At the Supreme Court Sitting as the High Court of Justice

HCJ 5817/08

Before:	**Honorable President D. Beinisch** **Honorable Justice (*emeritus*) A. Procaccia** **Honorable Justice E. Arbel**
The Petitioners:	1. **Bassam Aramin** 2. **Salwa Aramin** 3. **"Yesh Din" – Volunteers for Human Rights**
	v.
The Respondent:	1. **Attorney General** 2. **Sergeant Shani Y., Israel Border Police combatant** 3. **First Sergeant Major V., Commander of Israel Border Police unit**
Petition for *Order Nisi*	
Session date:	25 Tishrei 5770 (October 13, 2009)
Representing the Petitioners:	Adv. Michael Sfard
Representing Respondent 1:	Adv. Hila Gorni

Judgment

President D. Beinisch:

This petition was filed against the backdrop of a severe incident which took place over four years ago, when the girl Abir Aramin (hereinafter: the **deceased** or **Abir**), a ten year old minor from the village of 'Anata, was killed when she left school with her girl-friends during recess and was hit in her head, apparently by a rubber bullet, and passed away two days later as a result of her wounds. The petitioners before us are Abir's parents who request that we order the Attorney General (hereinafter: the **respondent** or the **Attorney General**) to take severe legal measures against the Israel Border Police (IBP) policemen who were in the village at that time and who have allegedly hit Abir and killed her. On February 10, 2010, an *order nisi* was issued by us ordering the respondent to appear and show cause why he should not direct that the investigation file which was closed be re-opened, that the investigation be complemented and that the possibility to press charges be reconsidered. After the file was examined respondent's counsel notified us

that a decision was made not to file an indictment against any of the individuals involved in the affair. It should already be noted that the factual infrastructure presented to us indicates that there are grounds for the assumption that the girl's death was caused by shots which were fired in the street in which she was walking, but the manner by which the affair and the investigation were handled had many flaws from the beginning and currently it is no longer possible to grant the requested remedy and file indictments against respondents 2 and 3.

Factual Background

1. In the morning of January 16, 2007, when she left her school and was walking with her girl-friends in the street, a blunt object hit Abir in the back of her head, an injury which fractured her skull and eventually caused her death. Ostensibly, the medical opinions stated that the fracture could have been caused either from a rubber coated metal projectile or from a stone. When Abir entered the street, an IBP jeep which came to the village to observe and secure the construction works of the separation wall in the Givaat Zeev area, was standing nearby. The four IBP policemen (hereinafter: the **policemen**) who were in the village to observe the construction of the separation wall, encountered in the morning of that day riots and stone throwing from several centers, and took action during the morning to handle the riots in an attempt to leave the village, and in so doing used crowd control measures including tear gas, stun grenades and rubber bullets which were fired towards the rioters.

   On January 18, 2007, petitioners' counsel turned to the Public Complaints Unit of the Israel Police and submitted a complaint which described the circumstances of Abir's injury and requested to open an immediate investigation of the incident. Following his request the unit conducted an inquiry with the security agencies and found that IBP Judea and Samaria was familiar with the incident and that according to the report an internal investigation was conducted by the Judea and Samaria Division. Following said inquiry the case was transferred to the Judea and Samaria police with which jurisdiction is vested to handle incidents of this sort in the territories of Judea and Samaria. In the framework of the investigation which was conducted by the Judea and Samaria police the testimonies of several residents of the village were taken; the testimonies of the four policemen who were in the jeep at the time of the incident were taken; and about a week after the occurrence of the incident the route taken by the policemen in the village was re-enacted (although it was conducted only partially since stones were thrown at the re-enactment team). About six months later the policeman who conducted the re-enactment reported to the interrogators that in the re-enactment blood stains were not found in the place in which Abir had fallen. It should be noted that some of the policemen reported that they underwent verbal questioning by their company commander, but findings of this inquiry or another conducted by company officials were not transferred to the police and are not found in the investigation file. In addition the police received Abir's hospitalization report which included the opinion of the surgeon who treated her in Hadassah hospital, Dr. Cohen. The latter was of the opinion, in view of the fact that no foreign objects were found in Abir's head and due to the absence of an exit wound, that the injury was not caused by a bullet but rather by a fall on a sharp object such as a step. Abir's body was sent to the pathologic institute, where an autopsy was conducted by Dr. Konstantin Zaitsev in the presence of Dr. Chen Kugel on behalf of the family. In the autopsy report Dr. Zaitsev stated that Abir's death was caused "due to a severe damage to the cerebellum and brainstem with a condensed fracture in the skull (on the right side of the occipital bone) as a result of a blunt trauma, most likely direct (injury) in the head. The trauma was caused by a hard and blunt object and a mechanism of injury caused by a rubber bullet shot from a close range or another similar object (hard and blunt) cannot be ruled out." Thereafter Dr. Zaitsev added that another similar object could be a stone. Dr. Kugel was of the opinion that although it was possible that the injury was caused by a stone, the likelihood that it was caused by a rubber bullet was higher. The autopsy report was transferred to the police only several weeks after the incident. About six months after the complaint, on July 24, 2007, a decision was made at the Jerusalem District Attorney's Office to close the

investigation file for lack of evidence. Abir's parents appealed this decision on September 24, 2007, before the director of the appeals division at the State Attorney's Office (hereinafter: the **appeal**). On February 4, 2008, after the file had been examined, a decision was made to deny the appeal. The petition before us concerns said decision.

Petitioners' Arguments

2. In their petition which was filed on June 29, 2008, the petitioners requested that we order the Attorney General to file indictments against the policemen – and specifically against respondents 2 and 3 with respect of whom it was determined that they fired the rubber bullets on scene at the time of the incident – for manslaughter or for causing death by negligence according to sections 298 or 304 of the Penal Law, 5737-1977 (hereinafter: the **Penal Law**), or, at least, for endangerment of life while breaching the Open Fire Regulations according to section 338(a)(5) of the Penal Law.

   In the petition the petitioners point at the contradictions and problems which according to them allegedly exist in the thesis which lead the investigation agencies to close the file. The main dispute between the parties concerned the object which hit Abir's head and caused her death, and specifically, the possibility that Abir was hit by a stone which had been thrown towards the jeep from one of the centers in which riots took place – the village cemetery – rather than by a rubber bullet which had been fired by the policemen. Thereafter, in response to the appeal, after the petitioners raised therein the argument that Abir could not have possibly been hit by a stone which had been thrown from the cemetery (due to the fact that a tall building was located between the cemetery and the place of the injury), the state attorney's office argued that Abir could have possibly been injured by a stone which was thrown later on, over the course of a massive stone throwing event which took place while the jeep was leaving the village.

3. The petitioners argue that the two reasons which lead to the denial of the appeal were based on factual errors: with respect to the possibility that Abir was hit by a stone they clarify again that it was ballistically impossible for a stone which was thrown from the cemetery, the relevant riot center, to reach the place in which Abir was injured. With respect to the possibility that a stone was thrown from a different place over the course of the riot which "accompanied" the jeep while it was leaving the village, the petitioners clarify, firstly, that said entire event appeared for the first time in a later version of the policemen's testimony, and according to the petitioners it was raised due to the need to provide a different explanation for the thesis that Abir was hit by a stone after it was proved that the first possibility was not viable. Secondly, the alleged event occurred while the force was leaving the village, which took place, according to the operations log, around 11:00, whereas Abir has already been injured around 09:15, and therefore she could not have been injured by a stone which was thrown over the course of said event.

   The petitioners also respond to another argument which was raised in the response of the State Attorney's Office to the appeal, according to which the place in which Abir was injured could be viewed at all from the place in which the force's vehicle was standing. The petitioners argue that the place in which Abir was injured can be easily viewed from the place in which, according to the policemen, the jeep was standing while shots were fired towards the cemetery for the purpose of dispersing the riot center over there, and that there are no obstacles between these two points.

   According to the petitioners, the decision to deny the appeal did not give any weight to the testimonies of the civilian eye-witnesses, which contradict the testimonies of the policemen; and to the fact that there is no dispute that no warning shots were fired in the air, and that consequently – according the petitioners – the Open Fire Regulations were breached. In addition, the petitioners argue against the manner by which the re-enactment was conducted on scene, and claim that the policemen were guided by the interrogator where they should "place" the jeep to invalidate the

possibility that they injured Abir. Petitioners' counsels also rely on an additional circumstantial evidence, namely, a rubber bullet which was allegedly found by one of the local residents in the place in which Abir was injured, and was transferred through them to the investigation authorities. The latter have completely disregarded said evidence as well while specifying the reasons for having denied the appeal. For all of the above reasons the petitioners argue that the decisions to close the investigation file and to deny the appeal were extremely unreasonable, and should be revoked.

Respondent's Arguments

4. In her first response to the petition respondent's counsel argued, in a written statement dated August 17, 2008 that the decision to close the investigation file was mainly based on the unequivocal claim made by the policemen that no rubber bullets were fired by them towards the place in which the deceased was standing when she was injured; on the fact that from the drawings made by the policemen and the re-enactment it seemed that there was no angle of vision between the place in which the deceased was standing and the place in which the jeep was standing; and on the findings of the autopsy according to which the possibility that the deceased passed away as a result of a stone which hit her could not be ruled out.

   In their explanations for the denial of the appeal the prosecution authorities added to the above reasons and explained that it could not be established that sufficient evidence exited which indicated that the deceased had been hit by a rubber bullet, on the basis of the opinion of the physician who treated the deceased, Dr. Cohen, who determined, as aforesaid, that the injury was not caused by a bullet, as well as on the basis of the opinion of the expert on behalf of the petitioners, Dr. Kugel, who did not rule out the possibility that the deceased was hit by a stone. According to respondent's counsel, said findings reconciled with the testimonies in the investigation file which attested to the fact that the policemen had been attacked by stones and bottles; as well as with the testimonies of the policemen according to which they did not fire towards the place of the injury and did not see any school girls over the course of the event. Therefore, the possibility that the deceased was hit by a stone could not be ruled out, and hence, there were no sufficient prospects for conviction in the file which justified the filing of indictments.

5. In addition, respondent's counsel also emphasized in her response to the petition the acceptable rule according to which the decision as to whether criminal charges should be pressed against an individual is situated at the heart of the professional authority of the Attorney General, or anyone appointed by him for this purpose, and that the intervention of the court in decisions of this kind of the respondent is very limited. According to respondent's counsel, in view of the fact that petitioners' complaint was examined and investigated by the investigation authorities and thereafter by the district attorney's office and the state attorney's office thoroughly and professionally, there is no cause for intervention in the professional decision regarding the sufficiency of the evidence in the file. Parenthetically respondent's counsel noted further with respect to the mere shooting and the manner of its execution that the policemen's version, according to which they felt that their lives were at risk, could not be ruled out, and therefore the shooting of the rubber bullets by the policemen was apparently lawful.

The Chain of Events in the Petition

6. On October 13, 2009 a hearing was held by us in the petition, following which a decision was given as follows:

   > The respondents will examine within fourteen days the material which was accumulated in the investigation file and whether there are additional data which may be checked at this time such as the radio communications at the time of the

> event. Upon the termination of the above period the parties will submit for our review the material and they may add a notice thereto which will consist of detailed explanations of the material and the doubts evoked thereby. After we receive the material we shall decide how to proceed with the petition.

On October 29, 2009, the investigation file was indeed submitted for our review and respondent's counsel even noted that inquiries were made regarding the radio communications on the date of the event which indicated that the radio reports as well as the conversations on the cellular phones between the policemen and between them and the front control-center were not recorded and obviously were not transcribed. In addition, the recordings of the communication net "Commanders' Channel" (*Gal Mefakdim*) which is a separate communication net distinct from the communication net used by the policemen, were kept for several months only and have long been erased. An additional inquiry was conducted with respect to the number of riots which took place in the village of 'Anata in the year which preceded the event being the subject matter of the petition. Said inquiry indicated that in 2006 five riots took place in the village. In four of these events crowd control measures were used while in one of the latter events it was explicitly noted that rubber bullets had been used. Other than these two inquiries, respondent's counsel was of the opinion that no additional investigative actions were required.

7. On February 10, 2010, and after we have received petitioners' response to respondent's updating notice, we issued an *order nisi* in the petition, in which we ordered respondent 1 to appear and show cause why he should not direct to re-open the investigation file in the case of the death of the girl Abir Aramin, to conduct complementary investigations therein as may be deemed necessary, and based on the above will consider the possibility of filing indictments. In response respondent's counsel notified on March 28, 2010 that a decision was made to re-open the investigation file for the purpose of conducting complementary investigation, taking testimonies from residents of the village as well as additional evidence to the extent necessary. Said decision was mostly based, according to respondent's counsel, on a new report which pertained to the incident being the subject matter of the investigation and which was prepared by a private investigation office at the request of the Ministry of Defense (hereinafter: the **investigation report**). The need to examine the events arose in the Ministry of Defense after a civil suit was filed by Abir's estate, her parents and sister, for compensation due to the responsibility of the State of Israel for Abir's death (hereinafter: the **civil suit**). The report included conversations with several residents of the village who described the events which took place in the village when Abir was injured, and whose testimonies were not taken by the police in the framework of the criminal investigation. Under these circumstances respondent's counsel notified that upon the completion of the investigation the evidentiary material would be re-evaluated and a decision in the matter would be made by the competent officials.

   On August 2, 2010, respondent's counsel notified that several attempts were made to locate the witnesses who were mentioned in the investigation report, without success. Thereafter, on September 3, 2010, she notified that an additional attempt to locate said witnesses was made, and petitioners' counsel was also requested to assist in their location. Eventually, and after the attempts to locate the witnesses were unsuccessful, respondent's counsel advised on February 3, 2011 that the Deputy State Attorney for Criminal Affairs decided to terminate the complementary investigation, and given the fact that it did not yield any new evidence, the respondent found no reason to change the decision not to file indictments against the policemen. Respondent's counsel argued that the requirements which were set in the *order nisi* given by this court have thus been fulfilled and we were therefore requested to deny the petition or, at least, to delete it.

8. We were notified by the petitioners that their petition remained unchanged. They argue that the file, as is, consists of more than enough *prima facie* evidence for the purpose of pressing criminal charges against the policemen for Abir's manslaughter, or, alternatively, for causing her death by negligence,

in view of the fact that their main argument – namely, that the file was closed based on a clear factual error – is still firm and valid, and that the investigation actions which were taken as well as the failure to locate the witnesses, had no bearing thereon. They specifically point once again at the following pieces of evidence: the admissions of the policemen who fired the rubber bullets (even if not towards the place in which Abir was injured); the shooting took place in the morning on the main street of the village, in an area in which three active schools are located; the shots were fired while no risk was posed to the policemen's lives; a rubber bullet was allegedly found in the place in which Abir was injured. All of the above, according to them, provide sufficient grounds for pressing charges against the involved policemen, at least, for opening fire unlawfully.

In addition, the petitioners specify the omissions of the prosecution in conducting the investigation and complementary investigation. Hence, they argue that the efforts to locate the required witnesses for the complementary investigation were unsatisfactory, and thus, for instance, Abir's admitting physician at the 'Al-Makassed hospital who noted that Abir was admitted to the hospital at 09:53 has not been interrogated. Said interrogation could have solved the question which was raised concerning the time in which Abir was injured relative to the time in which the force left the village – which was claimed by the prosecution to be unclear – and nullify the interrogators' claim that Abir was injured by the barrage of stones which "accompanied" the force on its way out. Similarly, the main issues which are in dispute between the parties, including the precise location of the jeep when Abir was injured and the time on which she was injured, were not examined.

The Civil Judgment

9. On August 15, 2010, the judgment of the Jerusalem District Court (Judge O. Efal-Gabbay) was given in the civil suit (CC 9334-07 **The Estate of Abir Bassam Aramin (minor) et al., v. Ministry of Defense – State of Israel** (not yet reported, August 15, 2010), hereinafter: the **civil judgment**). The court held in its detailed and reasoned judgment that the possibility that Abir was injured in her head by a rubber bullet which was fired by one of the policemen who were shooting at stone throwers in the cemetery area, was much more likely than the possibility that Abir was injured by a stone (*ibid*., page 19). The court examined the testimonies which were presented to it, as well as the admissions of the policemen which were taken on several occasions, the pathological opinion and the physical features according to the drawings which were prepared by the involved parties and a visit which was conducted by the court on scene. Plaintiffs' version was adopted based on several findings: firstly, establishment of the location of the jeep in the street and of the place in which Abir was injured; secondly, establishment of the number of shooting events in the village, their locations and the identity of the individuals who were involved therein; thirdly, establishment of the fact that Abir was at the range of shooting towards the cemetery when it occurred; and fourthly, adoption of the pathologists assumption who were of the opinion that a round and defined object caused Abir's death. The court rejected the version of the defense that Abir was injured by a stone in view of two combined determinations: firstly, it was determined that stones were thrown in the same street in which Abir was walking only twice – around the time in which the force entered the village, while she was inside the school, and when the force was leaving the village, when she has already been in the hospital after having been injured (the court also accepts, although definite conclusions are not established by it in this matter, petitioners' argument that the last riot was caused or at least escalated as a result of the fact that Abir was injured); and secondly, that when the other stone throwing events occurred Abir and her girl friends were "protected" from stones in the street in which they were walking due to the existence of a wall of structures between the cemetery from which stones were thrown and the street. Having held that the Abir's death was probably caused by a rubber bullet rather than by a stone; in view of the fact that these bullets were fired only by the policemen on that day in the village; and in view of the fact that Abir was not amidst the stone throwers or in their vicinity and therefore

there was no justified reason to shoot at her, the court held that Abir's death was caused as a result of the negligence of the defendant, namely, the State of Israel.

The petitioners wish to use the judgment to support their arguments, and mainly their basic argument that Abir's death was caused by a rubber bullet rather than by a stone. Respondent's counsel requested to remind that the level of proof required in a criminal proceeding was different that the level of proof required in a civil procedure. She therefore argued that analogy could not be drawn between the decisive holding of the district court in the civil judgment and respondent's decision not to institute criminal proceedings.

Discussion and Decision

10. The question to be decided by us is whether there is reason to intervene in the decision of the prosecution authorities – the Jerusalem district attorney's office – which decided to close the file, and thereafter the state attorney's office which decided to deny the appeal. Both decisions, as well as the arguments of the state in the hearing before us relied on the argument of insufficient evidence as a result of which indictments cannot be filed against the policemen. It is already worth noting at this point that this case was handled in a deficient manner from the outset, in the absence of an appropriate investigation from the beginning, and in the hearing held by us before the state's response was submitted we expressed our dissatisfaction of said conduct. Nevertheless, the final decision not to file indictments against the policemen at this stage as notified to us after the complementary investigation which was conducted following the *order nisi* which had been given in this petition, leaves no room for our intervention, mainly due to the difficulty in having an investigation conducted after the passage of about four years from Abir's death. Considering the difficulties which arose in the belated investigation and the difficulty involved in conducting a criminal proceeding at this present time, in view of the level of proof which is required in criminal matters, under the circumstances which were created and in view of the evidentiary difficulties at this stage, we have no alternative but to follow the rule regarding the limited intervention in the discretion of the Attorney General on the issue of pressing criminal charges and particularly when the decision is based on insufficient evidence. Therefore, we did not find reason to intervene and to order that respondents 2 and 3 should be indicted.

11. The normative framework governing the discussion is found in the first part of section 62(a) of the Criminal Procedure Law [Consolidated Version], 5742-1982 which states as follows:

Indictment and Closing a Case (Amendment No. 33) 5761-2001	62. (A) If the prosecutor to whom the investigation materials were sent sees that the evidence suffices to indict an individual, the prosecutor will indict that person, unless the prosecutor is of the opinion that there is no public interest in holding the trial; However, a decision not to indict because of lack of public interest will be made with approval from the following officials…".

Said provision which stipulates that the first and necessary condition for pressing charges is the decision of the prosecutor that there is sufficient evidence in the file, imposes on the prosecutor substantial public responsibility (for further discussion of this issue see Mordechai Kremnitzer "The duties of the Prosecutor in the Criminal Proceeding" ***Plilim*** 5 173 (1996)). The duties of the prosecutor in view of this provision have not been specifically discussed in the legal and Israeli literature until the judgment of this court in HCJ 2534/97 MK **Yahav et al., v. State Attorney's**

Office et al., IsrSC 51(3) 1 (1997) (hereinafter: **Yahav**) (see also Ruth Gabizon Administrative **Discretion in Law Enforcement: The Authority to Stay and Renew Criminal Proceedings** (hereinafter: **Gabizon**), 147-153). In **Yahav** the court, through Justice **E. Goldberg,** specified the possible tests which could be used by a prosecutor in preparing the case for trial and held that despite the fact that our legal system is an adversary system, the prosecutor had public duties in addition to the fact that he acted as a party to the proceeding. Therefore, he should not satisfy himself by the mere fact that he has some pieces of evidence in his possession and let the court make the decision concerning their weight, but rather he should also take into account additional considerations which may dissuade him from pressing charges if he is not of the opinion that there is a reasonable prospect that the indictment would result in conviction. In this context the prosecutor must examine not only whether *prima facie* evidence exists, but he should also examine the prospects for conviction in view of the court's decisions, his evaluation of the ostensible credibility of the evidence available to him, and based on an examination of the suspect's version and the evidence of the defense (**Yahav**, page 11; HCJ 5675/04 **The Movement for Government Quality in Israel v. Attorney General, M. Mazuz**, IsrSC 59(1) 199 (2004) (hereinafter: **Sharon**), page 220), for considerations of efficiency and the desire not to burden the courts with proceedings which would result in acquittal, as well as in view of the understanding that the consequences of criminal proceedings, even if not concluded by conviction, are too severe to prevent the filing of indictments unless the prosecutor is certain that the suspect is guilty (**Yahav,** page 11). The importance of the criminal proceeding, particularly – and in a manner relevant to the case at hand –for the purpose of conveying a moral message to the public, and on the other hand, the dangers which it may pose to the indicted person, were stressed by Justice **E.E. Levy** in HCJ 5699/07 **Jane Doe (A) v. The Attorney General** (not yet reported, February 26, 2008)(hereinafter: **Jane Doe**), in paragraph 38 of his judgment.

However, along said rulings it has also been held that evidence which unequivocally establishes conviction is not required since such a demand would render the trial redundant. On this issue we have already ruled that "For the purpose of filing an indictment, it is **not** necessary to have *prima facie* evidence which can prove the guilt beyond reasonable doubt already at the stage in which the indictment is filed, as opposed to the conviction stage after trial was conducted" (**Jane Doe**, paragraph 21 of my judgment, and see the references there). Eventually, the prosecutor must be of the opinion that there are reasonable prospects for conviction before he decides to indict.

Intervention in the decision of the Attorney General not to indict

12. The rule which delineates the scope of intervention of this court sitting as a high court of justice in the decisions of the prosecution authorities has been developed and established throughout the years. Initially, the court's intervention was limited only to cases in which the Attorney General acted in bad faith, but since then judicial criticism over the decisions of the Attorney General has expanded and it was eventually held that his decisions would be examined through the glasses of the judicial administrative criticism which require the decision to be reasonable and proportionate (for a review of the development of the rule see HCJ 11058/08 **Yaakov Shneior v. Attorney General** (not yet reported, August 29, 2010)(hereinafter: **Shneior**) paragraph 35; HCJ 4190/05 **Rina Naim v. State Attorney** (not yet reported, September 12, 2006)(hereinafter: **Naim**) paragraphs 9-11; **Gabizon**, pages 211-226). The current rule, which delineates the normative framework and the considerations which should be taken into account by the court whiles scrutinizing the decisions of the prosecution in such matters, is the rule which was specified in HCJ 935/89 **Ganor v. Attorney General**, IsrSC 44(2) 485 (1990)(hereinafter: **Ganor**) and which was reiterated by us in many judgments. Said rules provides that on the one hand, the court is indeed vested with the power to review the decisions of the prosecution authorities, but at the same time its above power is regarded as a power to scrutinize only (**Shneior,** paragraph 35). This rule is based on the concept that "This court does not turn, while hearing the petition, into a 'Superior Attorney General' and it must not replace the discretion of the

Attorney General with its own discretion" (and see HCJ 6271/96 **Yedidyah Be'eri v. The Attorney General**, IsrSC 50(4) 425 (1996), page 428; HCJ 223/88 **Yoram Sheftel v. The Attorney General**, IsrSC 43(4) 356 (1989), page 366; HCJ 10782/05 **Dvorah Ben Yoseph v. Judge David Mintz, Examining Magistrate at the Jerusalem Magistrate Court** (not yet reported, August 23, 2007)(hereinafter: **Ben Yoseph**), paragraph 21; HCJ 5305/08 **The Movement for Quality Government v. The Attorney General** (not yet reported, November 24, 2009)(hereinafter: **Ben Eliezer**), paragraph 9; HCJ 3425/94 **Uri Ganor v. The Attorney General**, IsrSC 50(4) 1 (1996)(hereinafter: **Ganor**[2]), page 6; and also **Jane Doe**, paragraph 11).

Accordingly, as a general rule and particularly with respect to evidentiary matters, the judicial intervention in the decisions of the prosecution authorities is limited, especially when the reason for not filing an indictment is insufficient evidence, as opposed to closing the file for lack of public interest (**Sharon**, page 207). The above is based on the assumption that the prosecution authorities have the skills, knowledge and experience which enable them to make a decision in this matter based on the evidentiary material which was gathered in the investigation; on the approach that the matter is in their responsibility and therefore they are vested with the authority to handle it (HCJ 4736/98 **Maariv Modiin Publishers Ltd. v. The Attorney General**, IsrSC 54(1) 659 (2000), pages 664-665); and also due to the potential ramifications that such intervention may have on the criminal proceeding which would consequently be initiated (**Ben Yoseph**, paragraph 22). As a general rule this court refrains from deciding, contrary to the opinion of the professional body, that there is sufficient evidence in the file for the purpose of filing an indictment against the suspect (however, see the minority opinion in **Sharon** which was willing to make such a decision). Nevertheless, a decision to close a file due to insufficient evidence must also be subjected to judicial scrutiny. We have already ruled that "The head of the prosecution must base his decision on fair and good faith considerations, act honestly and fairly and based on pertinent considerations only" (HCJ 7195/08 **Ashraf Abu Rahme v. Brigadier General Avichai Mandelblit, Military Advocate General** (not yet reported, July 1, 2009), paragraph 38). It seems that:

> A decision made by the prosecution authorities may not be upheld if it threatens to prejudice fundamental values of liberal law and morality; if it runs contrary to an internal and general feeling of justice; if it seriously impinges on the dominant values of a democratic society; if it threatens to encumber, in a manner which is hard to tolerate, truth finding where this is possible; and if it runs contrary to defining values of our legal system including, *inter alia*, the rule of law, the principle of equality, fiduciary duty of a civil servant and the making of justice with a person against whom a criminal proceeding was initiated")Jane Doe, the words of Justice **Levy**, paragraph 51).

From the general to the particular

13. The petitioners at hand argue that the decision not to file indictments against respondents 2 and 3 should be intervened based on these two: firstly, they argue that the decision of the district attorney's office and thereafter of the state attorney's office not to file indictments stems from an error which goes down to the root of the matter, when they determined that Abir could have been injured by a stone rather than by a rubber bullet; and secondly, they argue, contrary to the opinion of the state attorney's office, that there is sufficient evidence in the investigation file for the purpose of formulating indictments for the offenses pointed at by them. Hence, in fact they request that we hold that the decision of the General Attorney regarding the sufficiency of the evidence is not reasonable to the extent which justifies its revocation.

14. As aforesaid, the rule which pertains to the arguments concerning the sufficiency of the evidence in the investigation file is that the court will not examine the evidence as such, and will not replace the

discretion of the prosecutor who is trained to make such evaluations. However, the court must examine the reasonableness of the prosecutors' decision by reviewing the considerations which were taken by them into account in the decision making process. For the reasons specified below we also came to the conclusion that the decision to close the file *ab initio* based on the evidence which existed therein, and not to continue with the investigation, as well as the decision to deny the appeal in the matter, was *prima facie* erroneous.

The main argument of the professionals responsible for conducting the investigation in their decision to close the file and deny the appeal is that an alternative possibility exists which does not involve any fault on behalf of the policemen, according to which Abir was injured by a stone which was thrown at the force. This argument as specified in the response notice to petitioners' appeal (Exhibit E of the petition) is based on two levels: the pathological opinions which state that the possibility that Abit was injured by a stone cannot be ruled out, and – mostly – on the versions of the defendants, the policemen, regarding the events of said morning.

15. Indeed, ostensibly, for the purpose of a criminal proceeding which requires proof beyond reasonable doubt, the pathological report constitutes an obstacle in the indictment process, but it seems that the main flaw in this affair from the outset stemmed from negligence in the initial inquiry which commenced following Abir's injury and her later death. A basic and substantial rule is that when a violent incident takes place in which a civilian is seriously injured, and all the more so when a minor is concerned – and most certainly when the incident involves death – an immediate inquiry must be conducted forthwith. So long as the scene could have still been examined shortly after the incident, statements could have possibly been taken from witnesses and their cooperation could have been secured; the deadly bullet and other findings in the scene might have been found; and notes could have even been taken of what required examination according to objective criteria. It is an elementary duty to conduct an immediate investigation and not to rely on the statements of the policemen or involved persons whose natural inclination is to defend them-selves. In the case at hand the contradictions which arose from the statements themselves and the fact that the inquiry was conducted, the testimonies were taken and the on-scene re-enactment was executed within the framework of the unit, should have also affected the weight given to the testimonies of the policemen.

16. The excessive all-embracing adoption of the policemen's version, as occurred in the beginning of the investigation, has apparently prevented relevant considerations which should have been referred to by the prosecution from having been given adequate weight. Accordingly, a perusal of the pathological opinion of Dr. Zaitsev indicates that he initially stated that "the trauma was caused by a hard and blunt object and a mechanism of injury caused by a rubber bullet shot from a close range or another similar object (hard and blunt) cannot be ruled out (sic – D.B.)." Only in his complementary opinion, which was prepared later on, did Dr. Zaitsev add the words "such as a stone" at the end of the sentence. Indeed, the two pathological opinions, of the expert on behalf of the respondent as well as of the expert on behalf of the petitioners, are not clear cut, and they honestly note that the possibility that the death was caused by a stone also exists. However, in view of the above completion, it seems that the possibility that the pathologist on behalf of the respondent was also inclined to estimate that the object which hit Abir was a rubber bullet should have at least been examined, and perhaps investigation questions should have been presented to the pathologists shortly after the treatment and the preparation of the reports. Indeed, in his opinion, the surgeon, Dr. Cohen, who was the first to refer to the cause of death of Abir, stated that in his opinion the death was not caused by a bullet – but, so he points out – due to the fact that he did not find a foreign object in Abir's head – a less relevant factor when the possibility that the injury was caused by a rubber bullet is examined, which unlike a regular bullet does not penetrate the skull, as indicated by the last response of the petitioners. It therefore seems that the physicians/pathologists who referred to the reason of the trauma caused to Abir's head did not have adequate data and they were not presented

with clarification questions shortly after the event as was required under the circumstances. The opinions could have established a *prima facie* basis – yet an initial one – for further inquiry of the circumstances of Abir's death.

The above should be coupled with additional circumstantial evidence which apparently were not given any weight at all in the decision making process. Thus, for instance, the report about the time in which Abir was admitted to the hospital along the report in the operations log regarding the time in which the activity was concluded. These required an examination of the records and their credibility, which could have perhaps ruled out the possibility that Abir was injured during the last riot which "escorted" the force while it was leaving the village. Moreover. Indeed, it is difficult to base a criminal investigation on a rubber bullet which was allegedly found in the place in which Abir was injured by someone who happened to be there, and was transferred to the police by the petitioners. Had an investigation been conducted on scene shortly after the occurrence of the event, objective findings could have been established leading to a 'beyond reasonable doubt' conclusion regarding the bullet which was found and the location in which Abir was injured. There is no doubt that had an investigation been conducted on scene immediately after the event, as required, the investigation could have been advanced and the versions of respondents 2-3 in the initial questioning and in the interrogation could have been examined in an appropriate professional manner.

17. In addition to all of the above additional evidence exists which could have been gathered, but were not gathered, despite the fact that it has already been noted on January 16, 2007, in the complementary activity report of the duty officer concerning the event that a report had been received regarding a Palestinian girl who was injured by a rubber bullet. Hence, very few testimonies were taken from the local inhabitants of the village and no testimonies were taken from some of Abir's girl friends who were with her when she was injured (it should be noted that according to the material in the investigation file, an attempt was made to contact one of the girls whose mother refused to let her testify). The documentation of the scene was delayed, and it was therefore impossible to gather solid evidence regarding the location of the jeep at the time Abir was injured; the reports on the radio communication net "Commanders' Channel" (*Gal Mefakdim*) were not kept (and were erased after several months as they have not been requested by anyone). The acts taken when the later civil investigation report was prepared can possibly indicate that the prosecution authorities – which have available to them criminal investigation tools – could have conducted the investigation more thoroughly and gather more detailed information shortly after the incident. Had they acted accordingly, the probable conclusion reached by the Jerusalem District Court in the civil proceeding, according to which Abir's death was indeed caused by the rubber bullet that had been fired by the policemen, could have perhaps been established on the level required under criminal law.

18. Based on all of the above it can be determined that the initial decision to close the file for insufficient evidence, and to thereafter deny the appeal, was based on poor and partial evidentiary infrastructure. There is no doubt that the investigation of the incident from the outset was conducted in deficient manner and the petitioners have indeed pointed at the flaws which arose there-from. For this reason, in the first hearing held by us in the petition we were of the opinion that it was necessary to complete the investigation and re-consider the entire evidence. However, regretfully these proceedings also took place too late and failed to yield an appropriate result.

19. A second decision was made by the prosecution after the investigation in the file was completed following the order which had been issued by this court, and is based on the attempts to complete the investigation which were unsuccessful, *inter alia*, due to the inability to contact the potential witnesses. For some reason those acting on behalf of the respondent did not attach any urgency to the advancement of the complementary investigation and as indicated by the notices of respondent's counsel they procrastinated for a period of six months from the date on which the order was issued by this court before they took action for the opening of the investigation file and its completion.

Without derogating from the above-said with respect to the flaws in the investigation from its outset and considering the situation which was created after the completion of the investigation as well, it seems that respondent's decision not to indict respondents 2 and 3, at this time, is entrenched in a reasonable and professional evaluation of the prospects of conviction. The time which passed from Abir's death – more than four years – and the manner by which the evidence was gathered which indeed lead to lack of evidence constitute a material consideration in the exercise of judicial scrutiny over this decision. The above should be coupled with the ramifications of filing indictments against respondents 2 and 3 after all the years that passed, which are – mainly – the difficulty arising with respect to the possibility to produce evidence for the purpose of proving the case and substantiating the defense (and see: HCJ 2618/04 **Tikva Alus v. State of Israel** (not yet reported, May 19, 2005), page 6). It is also worth noting that the mere fact that the decision had been re-considered by the professional officials, as a an additional review "filter", leads to the limitation of the judicial scrutiny, based on the assumption that the limiting considerations mentioned above were doubled and their weight even increased due to the fact that additional professional officials had examined the decision (**Ben Yoseph**, paragraph 20). As aforesaid, judicial scrutiny must examine the prospects that an order to conduct investigation would yield a criminal file (**Ben Eliezer**, page 11), and ascertain that the scrutinized decision is based on reasonable foundations according to administrative standards.

Indictment for endangering life while breaching the Open Fire Regulations

20. Parenthetically, although not insignificantly, petitioners' counsel points out that the prosecution failed to sufficiently refer to the issue of indicting the policemen for endangering life while breaching the Open Fire Regulations according to section 338(a)(5) of the Penal Law. Ostensibly, the issue of indicting the policemen for these offenses could have been examined even if the cause of Abir's death has not been properly proved, in view of the fact that for the purpose of proving said offense a causal connection to the death need not be proved, but rather, it could have been sufficient to prove potential endangerment to life. Under the circumstances of the matter, in view of the fact that the prosecution authorities considered, while having examined the formulation of the other offenses, the conduct of the IBP policemen throughout the entire event, and did not find that it amounted to criminal conduct, we did not find cause to order the prosecution to continue to check this issue beyond the examination which has already been conducted.

Conclusion

21. In the comprehensive judgment of the district court, Judge **Efal-Gabbay** stipulates that "the scenario proposed by the defendant that Abir was not injured by a rubber bullet but rather by a stone, seems under the circumstances of the matter, as a remote and unreasonable possibility" (the **civil judgment**, page 21). The judge continues to state that "it seems that there can be no dispute that from the conclusion according to which Abir was injured by a rubber bullet which was fired by an IBP force, another conclusion immediately arises that the shooting which injured Abir was negligent and in breach of the Open Fire Regulations" (*Ibid*., page 23). And indeed, *prima facie*, it seems that this is the case. In view of the above-said, the above conclusions in the civil case do not lay sufficient evidentiary infrastructure for the substantiation of a criminal case to the extent which provides for intervention in the discretion of the prosecution in its decision not to indict.

22. To conclude this sad affair, we can only express our hope the lesson was learnt. The security forces and the IDF act in an area in which reside and live inhabitants who are protected residents many of whom wish to conduct their daily routine peacefully. Indeed, the area is also occupied by hostile parties who frequently expose the security forces to violent resistance and difficult situations, as also happened in the case at hand, and put soldiers and policemen at risk and sometimes even in a life threatening risk. However, young children on their way to and from school, their mothers and family members and their close environment have an expectation, also in the conditions in which they live

that their physical safety and freedom of movement be protected, and the security forces must take into consideration – even in difficult situations – the fact that they face civil population most of which does not wish to get involved in violent incidents. In view of the complexity of the situation on scene the security forces must act prudently and with the sensitivity which is required when one acts in a civil area. This is the purpose of the Open Fire Regulations and the different stages thereof, which must be meticulously upheld and only in a life threatening situation, and attempts must be made to reduce to the maximum extent possible the danger of causing harm to the civil population.

As aforesaid, under the circumstances of the matter we decided that due to the conclusion of the prosecution regarding lack of sufficient evidence for pressing criminal charges we cannot intervene in the current decision not to indict the policemen at this present time. Therefore the petition is denied. Due to the flawed handling of the event from the outset, lack of appropriate investigation and conduct which from the beginning caused the investigation to be treated in an inappropriate manner, the respondents will pay petitioners' costs and legal fees in the sum of 10,000 ILS.

The President

Justice (*emeritus*) A. Procaccia

I agree.

Justice (*emeritus*)

Justice E. Arbel

I join the judgment of my colleague, the President **D. Beinisch**.

This petition revolves around a ten year old girl, Abir Aramin, who was killed when she, together with her girl friends, left school on recess. The pain of her parents who want that those who are responsible for the death of their daughter will be held accountable for their actions, and possibly find in that some solace, is understandable to us all. Nevertheless, I agree that despite the clear determinations made the Jerusalem district court in its judgment (the Honorable Judge O. Efal-Gabbay) in the civil action which was filed by Abir's estate and family members, there is no room, at this present point in time and in view of the evidentiary difficulties which were specified and the level of proof which is required in a criminal proceeding, for our intervention in the professional position of respondent 1 according to which indictments should not be filed in this case.

However, and as also noted by the President in her judgment, the investigation which was conducted in this case was far from satisfactory and one must hope that it does not attest to the current conduct investigations of cases of this sort. It should be added that in the next step attempts were indeed made by the prosecution to take additional investigative actions and to complete the investigation but to no avail, to a large extent due to the fact that they were unable to contact witnesses who could have possibly contributed something to the evidentiary puzzle. However, at that stage it became clear that certain actions could not be taken after the elapse of such a long period of time, such as the radio reports of the IBP forces, in addition to the fact that the complementary investigation did not progress in a satisfactory pace as well. In any event, precisely

in view of the restraint applied by this court to decisions of whether or not indictment should be filed, it seems that the importance of conducting a comprehensive investigation immediately after the incident becomes more acute. The failure to conduct such an investigation encumbers the ability to complete the missing parts several years later and anyway dictates the results of petitions of this sort. Respondent 1 will act wisely should he remind the appropriate officials of the need to make immediate reports and conduct an immediate investigation in incidents of this sort, mainly in view of the fact that regretfully it is not unreasonable to assume that a situation such as this, in which the security forces must act in a complex and difficult reality, amidst a civil population which may be injured as an ancillary result of violent actions taken against the security forces, may recur.

Justice

Decided as specified in the judgment of the President D. Beinisch.

Given today, 8 Tamuz 5771 (July 10, 2011).

The President | Justice (*emeritus*) | Justice