H.C.J 1/48

HERMAN NEIMAN

v.

1) THE MILITARY GOVERNOR OF THE OCCUPIED AREA OF JERUSALEM

2) THE CHIEF MILITARY PROSECUTOR

In the Supreme Court sitting as the High Court of Justice
[September 29, 1948]
Before: Smoira P., Olshan J. and Cheshin J.

Military Court jurisdiction - Who is a soldier - Military offender no longer a soldier when charge filed.

The Petitioner, while employed by the Army as a civilian employee, assaulted a soldier and committed other acts constituting criminal offences under both military and civil law. After he had ceased to be so employed, the Petitioner was charged before a military court. He sought an order restraining the military court from proceeding with the charges on the grounds that he was not at the relevant time a soldier within the meaning of the Army Code, 1948[1)] or alternatively that he had ceased to be a soldier when charged and that a military court therefore had no jurisdiction in the matter.

Held, that the Petitioner had been a soldier within the meaning of the Army Code, 1948, when he committed the acts in respect of which he was charged, but that at the time such charges were filed he had ceased to be a soldier, and that a military court did not have jurisdiction to try such a person.

Palestine Case referred to :

(1) H.C. 143/44 - *Tatjana Spiwak (Bauer)* v. *Kvutzat Kfar Hamakabi.*
Tatjana Spiwak (Bauer) v. *Captain Jacob Bauer and another;* (1945) 2 *A.L.R. 472.*

English Case referred to:

(2) *Dawkins v. Lord F. Paulet,* (1869) L.R. 5 Q.B. 94.

1) See Schedule to the Emergency (Army Code 1948) Regulations 1948.

Frank for the Petitioner;
*Spae*r for the first Respondent;
H. H. Cohn, State Attorney, for the second Respondent.

SMOIRA P., giving the judgment of the court :

On September 16, 1948, an order nisi was issued by this court against the first respondent, the Military Governor of the occupied area of Jerusalem as the representative of the Minister of Defence of the State of Israel, and against the second respondent, the Chief Military Prosecutor, to show cause why they should not be restrained from placing the petitioner, Herman Neiman, on trial before a Military Court, and why they should not withdraw the charges that have been preferred against the petitioner in the Military Court of Jerusalem.

The facts in the case before us are not in dispute.

The petitioner is forty-six years of age and therefore not liable to conscription. He has never sworn allegiance to the Defence Army of Israel. He was employed in the Engineers Corps of the Army during the months of June and July, 1948. As from August 1, 1948, he was no longer employed in the Army. On September 5, 1948, the petitioner was summoned - with others - to appear on an indictment before the District Court of the Defence Army of Israel in Jerusalem. The indictment, which is dated August 18, 1948, contains six charges against the petitioner. As is stated in the indictment, a copy of which is annexed to the petition, these are not offences of a military nature, being offences under various sections of the Criminal Code Ordinance, 1936, such as assault, threat of violence, unlawful arrest, malicious injury, and abuse of office.

According to the particulars of the first charge, the petitioner, on or about July 12, 1948, unlawfully assaulted Walter Yalski, who was then enlisted for part-time service in the Army. The remaining charges relate to acts which were done on the same day against the

same person. The petitioner was charged before the Military Court pursuant to section 97 of the Army Code, 1948.[1)]

The questions which arise in the case before us are questions of law alone, and the submissions of the petitioner and of the respondents are shortly as follows :

The petitioner submits:

(1) He has never been a soldier according to the Army Code, 1948.

(2) Even if be had been a soldier, be ceased to be one on August 1, 1948, and he is not liable, therefore, to be tried by a Military Court.

The first respondent submits that he ought not to be made a party to this petition at all.

The second respondent submits:

(1) The petitioner must submit to the jurisdiction of the Military Court since, on the day of the commission of the offences, he was a soldier acting within the framework of or as an agent of the army.

(2) The High court of Justice cannot intervene in this matter because :

a) No injustice has been caused to the petitioner;
b) The interests of the public and of good government demand that the petitioner be brought before a Military Court and not before a Civil Court;
c) The petitioner has an alternative remedy - to appear before a Military Court and argue before that court that it has no jurisdiction.

We have heard many general submissions from both parties as to the relationship between the Civil and Military Courts, the advantages to be gained from appearing before

1) For text see infra p. 128.

the Military Courts on the one hand and, on the other, the rights of the citizen to be tried by ordinary courts. We have no intention, however, of deciding the matter on first impression.

In our opinion the answer to the question raised by this petition is to be found in the basic provision contained in Article 38 of the Palestine Order in Council, 1922, as amended in 1935. We have no doubt that this provision, with which the Part on "Judiciary" in the Order in Council opens, is still in force today, by virtue of section 11 of the Law and Administration Ordinance, 1948. The text of Article 38 reads as follows:

> "Subject to the provisions of this part of this Order or any Ordinance or rules, the Civil Courts hereinafter described and any other Courts or Tribunals constituted by or under any of the provisions of any Ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine."

The principle which flows from this provision is that the Civil Courts exercise jurisdiction over all the inhabitants of the State, and according to Proclamation I of the Defence Army of Israel Command in Jerusalem - which is deemed to be in force as from May 15, 1948 - the Law of the State of Israel is made to apply to the occupied area of Jerusalem (section 2 of the Proclamation). In order to exclude a resident from the jurisdiction of the Civil Courts and render him subject to special Courts, special legislation is required. Such special legislation is to be found in the Emergency (Army Code 1948) Regulations, 1948 (Official Gazette No. 20 Supplement 2). These regulations were made by the Minister of Defence by virtue of the powers conferred upon him by section 9 (a) of the Law and Administration Ordinance, 1948, and there is no appeal before us against the legality of these regulations. These regulations lay down, inter alia, the legal organisation of the army, its composition and its powers, the principles to be applied in regard to offences and punishment - of a special type for soldiers - and include, in section 97, a provision in regard to a soldier who commits an offence punishable by the general criminal law. It is under this provision that the petitioner is charged in the indictment before the Military Court.

And this is the text of section 97:

> "Any soldier who, within the framework of the army or by reason of his belonging to the army, has committed an offence punishable under the general criminal law which is in force or will be in force in the State from time to time, and whose belonging to the army, does not expressly relieve him from liability for such offence, may be tried for such o fence by a Military Court and shall be liable to the same punishment as that to which he would be liable in the general courts."

The first question is whether the petitioner was a soldier at the time of the commission of the offences with which he is charged.

The definition of "soldier" is found in section 2 of the Army Code, 1948, and is as follows: -

> "'Soldier' means any man or woman who has been accepted into the army under army regulations from time to time, and also includes any person who has acted from time to time in the framework of the army, or its agent, and also includes any person who is under a duty to enlist in the army or in the services associated with the army, even if such person has not been accepted into the army as aforesaid."

Mr. Haim Cohn, the State Attorney, who appeared on behalf of the second respondent, does not contend that the petitioner was accepted into the army under army regulations. Mr. Cohn also admitted before us that the petitioner is not subject to the duty of enlistment in the army or in the services associated with the army. His contention is that the petitioner acted on July 12, 1948, within the framework of the army and also as agent of the army. The words "from time to time" in the definition of the word "soldier" - Mr. Cohn argues - introduce an element of impermanence, and there is therefore no need for permanent service. The expression "framework of the army" is, says Mr. Cohn, an extremely wide one. The word "framework", he contends, must not be given an etymological but a colloquial interpretation. A person need not actually be in the army in order to be within its framework - any person who is in lawful association with the army is within its framework. The

question is whether the association between the person and the army is one which introduces him or his activities into the framework of the army. The petitioner was a hired employee of the army, and his receipt of a salary does not exclude him from its framework, for the army is composed not only of active soldiers but also of other persons including those who work for a salary, such as army doctors and judges. The expression "agency of the army" is, so it is argued: even wider than "framework", since such agency does not even demand any lawful association between the person and the army. These are the submissions of counsel for the second respondent.

As against these arguments Dr. Frank, counsel for the petitioner, has made the following submissions:

The petitioner did not act within the framework of the army or as its agent. In interpreting the expression "soldier" in section 2 of the Army Code, Dr. Frank directed our attention to section 176, sub-sections 9 and 10 of the English Army Act of 1881, in terms of which persons who are not soldiers but who are employed by the army are subject to Military law only if they are on active service, an expression defined in section 189 of that statute. Dr. Frank intended to prove the extent to which the English legislature has restricted the category of those who are subject to military Law. The immediate answer to this argument is that proof of such a restricted interpretation cannot be furnished by the English Statute since we are bound by the definition of a "soldier" in the Army Code, 1948, and that definition contains no such restriction.

An act done by a soldier within the framework of the army, Dr. Frank submits, is one that results from an order given by the State or by the army. A person who performs some activity in the army as a contractor for a wage and as an official on a salary is one who works under a contract and not on the basis of an order given or compulsion exercised by the State or the army. A person falls within the framework of the army, Dr. Frank submits, only when the army gives him orders as one of its members, and not when he works under a special contract for a salary. In any event, says Dr. Frank, if the regulation defining the expression "soldier" is not clear, there is a presumption that the civil courts have jurisdiction, and in a case of doubt the decision will be in favour of such jurisdiction.

The distinction referred to, which Dr. Frank wishes to introduce in interpreting the expression "soldier", is worthy of consideration. We are of the opinion, however, that, on the contrary, the legislature wished to widen the limits of the expression "soldier" as far as possible by introducing into that definition, as a category, any person "who has acted from time to time in the framework of the army, or as its agent". We think that the legislature, in framing the definition as it did, succeeded in extending the limits of the expression "soldier", and we do not agree with the submission that the receipt of a wage excludes a person from the framework of the army.

The definition of "soldier" in section 2 contains three categories:

(a) the first category mentioned "any man or women who has been accepted into the army under army regulations from time to time" - refers to ordinary soldiers;

(b) the third category "any person who is under a duty to enlist in the army or in the services associated with the army, even if such person has not been accepted into the army as aforesaid" - refers to those who in fact are not yet soldiers, but who are ordered to become and are about to become soldiers, and who are liable to be punished, for example, for offences such as feigning illness, or wilful maiming, under section 90 of the Army Code, 1948 :

(c) The second category includes just those people who have not been accepted into the army under army regulations and who are not about to be accepted into the army because of their duty to enlist, but those who work from time to time in the framework of the army or as agents of the army, such as the petitioner in the present case.

It is worthwhile pointing out, moreover, that in order that a person should be included in the first category, it is a condition precedent that he should be accepted into the army under army regulations. In order that a person should be included in the third category it is a condition precedent that he should be under a certain duty, namely, the duty of enlistment. In order that a person should be included within the second category there is no condition precedent at all. The very fact of his working within the framework of the army or as its

agent brings him by definition into the category of "soldier", without any reference to the element of the desire or duty which led him to work Within the framework of the army.

In regard to this point, therefore, we accept the submission of the State Attorney, counsel for the second respondent, that the petitioner was a "soldier" until the end of the month of July.

The second question which arises is whether a person who was a soldier at the time of the commission of the offence but who has ceased to be a soldier, may still be charged before a Military Court. It is not disputed that on the date mentioned in the indictment, namely, August 18, 1948, the petitioner was no longer a soldier. Counsel for the second respondent submits, however, that the fact that the petitioner was a soldier at the time that he committed the offence on July 12th is sufficient to permit his being tried before a Military Court under section 97.

Mr. Cohn relied upon three grounds in support of this submission .

His first ground was that it is a recognised principle that a person cannot, by a change in status, be relieved from a duty which was imposed upon him before that change. Mr. Cohn cited examples from Family Law, such as marriage obligations and the obligations of maintenance after proselytisation. We cannot accept this ground. This case is not concerned with an attempt to escape from an obligation. The question is one of the jurisdiction of courts, and is not similar to the matters cited before us by Mr. Cohn.

Mr. Cohn's second ground was that the Army Code, 1948,must be interpreted with reference to all its sections. Mr. Cohn admitted that the position of offenders who have ceased to serve in the army is not dealt with in the Code, but he submitted that it was the intention of the Code that they should be subject to the jurisdiction of a Military Code also after their discharge from the army. A hint to this effect, Mr. Cohn argues, is to be found in section 18 of the Code. We can find nothing in that section - which deals with the general jurisdiction of a District Military Court within the legal machinery of the army - which is an authority on the question before us, namely, whether the determining factor is the time of

the commission of the offence, or the time of filing of the indictment with the Military Court.

Mr. Cohn also referred to sections 32 and 37[1)] of the Code dealing with the confirmation of judgments. In these sections the words "judgments against those who are not soldiers" are to be found. Here too we cannot find a reply to the question before us in these sections. It is impossible to base the jurisdiction of the court on words such as these in a section dealing with an entirely different subject. Not only that, but an interpretation of the words "judgments against persons who are not soldiers" may be found in section 28 which includes among those against whom an accusation may be brought, an "army institution", that is to say, an accused which is not a soldier.

Section 58 of the Army Code[1)] the chapter containing which bears the caption "Supremacy of Military Courts" also adds nothing to the solution of our problem. This section merely shows that a *soldier* may be tried in Military Courts even if he has already been tried once before for the same offence in another court. It is impossible to conclude from this provision that the jurisdiction of Military courts also extends to citizens who are not soldiers.

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1) Army Code, ss. 32 and 37:

Unappealed judgement subject to confirmation of Chief of Staff

32. If no appeal is lodged against a judgment of the Special Tribunal and the case has not been automatically transferred for trail in the Supreme Tribunal acting as, court of appeal, a judgment of the Special Tribunal shall Staff. be subject to the confirmation of the Chief of Staff, who, may confirm the judgment and sentence or reduce the sentence, save for death sentences and judgments against persons who are not soldiers, which shall be subject to the confirmation of the Minister of Defence and not of the Chief of Staff.

Every judgement subject to the confirmation of the Chief of Staff.

37. Every judgment of the Supreme Tribunal shall be subject to confirmation of the Chief to the confirmation of the chief of Staff, who may confirm the judgment or the sentence or reduce the sentence if he thinks fit, save for death sentences and judgments against persons who are not soldiers, which shall be subject to the confirmation of the Minister of Defence and not of the Chief of Staff.

1) Army Code, s. 58:

Trial by non Army Court or decision thereof is not necessarily defence

Where a soldier is standing trial or has already been tried for any offence or in connection therewith by a court outside the Army legal staff, that fact does not of itself relieve the soldier of liability for an offence under this Code or from the obligation to stand trial before an Army tribunal (Court-martial) in connection with the same offence.

Sections 164 to 166 of the Army Code,[2] which deal with prescription and lay down the Period of prescription as from the date of the commission of the offence, provide no solution to the problem with which we are faced.

The third ground relied upon by Mr. Cohn in regard to the interpretation of section 97 is based upon section 158 of the English Army Act of 1881. That section provides that if a person has committed an offence under military law at a time when he is subject to that law, and if he thereafter ceases to be subject to that law, he may still be tried before a Military Court within three months from the date that he ceased to be subject to military law - save in the case of a few serious felonies in regard to which this limitation of time does not apply. Mr. Cohn attempted to argue that this Law of 1881 limited the period in which it was still possible to try a person who had ceased to be a soldier in a military court, and that according to English common law there was no limitation of time whatsoever in regard to this possibility. The authorities cited to us by Mr. Cohn from English Law in regard to this question, such as *Dawkins v. Lord Paulet* (2), in fact contain no solution of our problem, and Mr. Cohn stated frankly in the course of his argument before us that he found it necessary to abandon his submission based upon English common law. It is sufficient, in fact, to consult Dicey on Constitutional Law, which was referred to by Mr. Cohn, in order to realise that the principle of the supremacy of the ordinary Civil Courts is woven like a golden thread throughout the whole of the chapter in Dicey dealing with the army. At page 303 (eighth edition) he says : "The general principle on this subject is that the Courts of Law have jurisdiction to determine who are the persons subject to Military Law, and

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2) Army Code, ss.164-166:

Treason and murder -ten years limitation.	164. Every offence of treason and murder shall be prescribed and no prosecution shall be brought for such an offence after ten years from the date of the commission thereof.
Offences within the jurisdiction of a special tribunal or District Tribunal- three year limitation.	165. Such other offences as are within the jurisdiction of a Special Tribunal and all offences within the jurisdiction of a District Tribunal shall be prescribed and no prosecution shall be brought in regard to them after three years from the date of commission of the offence.
Offences within the jurisdiction of a commanding officer –six months limitation.	166. Offences within the jurisdiction of a commanding officer authorised to act as a judge shall be prescribed and no prosecution shall be brought in regard to them after six months from the date of commission of the offence.

whether a given proceeding, alleged to depend upon Military Law, is really justified by the rules of law which govern the army. Hence flow the following (among other) consequences. The Civil Courts determine whether a given person is or is not 'a person subject to military law'."

We are prepared to find some assistance in section 158 of the English Army Act, 1881, but in favour of the petitioner and not in favour of the respondent, for this section shows that the English legislature found it necessary to lay down by a specific provision that a person remains subject to military law for a certain period even after he has ceased to be a soldier. The Army Code, 1948, on the other hand, contains no parallel provision, and reading section 97 of that code literally, we are obliged to interpret it to mean that only a soldier - that is to say, a person who is still a soldier - may be tried before a military court for an offence which he committed within the framework of the army or by reason of his belonging to the army. In regard to this point, therefore, we accept the submission of the petitioner that since he ceased to be a soldier on August 1, 1948, he ceased from that date to be subject to the jurisdiction of the military court.

There remains the final argument of counsel for the second respondent that the High Court of Justice will not intervene in this matter since no injustice has been caused to the petitioner and the interests of the public and of good government demand that the petitioner be brought before a military court and not before a civil court, and that the petitioner has a legal remedy elsewhere. We cannot accept these submissions. The question before us is not whether an injustice will be done to the petitioner if he is arraigned before a military court. The rule is that every person is entitled to demand that he be tried before a competent court. In fact all the various constitutions of courts in different countries are extremely careful in defining the limits of jurisdiction. If, according to the rules laid down in the Code, an ordinary civil court is competent to try a person, and the authorities wish to arraign him before a special court, the accused is entitled to petition the High Court of Justice and to demand that it intervene in the matter.

We appreciate what has been said by counsel for the second respondent, that it is the duty of the army and its court to root out criminals, whose offences - even if they are also offences under the general criminal law - are in fact offences against the efficient and proper

administration of the army; that the army is interested in imposing order in its ranks and beyond its ranks; and that this is particularly so in a case such as that of the petitioner who is charged with assuming authority which he did not possess. But the general consideration such as this cannot take the place of a specific legal provision as to the jurisdiction of the courts. This is one of the basic principles of every ordered regime.

We also cannot accept the submission that it was necessary for the petitioner to appear before the military court, present to that court a submission of want of jurisdiction, and attempt in that way to secure his remedy.

Counsel for the second respondent cited to us a line of decisions of the High Court of Justice from the days of the Mandate in which the Court referred the petitioner to some other court in order to find his remedy there. One of the cases cited by him was *Spiwak v. Hamakabii* (1), in which the High Court of Justice refused to intervene because the petitioner, who was a litigant in the Rabbinical Court and argued want of jurisdiction, could have found his remedy in the Rabbinical Court of Appeals. We have some doubt as to the correctness of that decision. In any case, the situation in the matter before us is entirely different. The petitioner has not yet entered into the area of jurisdiction of a military court, and has petitioned us to decide that he is not obliged to be tried in such a court. Since we have reached the conclusion that the petitioner has ceased to fall within the jurisdiction of the military court, we must give him the remedy which he seeks.

For all these reasons we have reached the conclusion that the order nisi must be made absolute. We have still to deal with the prayer of the first respondent that he be dismissed from the case. Counsel for the first respondent submitted that the Military Governor has no connection with the questions here discussed, that he has no attitude in the matter, and that he has neither the right nor is he under any legal duty in regard thereto. The Military Governor, so he submits, does not convene courts nor does he confirm their judgments. He has cited to us English authority and authorities of this court from the time of the Mandate in support of his contention. Since Dr. Frank, counsel for the petitioner, has stated before us that he joined the first respondent as representing the Minister of Defence on the basis of

section 4 of the Army Code,[1)] but that he is interested in the question of jurisdiction alone and not in the number of respondents, and since we incline to the opinion that counsel for the first respondent is correct in his submission that the respondent adopts no attitude in this matter even as representative of the Minister of Defence, we make the order nisi absolute against the second respondent, the Chief Military Prosecutor, alone. In order that the matter should be clear we wish to emphasize that this decision is not intended to prevent the bringing of the charges in question before a competent court.

Order nisi made absolute against the *second respondent.*
Judgment given *on September* 29, 1948.

1) Army Code, S. 4:

Head of legal authority	The Minister of Defence is by virtue of his office legal head of the Army legal authority.