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Jerusalem District Court
Before the Honorable Judge Moshe Sobel

Appeal by the State of Israel 23834-04-13 State of Israel v. Ras *et al.*

Appellant **State of Israel**

– v. –

Respondents **1. Bonnie Riva Ras**
2. Lesley Sachs
3. Valerie Stessin
4. Sylvie Rozenbaum
5. Sharona Kramer

Ruling

1. The Jerusalem Magistrates Court (Judge Sharon Larry-Bavli), on April 11, 2013 – the *Rosh Chodesh* [first day of a Hebrew month] of Iyar 5773 – denied a petition which had been filed by the State of Israel, for the release of the Respondents on bail, subject to an order that prohibited them from entering the Western Wall [plaza] during the *Rosh Chodesh* prayers which are to be held there in the next three months (Sivan, Tammuz and Av). In denying the petition, the Magistrates Court ruled that the Respondents had not committed a breach of the peace, and this being the case, there was no cause for their arrest or for the requirement for bail for their release. This is the subject of the appeal which is currently before me, which was filed by the State of Israel.

2. The Respondents belong to the "Women of the Wall" group. The respondents came to the Western Wall plaza in order to take part in the prayers which the group holds every *Rosh Chodesh* in the women's section of the plaza. The petition for release on bail, which was filed by the State of Israel before the Magistrates Court on the same day, stated as follows: "**While they were in the women's plaza at the Wall, the suspects wrapped themselves in *tallitot* [prayer shawls] and read aloud from a Torah scroll; all of this was in violation of local custom, pursuant to the Holy Sites Regulations. In so doing, they directly caused a breach of the peace in that place and violated the law**." With respect to those actions, the State attributed the following offenses to the Respondents: conduct in a public place in a way which is liable to cause a breach of the peace (pursuant to Section 216 (a) (4) of the Penal Code, 5737-1977; hereinafter: the "**Penal Code**"); violation of a lawful instruction (pursuant to Section 287 of the Penal Code); and commission of an act which is prohibited within the confines of the Holy Sites (pursuant to Regulations 2 (a) (1a) and 5 of the Preservation of Sites Holy to Jews Regulations, 5741-1981; hereinafter: the

"**Holy Sites Regulations**"). In the hearing which took place before the Magistrates Court, the representative of the Israel Police added that the Women of the Wall had been holding *Rosh Chodesh* prayers in the Western Wall plaza for the last few months, in contravention of the law and in contravention of the High Court of Justice rulings which were handed down in 2000 and 2003, which held that they were required to hold their prayers in a location known as "Robinson's Arch", which is adjacent to, but not within, the Western Wall plaza. Initially, the Israel Police demonstrated restraint and tolerance toward the members of the group and refrained from detaining or arresting them. However, from month to month, the tension has been growing until, at this month's prayers, pursuant to which the petition for release on bail was filed, a heated dispute broke out: men and women worshipers who objected to the actions by the Women of the Wall gathered and shouted at them vociferously; Israel Police forces present on the site stood between the sparring groups; and one of the objectors, a man who was standing in the area of the barrier between the man's section and the women's section, burned a book and was arrested. The representative of the Israel Police went on to argue that the imposition of the restrictions on the Respondents as requested would help "**to restore tranquility and to keep away those women who are carrying out the provocation at the site.**"

3. The Magistrates Court studied the evidentiary material, briefly viewed the video clip which was shown to it by the representative of the Israel Police, and ruled that the Respondents were not the ones who had committed a breach of the peace and had initiated the provocation. Insofar as a breach of the peace was committed, the responsibility for the breach rests with other people who were present at the site and expressed their protest against the Women of the Wall. Accordingly, the Court ordered the unconditional release of the Respondents.

4. In its appeal, the State reiterated the arguments which it had raised before the Magistrates Court. According to the State, the Respondents committed the offense of violation of a lawful instruction in that they defied the Court ruling in High Court of Justice Additional Hearing 4128/00, **Director-General of the Office of the Prime Minister v. Hoffman**, *PD* 57 (3) 289 (2003) (hereinafter: the "**Hoffman Additional Hearing**"), in which the Court ruled (by a majority opinion of five Justices, with four Justices dissenting) that insofar as the Government prepares the "Robinson's Arch" site, within 12 months, for entry and occupancy by human beings, "**then the Women of the Wall will be allowed to pray, in their own way, in that place**", and "**it will be possible to consider it as an alternative to the [Western] Wall plaza and prayer therein**" (p. 318, Justice M. Heshin). In addition, the Respondents violated Regulations 2 (a) (1a) and 5 of the Holy Sites Regulations, which state that anyone who takes part in "**the performance of a religious ceremony other than in accordance with local custom, which offends the sensibilities of worshipers from among the public with respect to the site in question**" is committing an offense. The State identifies the "**local custom**", which is mentioned in Regulation (a) (1a) with the

status quo – that is, with the custom which has prevailed, for many generations, in the Western Wall plaza, pursuant to which women's prayers are not conducted at the site. This interpretation is based on the purpose of the regulation: to ensure public order and to prevent brawling in a sensitive holy place. In any event, the State disputes the ruling by the Court of first instance, which held that the Respondents, in their conduct, did not create a provocation.

According to an argument that has been set forth by the State, the very fact that the Respondents came to the Western Wall plaza (and that some of them were even wearing *tefillin* [prayer phylacteries]) constitutes provocation and a violation of the law and the ruling by the High Court of Justice. In light of the tense atmosphere which prevails at the site during this period of time, this conduct is capable of stirring up the atmosphere and giving rise to severe confrontations, and accordingly, the Court should have granted its petition and should have made the release of the Respondents contingent upon keeping them away from the Western Wall plaza for the next three *Rosh Chodesh* prayers. The State made reference to a ruling which was handed down by the Jerusalem Magistrates Court on an earlier occasion, in which its petition to release another member of the "Women of the Wall" group on bail, including a condition which barred the woman in question from the Wall (ruling by Judge M. Kadorry, dated October 17, 2012, in State of Israel File 25516-10-12). The State clarified that it had no objection to the Respondents' presence at the "Robinson's Arch" site for the next three *Rosh Chodesh* prayers, nor to their acting according to their custom there.

5. The law requires the appeal to be denied. The Respondents were detained and brought to the police station pursuant to Section 67 of the Criminal Code Law (Powers of Enforcement – Arrests), 5756-1956 (hereinafter: the "**Arrests Law**" or the "**Law**"), which confers upon a member of the Israel Police the power to detain persons in cases where there are "**reasonable grounds to suspect that a person has committed an offense… which is liable to endanger the well-being or the security of a human being, or the public welfare or the security of the State**". Once they had been brought to the police station, the officer in charge should have acted in accordance with Section 27 (d) of the Arrests Law: "**When a person has come to the police station or has been brought to it and is not under arrest, and when the officer in charge has found that there is a cause for arrest pursuant to Section 13, he is entitled, after having explained his considerations to the suspect, to arrest him or to subject him to bail**" (emphasis added). The officer in charge saw fit to impose bail upon the Respondents, and to demand that the conditions for bail include their exclusion from the Western Wall plaza for the next three *Rosh Chodesh* prayers. However, because the officer in charge did not have the authority to include among the conditions for bail (Section 42 (b) (3) of the Arrests Law) the condition of exclusion from a site for a period in excess of 15 days, the case in question is subject to the provisions of Section 42 (d) of the Law: "… **Should the officer in charge believe that**

the suspect should be released subject to conditions which are not within the scope of his powers, or should bail not have been provided in a timely manner, the subject shall be arrested and shall be brought before a judge as quickly as possible and within no more than 24 hours". Accordingly, the Respondents were brought before the Court, in order for it to exercise its powers pursuant to Section 44 (a) of the Law: "**Should an indictment not yet have been filed against a suspect… and should he be under arrest or imprisonment, the Court is entitled, at his request, to order his release on bail…**" (emphasis added). In contrast to the officer in charge, the Court is entitled to order, within the framework of conditions for release on bail, exclusion for a period of time in excess of 15 days (Section 48 (a) (3) of the Law), provided that the indictment against the subject is filed within 180 days (Section 58 of the Law).

As we have seen, a precondition for the imposition of bail by the officer in charge or by the Court – more precisely: a precondition for the imposition of that which includes a prohibition against being present in a certain place, in contrast to bail pursuant to Section 44 (b) of the Law, which is intended to ensure that the suspect will appear in Court – is the existence of a cause of arrest pursuant to Section 13. As [former Israel Supreme Court Justice] Jacob Kedmi explains: "**The Court is entitled: to impose bail instead of ordering release on bail, when it has the power to arrest, and then it is not limited with respect to the 'conditions for release'; and to impose bail in cases where it is not empowered to order release on bail, and then it is limited with respect to the conditions for release, as required by the provisions of Section 44 (b) of the Criminal Code Law (Arrests)**" (***On Criminal Law*** [Hebrew], Part I, 2008, p. 336).

6. We shall accordingly go on to examine the question of whether there is a cause of arrest against the Respondents, pursuant to Section 13 of the Arrests Law. Section 13 (a) of the Law states as follows:

> **"The judge shall not order a person's arrest, unless he has been convinced that there is a reasonable suspicion that the person has committed an offense, which is not a misdemeanor, and one of the following causes exist:**
>
> **(1) There are reasonable grounds to fear that releasing the suspect, or not arresting him, will give rise to the obstruction of investigation or trial proceedings, escape from investigation, trial proceedings or a sentence of imprisonment, or will give rise to the disappearance of property, the subordination of witnesses or harm to evidence in any other way;**
>
> **(2) There are reasonable grounds to fear that the suspect will endanger the security of a human being, the public security or the security of the State;**

> **(3) The Court is convinced, on the basis of special grounds, which shall be recorded, that it is necessary to conduct investigation proceedings which cannot be carried out unless the suspect is under arrest; the Court shall not order an arrest pursuant to this cause for a period in excess of 5 days; should the Court be convinced that it is not possible to conduct the investigation proceeding within the aforesaid period, it is entitled to order arrest for a longer period, or to extend it, provided that the total of all such periods shall not exceed 15 days."**

Accordingly, the first condition for the existence of a cause of arrest is the existence of a reasonable suspicion that the suspect has committed an offense which is not a misdemeanor. In accordance with that which is been set forth above, three offenses were attributed to the Respondents in the petition for release on bail: violation of a lawful order; commission of an act which is prohibited within the confines of the Holy Sites; and conduct in a public place in a way which is liable to cause a breach of the peace. Is there a reasonable suspicion for the perpetration of those offenses?

7. We shall begin with the offense of violation of a lawful order. The only lawful order which, according to the argument that has been set forth by the Appellant, was violated by the Respondents is the ruling in the Hoffman Additional Hearing. The Appellant does not argue that any other lawful order was violated; nor does it argue that the Respondents, in the course of the incident, failed to obey any order by the police. The argument with respect to the violation of the ruling in the Hoffman Additional Hearing deserves to be denied. **First of all**, the Respondents were not a party to the proceedings in the Hoffman Additional Hearing, and, this being so, the content of the ruling cannot be considered as a lawful order which was directed toward the Respondents and was violated by them. **Secondly**, the ruling in the Hoffman Additional Hearing did not include an order which prohibited the Women of the Wall from praying in the Western Wall Plaza. The operative outcome of the ruling was phrased in the following words (pp. 318-319, 336):

> **"At least at this time, it is <u>fitting and proper</u> for the Women of the Wall to pray according to their custom near the Western Wall, at the 'Robinson's Arch' site, provided that the site is appropriately and properly prepared for entry and occupancy by human beings… The 'Robinson's Arch' site, in its present state, cannot be considered as a site which is fitting and proper for prayer. However, if the site is properly prepared as required, <u>it will be possible to consider it</u> as an alternative to the Western Wall plaza and prayer therein. Thus, if the Government prepares the 'Robinson's Arch' site – properly and as required – within 12 months of today, then the Women of the Wall <u>will be allowed</u> to pray, in their own way, in that place. When I say that it is incumbent upon the Government to prepare the site 'properly and as required', I am referring, *inter alia*, to the establishment of appropriate**

> **safety arrangements and the preparation of a convenient and safe access route to the prayer site and to the Wall itself"** (emphases added).

The phrasing of the outcome in the ruling is not one of an imperative directed toward the Women of the Wall; rather, it is one of a recommendation ("**fitting and proper**"). The entire relevance of the ruling, in practical terms, was as a softening of the imperative which had been directed **toward the Government** in the ruling which constituted the object of the additional hearing, in which an absolute order was issued, "**which instructs the Government to establish the suitable arrangements and conditions, within which the Petitioners shall be able to exercise their right to pray according to their custom in the Western Wall plaza**" (High Court of Justice 3358/95, **Hoffman v. Director-General of the Office of the Prime Minister**, *PD* 54 (2) 345, 367 (2000); hereinafter: "**Hoffman HCJ II**"). The ruling in the Hoffman Additional Hearing opened the way for the Government to refrain from fulfilling the duty which had been imposed upon it in Hoffman HCJ II – that is, gave it the possibility of preparing the "Robinson's Arch" site, within 12 months, as a substitute for the duty of allowing the Women of the Wall to pray in the Western Wall plaza. The ruling in the Hoffman Additional Hearing did not impose a prohibition upon the Women of the Wall – at the very least, not a prohibition which, if breached, would give rise to penal sanctions – against praying in this or the other place. Moreover, the position that has been adopted by the Respondents is that the Government has not complied with the condition which was established in the Hoffman Additional Hearing, and that to this day, it has not prepared the "Robinson's Arch" site, properly and as required, as a place for prayer. If we note that the outcome of the Hoffman Additional Hearing was phrased in the manner of the stipulation, and in the absence of any determination by a court of law, at the time when the offenses attributed to the Respondents were committed, confirming that the Government had complied with the condition which was established in the Hoffman Additional Hearing, the ruling in question cannot be considered as an absolute order, which imposes a final and unequivocal order which is capable of giving rise to criminal liability for the breach thereof.

What this means is that there is no reasonable suspicion that the offense of violation of a lawful instruction was committed by the Respondents.

8. Similarly, in the case which is presently before us, there is no reasonable suspicion that the offense of commission of an act which is prohibited within the confines of the Holy Sites (pursuant to Regulations 2 (a) (1a) and 5 of the Holy Sites Regulations) was committed. This offense is committed by "**the performance of a religious ceremony other than in accordance with local custom, which offends the sensibilities of worshipers from among the public with respect to the site in question**". The question of the interpretation of the term "**local custom**" was discussed in High Court of Justice 257/89, **Hoffman v. Official in Charge of the Western Wall**, *PD* 48 (2) 265 (1994) (hereinafter: "**Hoffman HCJ I**"). Deputy Chief Justice Elon believed that notwithstanding the fact that the manner

in which the Women of the Wall pray is not formally in opposition to Orthodox Jewish law, it conflicts with the matter of prayer in an Orthodox synagogue and as such, it is in opposition to local custom, because "**'local custom' and the *status quo* are one and the same**" (**HCJ I**, p. 344). Justice S. Levin did not agree; he stated (on p. 357) as follows:

> **"As I see it, the phrase 'local custom' should not necessarily be interpreted according to Jewish law or according to the *status quo*. The nature of a custom is that it changes according to the changing times, and [the phrase] should express a pluralistic and tolerant approach to the opinions and customs of others, subject to those reservations which I have already mentioned above."**

Chief Justice Shamgar did not disagree with the opinion of Justice S. Levin; rather, he believed that the time had not yet come to decide in the matter of the appeals, because they were premature. In other words: Chief Justice Shamgar also recognized the right of the Women of the Wall to pray in the [Western] Wall plaza according to their custom, and their custom should not be viewed as offensive to the local custom. See, *e.g.*, a statement which appears in the ruling in the Hoffman Additional Hearing (pp. 306-307, 315):

> **"In this regard, the opinion by Chief Justice Shamgar concurred with the opinion by Justice Levin – that is, that the Women of the Wall have the right to pray, in good faith, next to the Wall, according to their custom. Admittedly, Chief Justice Shamgar believes, as we have seen, that: 'The legal starting point is, in fact, the *status quo*. But we must not close the door against the existence of the right, in good faith, of anyone who seeks to voice his prayer in his own way, and this is what clearly arises from the determinations in the aforesaid laws' (p. 355). At the same time, and even though, on the merits, the opinion by Chief Justice Shamgar concurred with the opinion by Justice Levin, they disagreed with respect to the operative remedy and for the reasons which we have pointed out above, Chief Justice Shamgar believed that the order *nisi* should be set aside and that the appeal should be denied.**
>
> **The summary of the first petition is that according to the majority opinion, the Women of the Wall have acquired the right to pray according to their custom next to the Western Wall. At the same time, and according to (a different) majority opinion, their appeal was denied…**
>
> **I find it hard to accept the argument by the Office of the Attorney General that the matter of the right of the Women of the Wall was not settled in the first petition. We have cited lengthy passages from the opinions by the Justices in the first ruling and in our opinion, the Court ruled in favor of the Women of the Wall and their right to pray according to their custom at the Western Wall."**

The Court made a similar statement in Hoffman HCJ II (pp. 364-366):

> **"This position, which sanctifies the '*status quo*', was supported in the first ruling only by Deputy Chief Justice Elon, but was totally and utterly rejected by Chief Justice Shamgar and by Justice S. Levin. This comment also applies to the balance formula, according to which the Neeman Committee oriented itself, in which weight was also attributed to the consideration of 'not offending the local custom'… The first ruling, in practical terms, recognized the Petitioners' basic right to conduct prayer according to their custom in the prayer plaza near the [Western] Wall."**

Justice (Emeritus) Englard, who disagreed with the minority opinion in the Hoffman Additional Hearing, also noted that the statement by Justice S. Levin in Hoffman HCJ I with respect to the pluralistic-secular-national interpretation which should be given to the expression "**local custom**" is "**the interpretive approach which has been accepted by this Court**" (Hoffman Additional Hearing, pp. 333-335).

The aforesaid interpretation of the expression "**local custom**" is sufficient reason to state that there is no reasonable suspicion that the Respondents violated the prohibition set forth in the Holy Sites Regulations, one of the necessary components of which is "**the performance of a religious ceremony other than in accordance with local custom**".

9. We shall now proceed to the third offense: that of conduct in a public place in a way which is liable to cause a breach of the peace. Even if I were to assume that there is a reasonable suspicion that the Respondents committed that offense, there is still no cause for their arrest pursuant to any of the alternatives which are set forth in Section 13 of the Arrests Law. The Appellant believes that the cause of arrest results from the dangerous nature of the Respondents – that is, that the cause of arrest is pursuant to Section 13 (a) (2): "**There are reasonable grounds to fear that the suspect will endanger the security of a human being, public security or the security of the State**". The problem is that the offense in question, pursuant to Section 216 (a) (4) of the Penal Code, refers to conduct "**in a way which is liable to cause a breach of the peace**". This is not conduct which is liable to endanger **public** security or the security of **individuals**, with respect to which Section 13 (a) (2) of the Arrests Law establishes a cause of arrest; rather, it is conduct which is liable to cause a breach of the **peace**, and after all, the former is not the same as the latter. It is well-known that the Arrests Law, which was enacted in the year 5756-1996, differed from the previously existing law because it omitted the endangerment of "**the public welfare**" as a cause of arrest (cf. Section 21A (a) (1) of the Criminal Code Law [Combined Version], 5742-1982, with Sections 13 and 21 of the Arrests Law). This omission is significant (R. Kitai Sangero, "Does stealing a bottle of perfume from a cosmetics shop really endanger public security? On the arrest of suspects and defendants in the name of the protection of public security" [Hebrew], ***Aley Mishpat*** IV (5765-2005), 325, at 326 and 358). "**The term**

'public security' appears to be narrower, to a certain extent, than the term 'public welfare'" (High Court of Justice 6624/06, **Pashko v. Ministry of the Interior**, ruling handed down on August 13, 2007, paragraph I (7) of the ruling). The distinction between "**public security**" and "**public welfare**" is reflected in situations such as the case which is presently before us. Even as the Appellant itself would have it, what is to be feared is that prayer by the Respondents will give rise to confrontations between groups of worshipers in the [Western] Wall plaza. The very fact of the fear that confrontations of this type will arise, in the absence of an argument which holds that any of the Respondents had recourse to violence (physical or verbal) of any type, is not sufficient to give rise to reasonable grounds for the suspicion that the **Respondents** were the ones who endangered public **security** or the **security** of any human being who was present in the [Western] Wall plaza. In this way, the case which is presently at hand may be distinguished from the cases which were discussed in Miscellaneous Criminal Applications 2712/96, **Hershkovitz v. State of Israel**, *PD* 50 (2) 705 (1996) and in Miscellaneous Criminal Applications 5523/00, **Federman v. State of Israel** (ruling handed down on August 8, 2000), which had to do with conduct which incited riots on the Temple Mount, a place which is emotionally fraught and extremely sensitive from the standpoint of security. In any event, it was made clear in the Hershkovitz Case (pp. 712-713) that: "**The Court must act cautiously and sparingly when it imposes restrictive conditions that are capable of prejudicing the suspect's rights before the evidence which gives rise to the suspicion against him has matured into *prima facie* evidence which substantiates a criminal charge… Restricting the movements of the suspect against whom an indictment has not yet been filed should be carried out in exceptional cases and only when there is a real and tangible fear of the suspect in question if he is not restricted by means of appropriate conditions**". The application of these criteria to the Respondents, against whom an indictment has not yet been filed, and when it is extremely difficult to see how they reflect any endangerment of security, leads to the conclusion that it is not appropriate to impose, within the framework of bail, limitations upon their freedom of movement and access to the [Western] Wall courtyard.

10. In light of that which has been set forth above, the appeal is denied.

The Office of the Court Clerk shall send the ruling to Counsel for the parties.

Given this day, 14 Iyar 5773, April 24, 2013, in the absence of the parties.

[Signature]
Moshe Sobel, Judge