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At the Supreme Court Sitting as a Court of Civil Appeals

CA 1354/97

Before: **Honorable President A. Barak**
Honorable Justice E. Rivlin
Honorable Justice E. Hayut

The Appellant: **‘Akashah Mahmoud**

v.

The Respondent: **The State of Israel**

Appeal from the judgment of the District Court in Jerusalem in CC 152/95 dated January 12, 97 rendered by Honorable Judge Dr. A.Z. Ben-Zimra

Representing the Appellant: Att. Darwish Nasser, Att. Daniel Mor

Representing the Respondent: Att. Eyal Yinon

Judgment

President A. Barak

The appellant filed a damages claim against the State of Israel in 1995. He claimed compensation for injuries he sustained from shots fired at him by IDF soldiers during riots and disturbances in Nablus. The State did not dispute the fact that the appellant was injured by shots fired at him by soldiers, but denied liability towards him.

The Facts

1. In the beginning of February 1988, riots, disturbances and road blocking erupted in the city of Nablus. A battalion of reserve forces of the armored corps was sent to the city (on February 7, 1988). Its mission was to secure the peace and order in the city and prevent, *inter alia*, road blocking. In the briefing of the battalion's commanding team regarding riot dispersal, it was

recommended to use tear gas and rubber bullets for close ranges and a tutu rifle (0.22 caliber live bullets) for long ranges.

2. On December 10, 1988 the curfew which had been placed on Nablus for two days was lifted. A troop of soldiers patrolling the city's "Kasba" that afternoon, ran into a barricade of stones and burning tires which was laid down across al-Basha road. This barricade blocked the entrance from the "Kasba" to the Jasmine Quarter. The patrolling soldiers attempted to remove the barricade but were stoned. The stone throwers emerged from the alleys of the "Kasba", then went back to hide, and so forth and so on, time and again. At a certain point, stones were hurled at the soldiers who were removing the barricade from the roofs overlooking the intersection as well. In order to enable the removal of the barricade, the soldiers fired two tear gas grenades from a launcher towards a narrow stairwell from which the stone throwers emerged. As a result of wind direction, the smoke blew back and hit the soldiers themselves. As the stone throwing continued, an additional patrol was called to the scene. Its mission was to cause a distraction that would enable the shooting of gas grenades and rubber bullets at the rioters. This action failed and the stone throwing continued. At this stage, the forces left the intersection in order to reduce the level of confrontation with the rioters and enable them to willingly leave the intersection and the roofs. The soldiers' departure was used to fortify the barricade and set additional tires on fire. The patrolling soldiers returned to the blocked intersection in their vehicle. They began removing the barricade again. The stone throwing from the roofs and allies continued. The soldiers had to take refuge behind their vehicle.
3. The appellant, a resident of the Jasmine Quarter, born on September 22, 1970, was among a group of stone throwers who were standing on the roof of a two to three story high building near the blocked intersection. The appellant was identified as the most dominant member of the group. He would throw a stone, take cover, and so forth and so on, time and again. During the incident, two company commanders and the deputy battalion commander (hereinafter – the **deputy**) arrived at the scene. The commanders situated themselves in a high position, overlooking the roof on which the appellant was standing, in a distance of about 50 to 100 meters from the roof. Under the circumstances, the deputy gave the company commanders permission to use the tutu rifle. Warning shots were fired but as this was to no avail, shots were fired at the legs of the young man who was standing on the roof and who was identified as the leader of the rioters. The young man was hit in the leg and the stone throwing stopped for a short period of time. With the deputy's approval, warning shots were fired again in the air and thereafter shots were fired at washing machines, cans and old stoves which were on the roof, so that the noise of the bullets hitting the tin would be heard. Nevertheless, the stone throwing by the appellant and his friends continued. They hurled stones the size of grapefruit at the soldiers, which could have caused the soldiers severe damage. Under the circumstances, the company commander decided to use the tutu rifle to shoot at the legs of the appellant, but at that moment, the appellant turned around in order to return to his hiding place, and was shot in the back. As soon as the appellant was hit, the stone throwing stopped and the barricade was removed.

4. In view of the above factual background, the District Court (Judge A.Z. Ben-Zimra) found that liability should not be imposed upon the respondent. The court rejected appellant's allegations that he had been on the roof with women and children and that no stones were thrown at the army forces in the area. On the other hand, the court rejected the state's claim that this was a "wartime action" providing an exemption from liability under section 5 of the Civil Wrongs (Liability of the State) Law 5712 – 1952. It was held that the soldiers were engaged in a policing action securing peace and order in the city of Nablus. The damages claim was therefore examined on its merits. The court ruled that in the case at hand, section 41 of the ordinance concerning the shift of the burden of proof did not apply, due to the fact that not all of the conditions set forth in that section had been met. The court dismissed the claim.
5. With respect to the alleged negligence, the court drew a distinction between the personal negligence of the soldiers who participated in the shooting and the army's negligence in the manner it has prepared itself to handle the disturbances. The court ruled that the soldiers' use of the tutu rifle which injured the appellant was not negligent. In view of the danger the soldiers faced as a result of the stones hurled at them from above, which could have hit their unprotected faces, the shooting, which was intended to protect them, was in place, when, at first, warning shots were fired and only later were shots aimed at the appellant's legs. The shooting was controlled, and it was intended to remove the danger posed to the patrol soldiers. It was further ruled that the soldiers had not breached the Open Fire Regulations concerning the use of weapons. They acted in accordance with the rules pertaining to the "use of weapons in circumstances of danger to life ": the soldiers who were removing the barricade were in real and immediate danger; warning shots were fired; a tutu rifle which usually causes less damage was used; the shots were aimed at the legs of the appellant who endangered the soldiers' lives.
6. The court also rejected the claim that the respondent was negligent, in that it sent to the scene a unit which had no experience in policing actions, which was not equipped with the appropriate equipment required for handling riots, disturbances and stone throwing, or in that it failed to allocate larger policing forces to the mission. The court pointed out that the incident took place in the beginning of the intifada, when the IDF was not yet ready to deal with the uprising. Therefore, no Federal guns (for shooting tear gas), sniper shotguns and snipers, shields and facial-shields and such other equipment were provided to the battalion. The court ruled further that even if the army had such resources available to it, and even if the military-operational discretion that was employed in sending the unit to secure order and free movement in the city was erroneous, it did not amount to negligence. The court added that even if negligence was presumed, the respondent could rely on the defenses of voluntary assumption of risk (Section 5 of the Tort Ordinance [New Version]) and contributory fault of 100%. The appellant voluntarily exposed himself to the risk of being hurt by leaving his hiding place in order to throw stones, although he heard the shooting and witnessed the injury of another young man

a short period of time earlier. He was aware of the fact that he could be injured. He could have left the roof or remained in hiding, but failed to do so.

The Appeal

7. The appellant does not wish to dispute the factual infrastructure set out by the District Court. His appeal is directed at the legal decisions made by the court. According to the appellant, in view of the factual infrastructure set out by the court and the testimonies of the soldiers which the court found to be credible, direct and vicarious liability for appellant's damages caused by the shooting should be imposed upon the respondent, based on the torts of negligence and assault. The appellant claims that the shooting towards him was unnecessary, unjustified and negligent. The shooting did not result from any threat to life but from the decision not to leave the intersection. The tutu rifle was used by soldiers who were not sufficiently familiar with this weapon and based on the assumption that the damage caused by such weapon was relatively minor. The soldiers testified that there was no intent to injure any of the rioters so severely and that, in retrospect, it was a mistake to use the tutu rifle during the incident. According to the appellant, the respondent's negligence came into effect in each of the following: mistaken shooting of rounds fire at an unarmed boy; negligent briefing regarding the use of weapons; lack of appropriate equipment required for handling riots and stone throwing; use of a unit of soldiers who were inexperienced in dealing with the riots; unprofessional use of weapons (the person who shot the appellant did not take a sniper's course and did not use binoculars); failure to observe the Open Fire Regulations.
8. The appellant further claims that the elements of the tort of "assault" were also met in the case at bar and that, under the circumstances, the defenses of necessity or self defense do not apply. It was not proven that there was real danger to the soldiers' lives, as they could have left the intersection, and the shooting exceeded reasonable necessity. With respect to voluntary assumption of risk, the appellant claims that he did not assume upon himself any physical or legal risk. He did not expect that stone throwing would entail such a severe response and cause such grave bodily damage. It was further claimed that no factual infrastructure was established concerning the contributory fault of the appellant, let alone a contributory fault of 100%.
9. The respondent, on its part, upholds the District Court's judgment. According to respondent, the court has justifiably ruled that the soldiers did not act negligently during the incident. The state continues to claim that the soldiers acted in accordance with the Open Fire Regulations concerning the use of weapons in circumstances of danger to life, which were in place at the time of the incident. If the unit breached the Open Fire Regulations, this does not necessarily lead to the conclusion that the soldiers were negligent. There is no exact symmetry between a soldier's fulfillment or violation of the Open Fire Regulations and a the fulfillment or violation of the duty of care imposed upon him. The reasonableness of the measures taken is examined in view of the factual circumstances of each case. The state admits that the unit which operated at the time of the incident was neither trained nor experienced in handling stone throwing and violent riots. The state also partially admits that

the soldiers who took part in the incident were not properly equipped for such a confrontation, with the shortage pertaining mainly to shielding equipment. But even if it is correct that the IDF did not prepare itself for the intifada in time, this does not give rise to a tortious cause of action. Finally, the state completely rejects the appellant's claim that had the soldiers left the blocked intersection, their lives would not have been in danger. According to the state, disputing the soldiers' duty to take action to disperse riots instead of giving in and retreating is an allegation which should not be heard within the framework of a damages claim.

THE FACTUAL INFRASTRUCTURE

10. The evidentiary infrastructure which the District Court had before it consisted, *inter alia*, of the appellant's testimony, eye witnesses on his behalf, and the testimony of four reserve soldiers who took part in the incident. Appellant's allegation that he did not participate in the riots, was not found to be credible by the court. The District Court laid down detailed factual findings concerning the circumstances of the incident based on the testimonies of the soldiers, who were fully trusted by the court. These findings are no longer in dispute between the litigants in the appeal before us. The premise for the examination of this appeal is, therefore, the factual infrastructure laid down by the District Court.

THE NORMATIVE FRAMEWORK

11. In our case the liability of the state is determined based on the Tort Ordinance [New Version] (hereinafter – the **Ordinance**). In the appeal the state does not pursue the claim that it is exempt from liability due to a "wartime action" (section 5 of the Civil Wrongs (Liability of the State) Law 5712-1952). Our assumption is, therefore, that the action at issue is a policing action involving ordinary risks rather than a "wartime action" involving special risks (see, [CA 5964/92 Jamal Qassem Bani 'Odeh v. the State of Israel](#), IsrSC 56(4) 1). Within the framework of the Ordinance, two alternative bases for the liability of the state were brought before us: assault and negligence. We shall examine each of these.

ASSAULT

12. We need not go into the details of the claim concerning assault due to the fact that in the case before us the shooting soldier himself was not sued. The law suit was filed against the state. In accordance with the provisions of the Tort Ordinance – provisions which have long been outdated – there is no vicarious liability for assault (section 25 of the Ordinance). Therefore, the cause of action for assault should be denied. Nevertheless, the directed behavior of the soldiers may establish personal (rather than vicarious) liability of the respondent for negligence, which we shall now examine.

NEGLIGENCE

13. The respondent does not deny the fact that it owes a duty of care to the appellant. The dispute between the litigants relates to the question of whether or not such duty of care was breached. The question is if the soldiers deviated, under the circumstances of this case, from the appropriate standard of behavior. An additional question is whether the respondent deviated from the appropriate standard under the circumstances, in the manner by which it made preparations to handle the disturbances in Nablus. If the answer to either one of the above questions is positive, then, personal or vicarious liability may be imposed upon the respondent towards the appellant.
14. The standards applied to examine whether the conduct of police officers and soldiers in suppressing a violent riot in the Judea and Samaria Area were reasonable, have been recently discussed in depth in CA 5604/94 **Hamed et al. v. the State of Israel** (not yet reported) (hereinafter –**Hamed**). I have written there as follows:

Public interest requires the prevention of riots, stone throwing and road blocking in the Area. The military commander, who controls the Area, must take measures to secure public safety. While taking such measures soldiers, police officers and residents of the Area may be injured. This is a reality of life which must be taken into account. Activity by security forces which is intended to maintain law and order should not be avoided only because of the fear that someone present at the scene may be injured...

Indeed, in view of the dangers and security threats caused by violent riots, road blocking and stone throwing in the Area, it is in the public interest that measures be taken to prevent them, even if this may possibly result in property or bodily damage. Activities intended to enforce law and order in the Area should not be avoided only because they possibly entail danger of injury (see CA 559/77 **Lampert v. the State of Israel** IsrSC 33(3) 649, 651). Nevertheless, not all actions of police officers, under these circumstances, are reasonable. Police officers may not do everything to suppress riots and restore order. Only such measures which are reasonable under the circumstances may be taken. Disturbance or security threats do not justify unreasonable conduct. A security threat is an important circumstance influencing the measures which should be reasonably taken under the circumstances.

Did the soldiers act reasonably according to these tests? Was the shooting from the tutu rifle towards the appellant negligent under the circumstances?

15. As held by the District Court, a military patrol force which operated in Nablus in an attempt to restore public order in the city ran into a blocked intersection and encountered stone throwing. A confrontation between the soldiers and a group of rioters began and continued for a few hours. The confrontation took various directions throughout the incident and the level of its intensity increased and decreased interchangeably. During the incident, the soldiers took various measures to drive away the stone throwers and remove the barricade. They shot tear gas; they shot rubber bullets; a distraction was

caused by another patrol force which was called to the scene; they temporarily retreated from the intersection in order to reduce the intensity of the confrontation with the rioters and give them a chance to willingly leave the scene. At a certain point two company commanders and the deputy arrived to the scene. They began shooting using the tutu rifle. At first, they shot in the air and at old cans and stoves. As the stone throwing continued, the officers used the tutu rifle to shoot directly at the stone throwers. These were the shoots that hit the appellant in the back.

16. Indeed, it is in the public interest that the army take measures to restore public order and open blocked roads. However, as I have pointed out in **Hamed**, not every action taken under these circumstances is reasonable. The law enforcement agencies are not entitled to impose order at "any price". Without derogating from the importance of keeping public order, it should be kept in mind that the security forces are not entitled to do everything in order to suppress a riot or open a blocked road. They must take only such measures which are reasonable under the circumstances. Suppressing at the cost of putting human life at risk is not always justified. Even in dangerous situations, not every measure for removing the threat is permissible. Under threat as well, only such measures which are reasonable under the circumstances may be taken. Was direct shooting using a tutu rifle reasonable under the circumstances?
17. The testimonies of the officers indicate that the shooting was meant to drive the stone throwers away from the roof in order to enable the opening of the road. The officers did not consider the incident to be an emergency situation requiring the use of live ammunition in order to rescue soldiers from a real and immediate threat to their lives. It did not occur to them to use their personal weapons to fire live rounds at the rioters (page 37 of the protocol). Indeed, the patrol soldiers in the intersection found themselves under a "barrage of stones" and their safety was in danger when they were trying to remove the barricade from the road. Evidently, the rioting cannot be seen as separate from the danger to which the soldiers at whom stones were hurled were exposed. However, the mere threat to the soldiers was not the reason for the shooting. The soldiers' safety could have been secured in a different manner, by a temporary retreat from the intersection or by taking cover nearby. This is clearly demonstrated in the testimony the officer Adi gave to the Military Police Investigations Unit (MIU) (on February 18, 1988):

I must point out that in this specific incident the shooting from the tutu may have been exaggerated because we could have left the area and our forces were not really in a life threatening situation... I, as the commander of the quarter, regarded the opening of the intersection as a very important mission which should be achieved at any price at a relentless effort, and this blew the situation out of proportion. Only after this incident, we added to the instructions to the soldiers "not at any price", meaning, that in retrospect, we may have had to let the intersection remain blocked and come back later or with larger forces than the 12-15 soldiers who were at the scene, come

back and try to open the road without shooting... after the incident we conducted a battalion commander investigation and it occurred to us that we may have been wrong in using weapons and I acknowledged that as soon as I realized and understood that using a tutu was actually using a live weapon.

Officer Raanan also gave a similar testimony to the MIU (on February 21, 1988):

We expected a minor injury and all of a sudden we saw a real injury among the rioters. Hence the reason for my opinion and the opinion of the other officers who took part in this incident, that we should not say that we were in a life threatening situation, but that we expected to achieve a certain result by shooting the tutu, and following the shooting a different result was achieved, much more severe than we had originally expected – and therefore I understand that using the tutu in this incident was a mistake. I should point out that after this incident a discussion was held with the battalion commander and we understood that using the tutu rifle was a mistake in this specific incident and the lesson was learned.

18. This "mistake" of the officers stemmed, *inter alia*, from an inadequate briefing concerning the tutu rifle. This led to unawareness concerning the full capacity of the weapon and the risks involved in using it (page 45 of the protocol). The tutu rifles were provided to the company commanders together with other riot dispersal means. The briefing concerning the rifle was given as part of the briefing on various riot dispersal means, such as gas grenades and rubber bullets. They were told that this was an effective tool for long range riot dispersal, assuming that a person hit by such a small bullet from a long distance would not be severely injured (testimony of company commander Adi, pages 28 and 34 of the protocol). The rifle was not mentioned within the framework of the Open Fire Regulations for live ammunition. Hence the officers' assumption that the shooting would not cause death or severe bodily damage to the stone throwers but would only hurt them the same way rubber bullets do (testimony of the deputy, page 37 of the protocol and testimony of company commander Raanan, page 47 of the protocol). One of the officers, Adi, points out in his testimony before the MIU:

... in all briefings and during the take over from the previous force, the tutu rifle was mentioned as an effective long range riot dispersal tool and was not mentioned at the same time as the Open Fire Regulations for live ammunition. It was therefore understood that using the tutu was standard practice in the same way and magnitude as gas [grenades] and rubber [bullets] were used and that using a tutu rifle was not regarded as using live weapons ... and in retrospect, this might have been the reason for our use of the tutu rifle in this incident.

This officer, in his testimony before the court, gave a positive answer when asked if "the use of the tutu rifle was made under the assumption that it would

only cause a scratch or a blow, similar to that caused by a rubber bullet from such a range" (page 34 of the Protocol). The officers were therefore unaware of the severity of the danger of the weapon they were using. This lack of awareness led to the use of a lethal weapon under inappropriate circumstances. The deputy who approved the shooting testified as follows:

I thought that the tutu bullets would not be lethal or cause severe bodily damage (page 37 of the protocol).

19. As a matter of fact, the tutu rifle is a "live weapon" for any and all purposes, and just as any other firing of live rounds, its shots may cause real injury. Indeed, the bullets have a relatively small caliber (0.22 millimeter), and yet, they may still cause fatal injury. Furthermore, a tutu rifle is a weapon with no binoculars, which reduces the accuracy of the shooting. Using a tutu rifle to disperse riots, therefore, puts the rioters and other passers-by who happen to be nearby, in a real life-threatening situation. In view of the above, it seems that its use in the course of policing actions, the purpose of which is to disperse riots and open blocked roads, is permitted only in special circumstances where the soldiers are in a life threatening situation and when no other, less harmful measure, is available to prevent the threat. Indeed, the reasonableness of the measure shall be determined in each case by properly balancing the relevant values and interests. The interests and values which will be taken into account are the interests and values of the injured party, the party who caused the damage and society.
20. Under the circumstance of this case, shooting directly at the stone throwers with a tutu rifle was not reasonable. As the testimonies of the officers who were present at the scene indicate, the blocked road was an internal road in Nablus used by the inhabitants of the city; the opening of the road was an action initiated by the army. It continued for a few hours and was mainly meant to enable the inhabitants of that area to get supplies after the curfew that had been imposed on them was lifted. The testimonies also indicate that this was not an unexpected emergency which caused an operational need to open the road and that the opening of the road was not really necessary beyond the general interest to maintain public order; the riot was not widespread and there were not many stone throwers; there was no indication that the incident could turn into a massive disturbance and loss of control and the shooting was not required to secure the soldiers' safety. Furthermore, the officers confirmed that they were not aware of the dangers involved in using the tutu rifle due the inadequate briefing they had received and that had they been aware of such dangers they would not have carried out the shooting. In view of all the circumstances, as described by the officers in their testimonies in this case, it seems that the shooting which was meant to disperse the rioters and open the road was not reasonable and the risk caused by the soldiers in using live fire was not reasonable. The shooting using the tutu rifle was therefore negligent.

VOLUNATRY ASSUMPTION OF RISK

21. The claim that the appellant's behavior gives rise to the defense of "voluntary assumption of risk" cannot be upheld. The defense of "voluntary assumption

of risk" applies if the injured party "knew and assumed or must be taken to have known and assumed the state of affairs causing the damage and voluntarily exposed himself or his property thereto." (Section 5 of the Tort Ordinance). The defense of voluntary assumption of risk shall stand provided that three cumulative conditions are met: the plaintiff's knowledge of the risk, including an assessment of its dangerous nature; the exposure of the injured party to such risk; the will of the injured party to expose himself to the risk. The will to expose oneself to the risk must, therefore, be based on one's knowledge of the state of affairs that caused the damage. Such knowledge is not only the knowledge of the facts that caused the damage but also assessing the nature of the risk (Presser & Keeton *On the Law of Torts* (5th Ed., 1984) 487). With respect to the requirement for "exposure", this does not only require knowledge that damage was caused, but also exposure to the legal consequences of the damage (CA 145/80 **Vaaknin v. Beit Shemesh Local Council et al.**, IsrSC 37(1), 113, 147). A defendant may use the defense of voluntary assumption of risk only when the plaintiff consented to assume the risk of injury without compensation (CA 119/86 **Kni Houses Ltd. v. The Netanya Local Building and Planning Committee**, IsrSC 46(5), 727).

22. In our case, there is no evidentiary infrastructure giving rise to the conclusion that the appellant was aware of the entire risk to which he was exposed and to its nature. It has not been proven that the appellant estimated that the riot would entail a severe reaction of live ammunition shot directly towards the stone throwers. In addition, it has not been proven that he knew and assessed the danger involved in the shooting. How can one say that he knew of the danger when even the shooting officers were not aware of the risks and dangers of the weapon they were using? Furthermore, the appellant indeed exposed himself to the risk of being injured by the soldiers, but he did not consent to release the respondent and its agents from their duty to act reasonably towards him (see, Presser & Keeton, p. 485). Even if he consented to the risk of a minor injury caused by riot dispersal means, he did not consent to bear the consequences of live fire (see J.G. Flemming, *The Law of Torts* (9th Ed. 1998) 336). He did not consent to bear the consequences of unreasonable shooting (compare, CA 3684/98 **The State of Israel v. Zawid Bader a-Haleil et al** (not reported)). The condition of voluntary assumption of the legal consequences of the damage has not been met in this case as well. It has not been proven that the appellant consented that should he be injured by the soldiers, the damage would be borne by him. There is no evidence that he had an intention to assume the risk of an injury without compensation. Also objectively, it may not be said that a reasonable person, in lieu of the injured party, would have assumed the risk of an injury without compensation.

Therefore, the appeal is allowed and the case is being remanded to the District Court in Jerusalem for further consideration of the issues of the damage, contributory fault and scope of damages.

The President

Justice E. Rivlin:

I concur.

Justice

Justice E. Hayut:

I concur.

Justice

Held as specified in the judgment of the President A. Barak.

Rendered today, 23 Kislev 5765 (December 6, 2004).

The President

Justice

Justice