C.A. 124/87

LIEUTENANT IZAT NAFSU

v.

CHIEF MILITARY ADVOCATE

In the Supreme Court sitting as a Court of Appeals
[24 May 1987]
Before: Shamgar F., Bejsky J. and Goldberg J.

Military Jurisdiction Law, 1955

Appeal of the verdict of the Military Appeals Court, file 202/82/a, of 29.6.86, given by S. Ziv, Judge Y. Shilo and A. Ravid, dated 24 May 1987.

A. Kamar, Dr. Z. Hadar, M. Kamar and Y. Kamar for the appellant.

Brig. Gen. A. Nevo and Col. U. Shoham for the respondent.

JUDGMENT

The President:

1. The appellant, an IDF officer holding the rank of lieutenant, was convicted by a special military court of treason under Section 43(7) of the Military Jurisdiction Law, 1955, and of aggravated espionage under Section 113(b) of the Penal Code, 1977. These accusations referred to the conveying of information on the IDF to the enemy, namely, to a Lebanese resident whose name is specified in the charge sheet and proved in court, and who on the relevant date, that is in 1979, was a senior commander in the Al-Fatah organization. The appellant was further convicted on two charges relating to the offence of assisting the enemy under Section 44 of the Military Jurisdiction Law, 1955, and aiding the enemy in

wartime under Section 99 of the Penal Code, 1977, in connection with his meeting with another resident of southern Lebanon whose name is specified and confirmed as in the case of the aforementioned person, with the aim of having the appellant carry out missions of transferring combat materiel to Israel. Finally, he was convicted on eight counts relating to the offence of treason, under Section 43(2) of the Military Jurisdiction Law, 1955, and aid to the enemy in wartime under Section 99(a) of the Penal Code, 1977, which with respect to their facts refer to the transfer of bags with combat materiel upon the request of the aforementioned person from Lebanon to Israel. The special court sentenced the appellant to 18 years' imprisonment. His sentence also included expulsion from the army, which automatically means cancellation of his military rank.

2. The appellant's appeal to the Military Appeals Court was rejected.

3. The appellant asked for and received permission to appeal to the present court, in accordance with the provisions and conditions specified in Section 440(t) of the Military Jurisdiction Law, 1955, passed by the Knesset several days before the judgment in the appeal was handed down.

4. The appellant's appeal was against his conviction. The appellant's arguments in his appeal addressed to this court, were in the main those which served as the basis of his defence in the special military court, and were also adduced before the Military Appeals Court: the special military court convicted the appellant on the basis of his written confessions, which were given to investigators of the General Security Service, and which, in the opinion of the court, were found to contain "an additional element," as required by the laws of evidence. The appellant's claim was that his confessions were inadmissible and did not constitute the truth. According to him, the confessions were made after GSS investigators exerted unacceptable means of pressure against him, which bars their admissibility under Section 477 of the Military Jurisdiction Law, 1955, according to which a military court will not accept a defendant's confession as evidence unless it is convinced that it was given of the defendant's own free will. The appellant says violent acts were carried out against him, which included pulling his hair, pushing him around, throwing him to the ground, kicking, scratching and insults. He was ordered to strip and sent to take a cold shower. He was prevented from sleeping for many hours during the day and

especially at night and he had to stand in the yard of the prison facility for long hours even when he was not being interrogated. He was also threatened that his mother and wife would be arrested and that personal information about him, which was in the interrogators' possession. would be made public.

The special court did not accept these arguments of the appellant, which were denied by his interrogators in their testimonies. The Military Appeals Court saw no reason to intervene in the judgment of the court of the first instance, that had seen and heard the above-mentioned witnesses, and had been able to formulate a first-hand impression of them.

5. With the opening of the hearing before this court, the learned representative of the state, Chief Military Advocate Brig. Gen. Amnon Nevo, who appeared before us together with Col. Uri Shoham, declared that prior to hearing the appeal, he himself, along with the General Security Service had examined the facts of the case and discovered new evidence and facts which indicated that there had been truth in most of the appellant's claims regarding the pressures exerted upon him with respect to his confessions, and which, he maintains, affected his free will. The following is the essence of his remarks, as made before us and as submitted to us in writing:

> "Following an examination conducted by the GSS at its initiative, after objections and reflections on the whole affair were raised within the service (29 January 1987), and following questioning conducted by myself personally during the past month since I was apprised of the findings of the GSS examination, new evidence and facts have been revealed and the following doubts arose in the episode in question:
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> "1. Mini-trial
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> Most claims of the defendant at the 'mini-trial' regarding the pressures exerted on him to give confessions, which, he argues, affected his free will, with the exception of direct means of violence, such as kicks and slaps, were examined and found basically correct..."

According to the conclusions of the chief military advocate, the testimony of the GSS interrogators in the court of the first instance had not been entirely truthful when they denied exerting undue pressures in obtaining confessions from the appellant. Except for their contention that there was no hitting or slapping, most of the appellant's claims regarding the conduct of the investigation have been validated. In view of the above, the chief military advocate in concurrence with the A-G have accepted the appeal before them that the confessions were inadmissible, and find it incumbent upon the state to overturn the conviction regarding the transfer of combat materiel, based on these confessions. Brig. Gen. Nevo announced that he is also forgoing the argument that the conviction of conveying information to the enemy can be based on evidence other than the confessions to GSS investigators, which, he maintains, is implicit in the material before us. It is noteworthy that in view of the aforementioned stand of the general prosecution, we saw no place to examine other items of evidence at the court's initiative.

Brig. Gen. Nevo informed us that instead, with the approval of the attorney general, he had reached the following agreed settlement with the appellant and his learned lawyers, the full text of which is given hereinafter, and which we have been asked to approve:

> "Agreement
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> The sides wish to inform this honourable court that they have reached the following agreement on the issue of the appeal:
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> 1. The prosecution agrees to the annulment of the verdict of the Military Appeals Court, file 202/82/a and of the verdict of the special military court, file 80/3, on the issue of the appeal.
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> 2. The appellant admits to the offense of exceeding his authority to the point of endangering the security of the state under Sec. 73 of the Military Jurisdiction Law, 1955. The following are the details: the appellant, while serving as a special-duties officer at Southern Lebanon Region HQ, on unknown dates in 1979 or proximate thereto, did exceed his authority and by so doing was liable to harm the security of the state or the operations of the army, according to the following facts:

(a) As part of his mission as a special-duties officer in the Southern Lebanon Region [SLR], the appellant, together with the Christian Forces, toured the village of Shuba in Southern Lebanon on an unknown date in 1979.

On one of the occasions when he visited the village, he was asked by an informer of the SLR (who shall herein be called "X"- his full name appears in the agreement - M. Sh.) to come to his house and meet there with a person involved in hostile terrorist activity, who was ready to provide the IDF authorities with important information. The appellant accompanied "X" to his home and there met a stranger who presented himself as being connected with the terrorists and able to provide information regarding their activity in the eastern sector of the SLR. The stranger introduced himself as "Y" (his full name appears in the agreement - M. Sh.).

(b) In a second meeting two months later at the home of "X", "Y" told the appellant that he was a senior commander in Fatah and that their previous meeting had been photographed secretly. "Y" demanded that the appellant co-operate with him and give him information about IDF activity in the sector. In the event the appellant refused, "Y" threatened to convey the photographs in his possession to Israeli Intelligence. After an exchange of words between them, the appellant got up and left.

(c) The appellant informed no one about these meetings.

3. The appellant and the prosecution will be free to present whatever arguments they see fit regarding the punishment, on the basis of these facts only. The prosecution will argue that a punishment of expulsion from the army is not commensurate with the circumstances of the matter."

As the agreement indicates, we now have before us on the part of the appellant an admission of guilt, as entailed under Sec. 354(a) of the Military Jurisdiction Law, 1955, including an admission of facts which support the charge.

Since this confession conflicts with the appellant's statements in the special military court and his arguments in the Military Appeals Court - when he denied any connection with "Y" and any meeting or acquaintance with him - we found fit to examine thoroughly why the appellant had changed his story. Principally, we wished to examine whether the appellant had not admitted wrongdoing because his strength had given out and he was no longer able to bear the penalty of imprisonment he was serving. We therefore heard also the statement of the appellant himself, who insisted that the facts detailed in the agreement describe the whole truth - that is, they constitute, as he says, a description of what occurred, no more and no less. The appellant explained to us that he had considered the matter and had heard the explanations of defence counsel, and his confession does not constitute submission to the pressure of prison but is, as noted, a description of what took place. After we were convinced that the appellant was acting on the basis of his own free consideration, and after we reached the conclusion that the appellant's description could be consistent with the basic facts as they were presented to the court, we decided to accept his confession, and we stated so in our decision which was given prior to hearing the arguments regarding the penalty to be meted out.

We therefore decided to annul the conviction and the punishment meted out by the special military court, and instead to convict the appellant of an offence under Sec. 73 of the Military Jurisdiction Law, 1955, in accordance with the facts spelled out in the written statement of confession, above.

6. As we noted, implicit in the above is that the appellant's absolute denial in the first court were not truthful.

In the face of this conclusion, it became clear to us from the words of the learned representative of the state that in his opinion, the General Security Service interrogators had gone beyond the bounds of the permissible with respect to the cumulative weight of their deeds, and had compounded this misdeed by giving false testimony to the special military court about the interrogation of the appellant and by denying his principal contentions regarding the methods of interrogation.

Nothing can detract from the gravity of this conclusion, which points to these witnesses' disavowal of their duty to tell the truth in testifying before a legal tribunal. These actions constitute a severe blow to the credibility of a heretofore unquestioned arm of the state. The court was thereby deprived of the ability to decide in the case of the appellant on the basis of truthful data, and the standing and force of the court were harmed when it was misled by the statements of the interrogators.

We find that the acts revealed in this case have been reprehensible, in that they led the court into incorrect findings and conclusions. We direct the attention of the A-G to the obligation of adopting the decisive measures necessary to uproot this phenomenon.

7. In this connection it should also be noted that in the special court it also emerged that the General Security Service interrogators who conducted the interrogation of the appellant, did not keep the notes and other auxiliary records which they took down in the course of the interrogation, and erased recordings of the various stages of the interrogation when in their opinion their investigation was completed. As a result, the general prosecution and the defence alike were deprived of information about the course of the interrogation as this was reflected in the notes and recordings, and this *ipso facto* limited their ability to question the witnesses who had taken part in the interrogation; and the appellant's ability to support, through the notes or recordings, his contentions regarding the interrogation, was also affected. The learned representative of the state informed us, that a few years after the episode, and principally in the wake of the judgment handed down by this court in the Abu-Sneineh case (appeal 343/ 82, Abu-Sneineh vs. State of Israel - not published), orders were issued requiring that records be kept and that every notation and every recording be preserved. In this connection it bears re-emphasizing that an investigation by the General Security Service which leads to legal proceedings (irrespective of the original intention of those who initiate the investigation) must be conducted in accordance with the same rules which apply to the police in its investigations; and just as the latter must meticulously keep records and preserve every notation and every recording made during the investigation, so, too, must the General Security Service.

We did not see the orders issued in this matter about which we were informed by the learned representative of the state, and therefore we direct the attention of the attorney-

general to the advisability of re-examining whether the existing orders meet the requirements set forth above.

We are also given to understand, from the words of the learned representative of the state, that an examination by a special team is now underway regarding the methods of interrogation employed by the General Security Service. The present case illustrates the urgency and importance of this matter.

8. We turn now to the appropriate punishment for the deeds admitted to by the appellant. Sec. 73 of the Military Jurisdiction Law, 1955, which bears the marginal heading "Exceeding Authority to the Point of Endangering State Security," states that a soldier who exceeded his authority and thereby harmed or could have harmed the security of the state or the operations of the army or the operations of the armed forces who are acting in concert with the army, is liable to a prison term of five years; if he did the act knowingly (an argument not adduced here) he shall be liable to ten years' imprisonment.

The act admitted to by the appellant bears grave aspects: it relates to activity in an area where at that time terrorist forces were also operating. When the appellant was invited to meet with a person linked to hostile terrorist activity who was ready to provide information, he was obligated to report this at least *post factum.* This obligation stems, in itself, from what is required in order to maintain the orderly activity of the military framework. Further, it derives from security reasons, since in a case like this, one should examine who it is that is making contact, at his initiative, with the IDF, and whether anything is known about him. It is unnecessary to emphasize that without this kind of report and examination, at least following the meeting, the appellant or anyone else who might act with him or in his stead, could fall into a trap laid by the terrorists which could endanger human life and state security.

In this case the appellant erred twice in failing to report, and the second case was actually far more serious than the first, since he found, at a later stage, that the person in question was not someone who sought, ostensibly, to serve as an IDF informer, but a senior Fatah man who was acting on behalf of this organization. According to him, he photographed the first meeting and wanted to exploit this for extortion. The absence of a

report and of any other action deprived the relevant authorities of information on this matter, and this was liable to create difficulties for anyone succeeding the appellant, or any other officer who might easily have found himself in similar circumstances. It also prevented information about the activity of "X", in whose home the meeting was held, and about whom it then became quite clear that he was connected with the senior Fatah commander.

Finally, it bears noting that the appellant also did nothing whatsoever to stop "Y" or to neutralize him in some other way. That he made do with leaving the place is not the kind of reaction required under these circumstances from an IDF officer who encountered a senior terrorist.

In contradistinction to the significance, as described, of the appellant's commissions and omissions, to his credit stands his positive military record as this is indicated, *inter alia,* by the written character testimonies of Brig. Gen. (res.) Binyamin Ben-Eliezer and Lt. Col. (res.) Yoram Hamizrahi and the head of the Kafr Kama local council.

Essentially, we must take a lenient view of the fact that the appellant has already been imprisoned for many years (7 and a half years) after being convicted of an offence of extreme gravity, while it now emerges that his conviction, based on confessions given to GSS interrogators, was devoid of any legal basis and that the maximum penalty prescribed for the offence he has now admitted to, is far less than the prison term he has already served.

In view of these considerations, we have decided to sentence the appellant to 24 months' imprisonment from the date of his detention, and to demote him to master sergeant. Since he has already served his penalty, he is to be released.

We assume that the military authorities will know how to compensate the appellant, who served a longer prison term than was meted out to him in the wake of this appeal.

Marginally, we express our displeasure at the fact that while this matter was still pending before us, the media carried reports which exceeded what is permitted under the

Law. This absence of restraint adversely affected the atmosphere needed to do justice, and it is to be avoided.

This judgment shall be published in full. Given this day, 24.5.87.