

Before: The honourable Justice E. Rubinstein

The appellant: Abdul Azbarga

v.

The respondent: State of Israel

Appeal of the decision of the Tel-Aviv-Jaffa District Court in MApp 93362/05 (SFC 1145/05) that was given on 7 November 2005 by Justice Noga Ohad

For the appellant: Adv. Moshe Meroz

For the respondent: Adv. Maya Hadad

Decision

1. This is an appeal of the decision of the Tel-Aviv-Jaffa District Court (Justice Ohad) of 7 November 2005 in MApp 93362/05 (SFC 1145/05), in which the appellant's application to be allowed out of the house arrest to which he is subject, on a daily basis at fixed times, in order to participate in daily prayers at the mosque of the town of Qalansuwa, was denied.

2. (a) On 5 September 2005, an indictment was filed against the appellant in the Tel-Aviv-Jaffa District Court, which attributes to him an offence of attempted murder under ss. 305(1) and 29(a) of the Penal Law, 5737-1977.

(b) According to what is alleged in the indictment, on the afternoon of 2 August 2005, the appellant and a relative of his, Ahmad Azbarga, entered the garage of the Alwahwah brothers in Lod. Each of them carried a hand-gun. Ahmad and the appellant approached Guptan Alwahwah, the appellant cocked his gun and Ahmad shot him in the chest. As a result of the shooting, Guptan lost consciousness and was rushed to hospital in critical condition, suffering from a torn diaphragm, several

puncture wounds in the intestine and additional wounds. This happened following a fight that broke out the previous day between the Azbarga family and the Alwahwah family as a result of suspicions that arose that the borrowed car that a member of the Azbarga family brought into the garage of the Alwahwah brothers for a paint job on the occasion of a family wedding was a 'fake.' In the course of the fight, the windscreen of the car was smashed and another car in the garage was damaged, following which the appellant said that 'he would turn the wedding of the Azbarga family into a funeral for the Alwahwah family.'

(c) When the indictment was filed, the state applied for the appellant to be held under arrest until the proceedings were concluded. On 20 September 2005, the District Court in MApp 93050/05 (*per* Justice Rozen) denied the application and ordered the appellant to be placed under house arrest on the following conditions: a personal guarantee of a third party in a sum of NIS 250,000, a cash deposit or bank guarantee in a sum of NIS 20,000, complete house arrest at a distance of no less than 30 kilometres from the city of Lod with supervisors who would give a guarantee of NIS 250,000, and a stop order preventing the appellant from leaving the country. The reason given for the decision was that there was *prima facie* evidence and a ground to hold the appellant under arrest, but the strength of the *prima facie* evidence was not great.

(d) The appellant filed an application for a review in the District Court, in which he requested that he should be allowed to go out to pray five times a day at the mosque situated at a distance of approximately 200 metres from the place of the house arrest in Qalansuwa. During the oral hearing, the application was changed to twice a day. On 7 November 2005, the court denied the application. It held that the application had no merit in view of the short time that had passed since the decision regarding the house arrest was given. It was also determined that the state's consent to allow the appellant to go to pray at the mosque twice a day during the month of Ramadan did not necessarily mean that going out to pray should be allowed on ordinary days, since the permission to go to pray during Ramadan was allowed in order not to discriminate against the appellant in relation to another defendant, a member of the Jewish faith, who was allowed to go to prayers during the Jewish festival season.

3. In the current appeal, it is argued that the appellant is a *sheikh*, who is very particular about observing the precepts of his religion, including, as aforesaid, praying in a mosque. It was also stated that the mosque of the town of Qalansuwa was approximately 300 metres away from the house where the appellant was under house arrest, that the appellant would go solely to the mosque, and that during the prayers the appellant would be accompanied by the supervisor that gave the guarantee. It was also argued that the appellant was a young man without any criminal record, and that he was summoned for interrogation only approximately a month after the event described in the indictment, during which he was free, and he has been under house arrest for two months. It was argued that the appellant was allowed out for prayers during the month of Ramadan, during which he did not infringe the conditions, and therefore he was deserving of trust. It was also argued that prohibiting his going to prayers in the mosque was inconsistent with upholding the appellant's constitutional right to freedom of religion and worship.

4. (a) During the hearing, counsel for the appellant pointed out that we are speaking of prayers between 5:00 and 6:00 in the morning, and between approximately 4:50 and 6:30 in the evening, and on Friday also at midday. According to the appellant, where there is a mosque, there is a religious obligation to pray at the mosque.

(b) Counsel for the state emphasized that a review requires a change of circumstances, and there is none. Moreover, it was difficult to supervise the appellant's compliance with the conditions of the house arrest, and the question is one of balance: during Ramadan the appellant was allowed out in view of the importance of the period and in order not to discriminate against him.

(c) After the hearing, counsel for the appellant submitted references to cases in which Jews and Muslims were allowed to go to prayers. The respondent replied that each case should be examined according to its circumstances. The danger presented by the appellant was an established fact and no change had taken place in this regard. Therefore the possibility of going to prayers undermined the ability to supervise him.

5. (a) For the purpose of the decision I have studied certain material in order to understand the relevant religious requirements, in so far as I have able to do so. Since the relevant comparison, which counsel for the appellant also addressed, is an application to allow Jewish defendants under house arrest to go to participate in prayers at the synagogue, I have also studied the Jewish sources. It is self-evident — but I nonetheless emphasize the point — that in my remarks below I am not purporting to make any religious law ruling, either with regard to Jewish law or with regard to Islamic law.

(b) With regard to Islam law, praying (*sallat*) five times a day, while facing Mecca, is one of the five basic precepts of the religion, which are called the pillars (*arkan*) of Islam. The others are belief with regard to the unity of God and his emissary, the prophet Mohammed, charity, fasting and the pilgrimage to Mecca. Prayer can be done on one's own and in any place; see Ibn Rushd, *The Distinguished Jurist's Primer* (Prof. I.A.K. Nyazee (tr.)), at p. 129, according to which any clean place is suitable for prayer, but not unclean places such as cemeteries, slaughterhouses, a public bathhouse, etc.). See also H. Lazarus-Yaffe, *Chapters in the History of the Arabs and Islam* (Heb.), at p. 94: 'The daily prayers and additional voluntary prayers... may be performed by any Muslim where he chooses, although praying in a mosque is always preferable.' In other words, it is possible to pray anywhere, at home or outside the home, but Muslims are recommended to pray at a mosque if it is possible in the circumstances. With regard to the duty of prayer itself, see the *Qur'an*, *surah* (chapter) 2 (The Calf), verse 238: 'Guard strictly your (habit of) prayers, especially the Middle Prayer; and stand before Allah in a devout (frame of mind)'; *surah* 4 (Women), verses 102-104; *surah* 30 (The Romans, The Byzantines), verses 17-18: 'So (give) glory to Allah, when ye reach eventide and when ye rise in the morning; Yea, to Him be praise, in the heavens and on earth; and in the late afternoon and when the day begins to decline' (Yusuf Ali translation). The total number of prayers is determined by tradition. By contrast, the Friday midday prayer is a prayer that is required to be said as a rule in a mosque, led by an imam if possible, and it also involves a sermon (*khutbah*) (see *Encyclopaedia of Islam*, vol. 8 (fifth edition), 'Sallat' (Prayer), 930, at p. 932; *Hebrew Encyclopaedia* (Heb.), vol. 4, 'Islam,' (by M.M. Plessner), at pp. 954, 972-975; H. Lammans, *Islam*, at p. 45); the

source in the *Qur'an* for Friday prayers is *surah* 62 (The Congregation, Friday), verse 9: 'O ye who believe! When the call is proclaimed to prayer on Friday (the Day of Assembly), hasten earnestly to the Remembrance of Allah, and leave off business (and traffic): That is best for you if ye but knew!'

(c) With regard to Jewish law, according to Maimonides (*Mishneh Torah, Hilechot Tefilla* (Laws of Prayer) 1, 1), prayer is in itself a positive commandment:

'It is a positive commandment to pray each day, as the Torah says: "And you shall worship the Lord your God" (Exodus 23, 25). By oral tradition it has been taught that this worship is prayer, as the Torah says: "... and to worship Him with all your heart" (Deuteronomy 10, 12). The Sages said: "What worship is done with the heart? Prayer." And there is no number of prayers according to the Torah, nor is the format of this prayer stipulated in the Torah, nor does prayer have a fixed time according to the Torah.'

The laws that follow this describe in detail the rabbinical enactments with regard to the number and times of the prayers. See also Maimonides, *Book of Commandments*, positive commandment no. 5, which also bases these remarks on the verse '... and Him you shall worship...' (Deuteronomy 10, 12), and he also says (*Mishneh Torah, Hilechot Tefilla* (Laws of Prayer) 8, 1):

'The prayer of a congregation is always heard, and even if its includes sinners, the Holy One Blessed be He does not reject congregational prayer. Therefore a person should join with the congregation, and he should not pray individually whenever he can pray with the congregation, and a person should always go in the morning and the evening to the synagogue, since an individual's prayer is not heard at all times unless it is in the synagogue, and anyone who has a synagogue in his town and does not pray in it with the congregation is called a bad neighbour.'

Rabbi Yosef Karo states in *Shukhan Aruch, Orach Hayim* 90, 9:

'A person should endeavour to pray in the synagogue with the congregation, and if he is prevented and is unable to go to the

synagogue, he should seek to pray at the time when the congregation is praying (Comment of Rabbi Moshe Isserlis (Rama): “And that is the law for persons who live in places where they do not have ten men: they should nonetheless pray in the morning and the evening at the time when congregational prayer is held”) and also if a person is prevented from praying at the time when the congregation prays and he prays individually, he should nonetheless pray in the synagogue.’

Rabbi Yisrael Meir HaCohen (Kagan) in *Mishnah Brura* (Commentary on *Shulhan Aruch, Orach Hayim* 90, 9), explains the word ‘endeavour’ as follows: ‘And even if he has ten men in his home, he should endeavour [to pray] in the synagogue...’ and why ‘with the congregation? Because the Holy One Blessed be He does not reject congregational prayer...’. He goes on to point out there: ‘It is written in a responsum of Rabbi David ben Shelomo Ibn Abi Zimra (Radbaz) that if a prisoner is given permission by the ruler to pray on one day of his choice with the congregation, he should pray on that day immediately and should not postpone fulfilling the obligation (of praying with the congregation) until Yom Kippur or Purim...’.

Thus we see that the obligation to pray in a synagogue — which appears as a normative part of Jewish law — is defined as something that one should endeavour to do. Here we should point out that there are parts of the prayers that can only take place when ten men are present (even if not in the synagogue), such as the *Kaddish*, *Kedusha*, the reading of the Torah and the priestly blessing. On the subject of communal prayer and its importance, see Rabbi A.I. Kook, *Olat Re’iyah*, 1, 261, which is cited in Rabbi M.Z. Nerya, ‘Orot HaTefilla,’ in *Siach Yitzhak* in memory of Yitzhak Lavi (Rabbi Y. Shaviv, ed.), at pp. 147, 230. I should also add that within the framework of the balances between conflicting interests, even though there is usually a possibility of communal prayer in Israeli prisons, a rabbinical court may deny a prisoner this possibility under s. 6 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which makes it possible to compel the giving of a divorce bill (*Get*) by means of imprisonment (see also s. 7, which allows a person to be compelled to perform levirate divorce (*Halitza*)), by virtue of s. 3A of the Rabbinical Courts (Compliance with Divorce Judgments) Law, 5755-1995.

(d) The freedom of worship is one of the basic values of the State of Israel as a Jewish and democratic state, and it is one of the principles listed in the Declaration of Independence ('The State of Israel shall guarantee... freedom of religion...') (see the discussion of its status in H CJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] IsrSC 59(4) 736; [2005] (1) IsrLR 98, at paras. 12-16, *per* Justice Beinisch, and the references cited there, including with regard to a conflict of rights, as well as the freedom of worship and the freedom of movement; see also H CJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; [2004] IsrLR 53, *per* Justice Procaccia). There are those who regard the freedom of worship as also falling within the scope of respect for rights under the Basic Law: Human Dignity and Liberty (see A. Barak, *Legal Interpretation: Constitutional Interpretation* (Heb.), at p. 430). It need not be said that this right of freedom of worship may conflict, and in the case of arrest or imprisonment it does conflict, with the provisions of the law concerning arrest or imprisonment (see s. 5 of the Basic Law: Human Liberty and Dignity). In such cases a balance needs to be reached on the basis of the specific circumstances, common sense and experience.

(e) Matters of well-established and well-respected religious custom often come before the courts in Israel and elsewhere, and the question in this case is one of the proper balance between the right to communal prayer, even if its religious status is essentially and mostly that of a desirable practice, and the constraints of arrest. Obviously there is a difference, which does not need to be considered here, between compelling someone — Heaven forbid — to transgress a religious precept of a kind where 'it is preferable to be killed rather than to transgress,' on the one hand, and not allowing him to observe a desirable practice, on the other.

(f) Approximately twenty years ago, the United States Supreme Court decided the case of *Goldman v. Weinberger*, 475 U.S. 503. In that case, an officer in the United States Air Force, an orthodox Jew, applied to be allowed to wear a skullcap in his unit's facility on the ground that his constitutional rights (under the First Amendment of the United States Constitution, which guarantees the freedom of worship) were being violated by the Air Force Regulations that prohibited this. Indeed, the skullcap (a head covering has been a well-established practice for many generations among orthodox Jews) was presented by the petitioner there as a 'silent

devotion akin to prayer.’ The court decided, by a majority of five to four, against the skullcap (the law was subsequently amended to allow the wearing of the skullcap).

(g) I have studied each of the collection of decisions on questions of prayer during house arrest that was presented by counsel for the appellant. They range from judicial decisions of every judicial instance that approved communal prayer at all prayer times, both for Jews and for Muslims, and decisions that approved certain times only. The background and the circumstances in these decisions vary from cases involving the disengagement from the Gaza Strip to cases in the ‘classic’ criminal sphere, such as assaults, indecency, etc.. There are also cases in which permission for communal prayer has been rescinded after it was given; there is a case of administrative house arrest in which the petitioner was not allowed in the circumstances of the case to leave the place of house arrest, but it was held that people could come to constitute a quorum of ten men (*minyán*) in the place where the petitioner was under house arrest (HCJ 5555/05 *Federman v. Central District Commander* (unreported)).

(h) In my opinion, ultimately the attitude towards applications to be allowed to participate in communal prayers while under house arrest, both for Jews and for Muslims (the existing examples), as well as for members of other religious communities in accordance with what is accepted in their religions, should be one that inclines towards granting the application, where circumstances allow. However, every case should be considered on its own merits, and naturally there may be cases in which it will not be allowed. The court should consider — and this is what the courts do consider, to the best of my understanding, in such cases — the balance between the grounds for arrest in the law, such as the danger presented by the person under arrest, perverting the course of justice and fleeing from justice, on the one hand, and the desire to pray with the community, on the other. Each of these grounds should be examined, as well as the guarantors and the manner of carrying out supervision in cases that the court decides to approve.

(i) In the present case, I have reached the conclusion that at this time it is possible to accommodate the appellant to some extent, and in this sense the appeal is allowed in part. Approximately two and a half months have passed since the arrest

decision, and in the meantime the appellant has gone out twice a day to prayers during the month of Ramadan, and there is no report of his having breached that trust. I have taken into account the danger that he presents, as can be seen *prima facie* from the offence, but also the approach that was adopted in his case during Ramadan, and also, as aforesaid, in other cases. I have decided at this time to allow a two-stage arrangement: starting this Friday, 9 December 2005, the appellant may go to pray each Friday at the mosque. In so far as the arrangement is observed and there are no other breaches, and if he is still under house arrest, then from the beginning of March 2006 he may go to one prayer each day, which is the morning prayer between the hours of five and six in the morning, on each day apart from Friday, when he may go to the midday prayer. The mosque will be the closest one to the place of the house arrest; the appellant will be accompanied on each occasion by the supervisor, he will go directly to the mosque and will return directly from the prayer without delay. The guarantees that applied during the month of Ramadan when he was allowed out to go to pray will also apply here and compliance with them will be ensured. The other conditions of the house arrest will remain unchanged.

Given today, 5 Kislev 5765 (6 December 2005).