **the State of Israel**

v. A, IsrSC 53(2) 632; CrimA 4230/99 **Sabari Abu Ghanem v. the State of Israel**, Dinim Elyon, volume 60, 349; CrimA 6359/99 **the State of Israel v. Nachum Kurman**, Dinim Elyon, volume 58, 548; CrimA 4351/00 **the State of Israel v. Jamal Abu al-Hawa**, IsrSC 55(3), 327). Although the actions attributed to the deceased's interrogators were allegedly performed before amendment 39 to the penal law entered into effect, the provisions of the amendment should be applied, by virtue of section 5(a) of the penal law, to offenses which were committed before the amendment, including manslaughter, to the extent that the provisions of amendment 39 are more lenient with the accused:

> …in view of section 5(a) of the amended penal law, as to offenses which were committed before the amendment was enacted and before it entered into effect, and the hearing thereof has not yet been terminated, the above section 5(a) should be implemented as it is a procedural provision. Hence, in view of the provision contained in section 5(a), in principle, there is no impediment preventing the application of the annulment of section 299 of the penal law and the provisions of amendment 39, inasmuch as they are not more stringent with the 'doer' (CrimA 2598/94 **Haim Danino v. the State of Israel**, Dinim Elyon, volume 42, 218 paragraph 9 of the judgment; see also CrimA 1713/95 **Friedman v. the State of Israel**, IsrSC 50(1) 265, 277).

In view of the above, the attorney general's decision not to charge the interrogators with manslaughter is a reasonable decision which stands up to judicial review.

11. As to the decision not to press charges against the deceased's investigators for the offense of causing death by negligence in accordance with section 304 of the penal law, the attorney general is of the opinion that in order to establish this offense it should be proven that a reasonable person – and in this case – a reasonable interrogator – should have foreseen the possibility of the deceased's death. A review of the evidence, and especially of the medical opinions, led the attorney general to the conclusion that not only did the ISA interrogators not foresee the deceased's death, applying a subjective standard, but that they could not have foreseen it, applying an objective standard, in view of their experience in interrogations of this kind, where never before was death caused to any person who was interrogated, and in view of the medical rarity of a case such as this. In the absence of the ability to objectively foresee the deceased's death, a material component required for establishing the mental element required in order to convict a person of the offense of causing death by negligence is missing (see for instance CrimA 1/52 **Shmuel Deutsch v. the Attorney General**, IsrSC 8 456; CrimA 196/64 **the Attorney General v. Mordechai Bash**, IsrSC 18(4) 568). The respondents further argue that the statute of limitations for this offense has run out and therefore the interrogators should not be charged for this offense.

    The difficulty in proving the mental element of this offense and the problems arising in connection with the statute of limitations are legitimate

considerations within the framework of the attorney general's considerations concerning the question of whether or not charges should be pressed.

12. An additional consideration among the general attorney's considerations not to press charges against the ISA interrogators is the absence of a causal connection between their use of the "shaking" method and the deceased's death. The deceased was interrogated by four interrogators in succession, and it was argued that it is impossible to identify the person and/or act which caused the death. Therefore, it is also impossible to connect the acts of any of them with the fatal outcome. This is doubtful, since, the rule is that in the event of cumulative causes bringing about a forbidden result "the test of cause 'sine qua non' test retreats and the test of the 'sufficiency of the act' test is adopted in lieu thereof" (CrimA 8710/96 **Merkado et al. v. the State of Israel**, IsrSC 51(5) 481, 534; also see Y. Levi and E. Lederman **Principles of Criminal Liability** (5741) 319 – 322). However, in this case it is not clear whether the act of any one of the interrogators can pass the 'sufficiency of the act' test. In any event, since the attorney general based his decision mainly on the inability to prove the mental element of the above criminal offenses, I am not required to rule on the quality of this consideration.

    The option to press charges against the ISA interrogators for the offense of severe injury was argued before us by counsel for the petitioners half-heartedly. We were not presented with thorough discussion and analysis of the mental element required for a conviction of this offense, nor of the possibility to charge for this offense when the injury caused a person's death. The argument was raised mainly in order to overcome the argument that the statute of limitations has run out on the offense of causing death by negligence. In any event, the attorney general's argument concerning the absence of a reasonable likelihood for a conviction applies to this issue as well.

13. One of corner stones of the attorney general's decision is based – in addition to all other considerations which led him to reach his decision – is the 'necessity' defense, which, under the circumstances of the case, could have been successfully invoked by the interrogators, had they been indicted. The petitioners argue that by resorting to the 'necessity' defense, the attorney general acted unreasonably, since, by doing so he legitimized criminal acts *ab initi*o. They argue that such prior legitimization cannot be based on a restriction on criminal liability. With respect to this issue, counsel for the petitioner has misinterpreted the words of this court in the **public committee** case which stated that "one cannot infer from the 'necessity' restriction a general power to issue guidelines concerning the use of physical measures during an interrogation conducted by ISA interrogators" (paragraph 36 of the judgment). This does not apply to a single case, as part of the attorney general's considerations whether or not charges should be pressed, where he can take into consideration the 'necessity' restriction in order to weigh the likelihood of a person's conviction if charges were pressed against him. This is not prior legitimization, but, rather, a retroactive defense. And it was stated there as follows:

> As the 'necessity' restriction does not create authority, the lack of authority does not negate, in and of itself, the 'necessity' restriction or other restrictions on criminal liability. The attorney general can guide himself as to the circumstances under which charges will not be pressed against interrogators who allegedly acted in a single case with a sense of 'necessity' (p. 845) (emphasis added – T.S.C.).

See also **Yahav**, p. 16.

14. Therefore, in spite of the tragic outcome of the interrogation, which caused the deceased's death and although an interrogation method which was later found by this court to be inappropriate, was used, the decision making process of the prosecuting authorities, headed by the attorney general, as well as the considerations which led to the decision not to press criminal charges against the interrogators, are upheld by judicial review. The decision is not extremely unreasonable and has no material fault which justifies our intervention.

I, therefore, propose to reject the petition.

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Justice

Justice I. Englard:

I concur.

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Justice

Justice E. Rivlin:

I concur.

(-)

Justice

Held as stated in the judgment of Honorable Justice T. Strasberg-Cohen.

Rendered today, 13 Nisan 5762 (March 26, 2002).

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Justice	Justice	Justice