**H.C.J 268/52**

**H.C.J 47 /53**

**DAVID SAPOZNIKOV**

**v.**

**THE COURT OF DISCIPLINE OF THE ISRAEL POLICE and INSPECTOR-GENERAL OF THE ISRAEL POLICE**

H.C.J 268/52

**NISSIM MIMRAN**

**v.**

**Y. SAHAR, INSPECTOR-GENERAL OF THE ISRAEL POLICE AND OTHERS**

H.C.J 47 /53

In the Supreme Court sitting as the High Court of Justice.
[May 31, 1953]
*Before: Olshan J., Silberg J., and Sussman J.*

*Police Court of Discipline - Police Ordinance ss.* 18, 50 - *Jurisdiction - Conduct likely to cause injury*" *to reputation of the Force - Police officer charged* with *criminal offence not committed by him* qua *police officer - No jurisdiction.*

Under section 18 of the Police Ordinance the Inspector-General may constitute Courts of Discipline to try police officers charged with disciplinary offences, the section prescribing the offences which may be the subject of such charges. One of those offences is thus described (in section 18(1)(i)): "any offence contrary to the good order and discipline of the Force.. ." The High Commissioner in Council was empowered by section 50(1)(e) to make rules "for the definition of offences to the prejudice of good order and discipline", and under that power made the Police (Disciplinary Offences) (Definition) Rules, 1941. Offence No. 23 of those Rules creates the offence of "knowing where any offender is to be found, failing to report the same or to exert himself to make the offender amenable to law" and Offence No. 47 provides that a police officer is

liable to punishment for "acting in a disorderly manner or in any manner likely to bring discredit on the reputation of the Force."

The petitioner, Sapoznikov, was convicted by a Court of Discipline of three offences "contrary to the good order and discipline of the Force", one based on Offence No. 23 and two on Offence No. 47, in that, knowing of the whereabouts of an offender who had brought goods into the country without an import license in contravention of the Customs Ordinance, he did not report thereon to the proper authorities. He was sentenced to six weeks' imprisonment, and later dismissed from the service.

The petitioner, Mimran, was charged before a Court of Discipline with "conduct likely to cause injury to the reputation of the Force", in that he had had intercourse with a woman against her will in a police car of which he was the driver. His trial was not yet completed.

The petitioners contended that since the offences with which they were charged were offences under the criminal law, they could not be tried in a disciplinary court.

Held: (1) That the Court of Discipline has no jurisdiction to try the charge against Mimran;

(2) By Silberg and Sussman JJ. (Olshan J. dissenting) that the Court of Discipline had jurisdiction to try only that charge against Sapoznikov which was based on Offence No. 23, but not those based on Offence No. 47.

Palestine cases referred to:

*(1)* *H.C. 111/40; George Frederic Upfold* v. *Superintendent in Change of Prison, Acre,* (1940), 7 *P.L.R.* 615.

(2) *P.C.A. 24/45; Arieh Zvi Lipshitz* v. *Haim Aron Valero,* (1947), 14 *P.L.R.* 437.

English cases referred to:

(3) *Lewis* v. *Morgan,* (1948) 2 *All E. R.* 272.

(4) *R. v. Thomas,* (1949) 2 *All E. R. 662.*

*(5)* *R. v. William Barron,* (1914) 10 *Cr. App. R.* 81.

*(6)* *Leyton Urban District Council v. Chew and another,* (1907), 96 *L.T.* 727

*(7)* *Scott v. Pilliner,* (1905), 91 *L.T.* 658.

*Tunik* for the petitioner, Sapoznikov.

*Lubinsky* for the petitioner, Mimran.

*Miriam Ben-Porath,* Deputy State Attorney, for the respondent.

SUSSMAN J. This is a joint hearing of the respondents' replies to two orders nisi issued by this court, and they concern the jurisdiction of a Court of Discipline of the Israel

Police to consider certain charges brought against the petitioners. Before setting out the facts which led to the bringing of these charges, it would be useful if I were to preface them with certain observations touching upon the law which lays down the jurisdiction of a Court of Discipline.

2. Section 18 of the original Police Ordinance, was replaced by section 2 of the Police (Amendment) (No. 2) Ordinance, 1939, and according to section 18 as replaced, the Inspector General of Police may constitute a Court of Discipline to consider certain charges against police officers, as set out in that section. Section 18(1)(h) of the said Ordinance provides, inter alia, for the punishment of a police officer who "is repeatedly guilty of serious offences to the prejudice of good order and discipline." By section 6 of the Police (Amendment) Ordinance, 1946, an additional offence is added to the list of offences ill section 18, and is defined as follows : "Any offence contrary to the good order and discipline of the Force which the Inspector General considers should be tried by a Court of Discipline."

Section 50(1)(e) of the Police Ordinance provides that the High Commissioner in Council (the words "in Council" were omitted by mistake in the Hebrew edition of Drayton's Laws of Palestine) is entitled to make rules for "the definition of offences to the prejudice of good order and discipline." The provision contained in the new paragraph (i), which, as I have said, was added to section 18(1) in the year 1946, was in force prior to the enactment of the Police (Amendment) Ordinance, 1946, having been introduced as a temporary measure in 1940 by Defence Regulations. In *Upfold v. Superintendent in Charge of Prison, Acre,* (1), the Supreme Court in the time of the Mandate held that a police officer could not be brought to trial before a Court of Discipline for an act regarded by the Inspector General as an "offence contrary to the good order and discipline of the Force", unless that act had previously been defined as such an offence in rules made by the High Commissioner under the powers given to Him by the said section 50(1)(e).

3. Acting under section 50(1)(e) the High Commissioner, in the Police (Disciplinary Offences) (Definition) Rules, 1941, specified 46 offences which, if committed by a police officer below the rank of "Superior Police Officer" shall be deemed to be offences to the prejudice of good order and discipline. Offence No. 23, for which a police officer is

punishable, is in the following terms : - "knowing where any offender is to be found, failing to report the same or to exert himself to make the offender amenable to law". A further Offence, No. 47, was added to the said offences by the Police (Disciplinary Offences) (Definition) (Amendment) Rules, 1941, and is constituted by a police officer "acting in a disorderly manner or in any manner likely to bring discredit on the reputation of the Force."

4. As I have said, a Court of Discipline may not sit to try a police officer unless constituted for that purpose by special order of the Inspector General of the Police. This means that a Court of Discipline is not properly constituted unless the Inspector General considers that there is need therefore in order to investigate an offence being one of the offences specified in section 18(1) of the Police Ordinance.[1)] For that reason, the language of section 18(1)(i) (which was added to the main section in 1946) is most defective, for by providing that the court shall try an offence under that same paragraph whenever the Inspector General considers that there is need for it, it creates unnecessary duplicity. But the meaning of the paragraph is this : Whilst according to the previous paragraph, the said section 18(1)(h), a police officer commits no offence for which the court would be empowered to try him unless he has been "repeatedly" guilty of serious offences to the prejudice of good order and discipline, paragraph (i) of that section provides that every offence of that kind, whether

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1) Police Ordinance, s. 18(1):

Courts of Discipline for trial of certain offences (as amended No. 42 of 1939)

18. (1) It shall be lawful for the Inspector-General, as occasion arises, to constitute Courts of Discipline for the trial of police officers who have committed one or more of the following offences and any such police officer may be arrested and detained in the manner provided in section 17(1): -

(a) begins, raises, abets, countenances, incites or encourages any mutiny;
(b) causes or joins in any sedition or disturbances whatsoever;
(c) being at an assembly tending to riot, does not use his utmost endeavour to suppress such assembly;
(d) having knowledge of any mutiny, riot, sedition or civil commotion or intended mutiny, riot, sedition or civil commotion, does not, without delay, give information thereof to his superior officer;
(e) strikes, or offers violence to, his superior officer, such officer being in the execution of his duty;
(f) deserts, or aids or abets the desertion of any police officer, from the Force;
(g) displays cowardice in the execution of his duty;
(h) is repeatedly guilty of serious offences to the prejudice of good order and discipline;

(added, No. 4 of 1946)

(i) any offence contrary to the good order and discipline of the Force which the Inspector-General considers should be tried by a Court of Discipline

committed once or repeatedly, whether serious or not, will be a ground for complaint, and for trial before the Court of Discipline.

5. In the charge sheet filed against the petitioner, David Sapoznikov, a sergeant in the Police, he was charged with having committed three offences under section 18(1)(i) of the Police Ordinance, and after a trial before the Court of Discipline which the Inspector General had convened, he was found guilty of those offences. Each of the three offences was described in the information as "an offence contrary to the good order and discipline of the Force." One charge was based on Offence No. 23 of the Police (Disciplinary Offences) (Definition) Rules, 1941, and the act attributed to this petitioner was that, knowing the whereabouts of an offender who had brought goods into the country without an import licence, he did not report thereon to the proper authorities. The two additional charges were framed in accordance with Offence No. 47 of the said Rules, and in the particulars thereto, it was stated that the petitioner was charged with "acting in a manner likely to bring discredit to the reputation of the Force." The petitioner was sentenced to six weeks' imprisonment. The judgment was confirmed by the Inspector General, and as A result thereof the petitioner was dismissed from the service in accordance with section 18(7) of the Police Ordinance, as amended.

The petitioner Mimran was also charged before the Court of Discipline with conduct likely to bring discredit to the reputation of the Force, in that he had had intercourse with a woman against her will in a police car. The trial of his case has not yet been concluded.

6. The act alleged against the petitioner, Mimran, is also an offence under section 152 of the Criminal Code Ordinance, 1936,[1)] and petitioner's counsel contends that such an offence,

1) Criminal Code Ordinance, 1936, s. 152:

which we described in the course of tile proceedings as a "civil offence" to use the language of section 41 of the English Army Act, should not be disguised as an injury to t;he reputation of the Police, in order to have it investigated before the Court of Discipline, in which event the defendant is deprived of a right of appeal and his case is tried before police officers who are not learned in the law and do not even enjoy legal guidance. On the other hand, where the matter has been brought before the Court of Discipline, the police officer cannot be brought before the general courts for the same offence, for the act of the Court of Discipline is to be considered as *res judicata*. Is it reasonable, asks counsel for the petitioner, Mimran, that the investigation of such grave charges should be removed from a civil court just because the Inspector General has chosen, incidentally, to bring him before a court of the police?

7. In the case of *Lewis v. Mogan* (3), a seaman serving in a merchant ship was brought to trial for having absented himself for one day from his ship, contrary to regulation 47A of the English Defence Regulations. The accused argued that he had already been punished for the same act by the master of the ship, who had examined the matter and had deprived him of one day's pay. This authority is given to the master by section 114(2)(g) of the Merchant Shipping Act, 1894, whereby it is permitted to lay down in a seaman's contract of service

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Rape, sexual and unnatural offences

152. (1) Any person who:

(a) has unlawful sexual intercourse with a female against her will by the use of force or threats of death or severe bodily harm, or when she is in a state of unconsciousness or otherwise incapable of resisting; or

(b) commits an act of sodomy with any person against his will by the use of force or threats of death or severe bodily harm, or when he is in a state of unconsciousness or otherwise incapable of resisting; or

(c) has unlawful sexual intercourse *or* commits an act of sodomy with a child under the age of sixteen years,

is guilty of a felony and is liable to imprisonment for fourteen years. If such felony is committed under paragraph (a) hereof it is termed rape:

Provided that it shall be a sufficient defence to any charge of having unlawful sexual intercourse with a female under paragraph (c) of this subsection if it shall be made to appear to the court before which the charge shall be brought that the person so charged had reasonable cause to believe that the female was of or above the age of sixteen years

(2) Any person who: -

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal or

(c) permits a male person to have carnal knowledge of him or her against the order of nature

is guilty of a felony, and is liable to imprisonment for ten years.

"any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct." The accused's submission that the case was one of "autrefois convict" was rejected by the court on two grounds. First, that the master had not sat as a court with jurisdiction to try criminal offences, but had acted "in a domestic way." Secondly, even assuming that the *subject-matter* of the complaint in the two instances was identical, that an offence against the Merchant Shipping Act, 1894, is not the same as an offence against the Defence Regulations, so that *the offences* are not identical, and the accused cannot be heard to say that he has already been tried for an *offence* against the Defence Regulations.

The court's attitude will be further clarified if we turn our attention to the case of *R. v. . Thomas* (4). There, the contention of the appellant, who had been found guilty of murdering his wife by stabbing, was that he had already been convicted by a court for the same act, when he was convicted of wounding with intent to murder, and this was the act which in the end had caused the wife's death. To support this contention, the appellant relied on section 33 of the Interpretation Act, 1889, which provides : -

> "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law..... the offender shall, unless the and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

The court answered the contention in these words : -

> "Certainly it (the section) adds nothing and detracts nothing from the common law. It was argued that we ought so to read the section that the last word "offence" should be read as meaning "act" and it was submitted that "act", "cause" and "offence" all mean the same thing. In our view, that is not correct. It is not the law that a person shall not be liable to be punished twice for the same act. No court has ever said so, and the Interpretation Act has not said so."

Accordingly, that is to say, because of the differences in the two offences, notwithstanding the identity of the act, the appellant's contention was rejected; see also *R. v. Barron* (5), where it was stated: -

> "The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence. . . . ."

Section 33 of the Interpretation Ordinance, 1945, (which replaces section 25 of the original Interpretation Ordinance) corresponds to section 33 of the English Interpretation Act, yet nevertheless it is not to be inferred therefrom that the rule laid down in *R. v.. Thomas* (4), applies equally in this country.

In addition to section 33 of the Interpretation Ordinance, 1945, section 21 of the Criminal Code Ordinance, 1936, applies to our case; and in order to make comparison easier, we quote it here in its English version: -

> "A person cannot be twice criminally responsible either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of same other offence constituted by the act or omission."

It appears that the local legislator, in the Criminal Code Ordinance, 1936, enacted something that was not provided in the English Interpretation Act or in the Interpretation Ordinance, 1945, namely, that criminal responsibility cannot be imposed twice on a person for the same act or omission; it states, "the same act", not "the same offence". This is shown by the fact that where an act which causes injury, and for which a person has been charged, causes the victim's subsequent death, the accused in England is not immune from a murder or manslaughter charge since such offence is different from that formerly charged; and so the local legislator went out of his way e*xpressly* to provide that this instance, of an act

causing a person's death, is exceptional, and that the offender may be brought to trial although already once convicted in respect of the same act which constitutes a different offence.

It follows that there are grounds for the view that a police officer who has been tried for a particular act by a Court of Discipline is not liable to stand trial once more before an ordinary court on a charge of a "civil offence" arising out of the same act.

8. Notwithstanding that conclusion, I do not think that an act which may also constitute a "civil offence", even if it be of the category of a felony, is for that reason excluded from the jurisdiction of the Court of Discipline. The truth of the matter is that most, if not all, of the list of offences defined in the High Commissioner's rules as offences prejudicial to good order and discipline are acts which, if not committed by a police officer, are not regarded as offences, and there is a plain desire on the part of the authority which made the rules to supply the particular needs of the police force by passing a law which would impose upon it order and discipline. One must not, however, conclude that the task of the Court of Discipline, or even its main task, is to investigate such offences, which are of little importance from the point of view of the public, for in section 18(1) further offences are enumerated which are also within the jurisdiction of the Court of Discipline, and among them are acts numbered among the gravest of offences for which a person may be punished under the Criminal Code Ordinance, 1936. It seems that a police officer who "incites to mutiny" may be brought to trial either before the Court of Discipline under section 18(1)(a) of the Police Ordinance, 1936, or before a civil court under section 54(b) of the Criminal Code Ordinance, 1936. In the first case, he is liable to two years' imprisonment, and in the second case, to imprisonment for life. A police officer who assists another police officer to desert from the police, is guilty of an offence under section18(1)(f) of the Police Ordinance, or under section 56(b) of the Criminal Code Ordinance, 1936. A police officer who strikes a superior officer must be tried either under section 18(1)(e) of the Police Ordinance or according to Chapter XXVII of the Criminal Code Ordinance, 1936. It can hardly be imagined that the legislator overlooked this duplicity when he empowered the Court of Discipline to deal with charges of the gravest kind - felonies - when the accused is a police officer and the Inspector General decides to convene the court to try the matter. The reason for this is that according to the original version of section 18 of the Police Ordinance the

Inspector General was authorised to order the trial of a charge before the President of the District Court, like any other civil court, and only in 1959 was the Ordinance amended by transferring the matters dealt with in section 18 to Courts of Discipline that were established at the same period. It is clear that the legislator's intention was not to detract from the jurisdiction of those courts, notwithstanding the absence of legal guidance, and the withholding of a right of appeal.

9. An additional argument was put forward by the petitioner's counsel, mainly by Mr. Tunik, counsel for the petitioner Sapoznikov, but common to both cases. When the High Commissioner added offence No. 47 to the above mentioned list, and laid down that a police officer "acting in a disorderly manner or in any manner likely to bring discredit on the reputation of the force" is guilty of an offence to the prejudice of good order and discipline, he in fact failed to do what was imposed upon him - so Mr. Tunik contended - and did not at all define what an offence to the prejudice of good order and discipline is. Accordingly, the argument continues, the rule should be declared invalid, and in any event there is no foundation for the charge before the Court of Discipline in respect of an offence under that rule.

It seems to me that the petitioners' submission is sound, and not only on the ground submitted by them.

When the legislator has transferred the power of "subordinate legislation" to another public authority, the court will not be disposed, generally speaking, to restrict that power by way of construction, but will assist the legislator who, whether because of the burden of work imposed on him or because of the other authority's special knowledge, has decided to transfer to that authority some of the duties : *Leyton Urban District Council v. Chew* (6). How much more so will the court act in accordance with that rule if the duty of subordinate legislation is transferred to the High Commissioner in Council, who at that time was also the legislative authority and the difference between the two acts of legislation was, accordingly, purely technical.

A punishment is sometimes laid down for an act prejudicial "to good order and discipline", as in section 40 of the English Army Act, and the legislator refrains from

defining the nature of such an act. In that case, the duty of definition is imposed upon the court trying the charge, which has the power not only to establish facts, but also to weigh and determine whether, on the facts as found, good order and discipline have been there prejudiced. But it is clear that the local legislator did not take that course with regard to police officers' offences. The rule laid down in *Upfold v. Superintendent in Charge of Prison, Acre* (1), is clear, and its meaning is that, as regards offences under section 18(1)(i) of the Police Ordinance, the power given to a Military Tribunal by section 40 of the English Army Act to weigh and determine whether or not a particular act is compatible with good order and discipline, has not been given to the Court of Discipline. A condition precedent to the transfer of a police officers' trial to a Court of Discipline is, as was decided in Upfold's case (1), that the offence has been previously defined by the rules. The legislator was desirous, therefore, that the policeman should have before him a list setting out in advance how he was to conduct himself, and he cannot be brought to trial on account of any act whatsoever, unless the act has been first defined and described by the maker of the rules as a police offence.

10. As the learned author of the Manual of Military Law, 1951, notes in note 4 to section 40 of the English Army Act, in explaining the expression "good order and military discipline", it is not enough that a particular act is contrary to good order; an offence under the said section 40 is not committed unless the same act is also prejudicial to military discipline. The author cites, by way of example, the case of an officer dressed in civilian clothes, who disturbs a theatrical performance by talking in a loud voice. That act, the learned author infers runs counter to good order, but is not prejudicial to military discipline. He goes on to illustrate the meaning of the said section 40 with examples of improper receipt of a loan, or of unlawful possession of property, which constitute an offence if a soldier borrows money from another soldier, or if the property in question belongs to the army, but not if he borrows money from a civilian, or if the property belongs to a civilian, since in the latter two instances the element of prejudice to military discipline is once more absent.

Because of the similar language of section 18(1)(i) of the Police Ordinance ("good order and discipline of the Force"), we shall be correct in examining offence No. 47 made by virtue of the said section 18(1)(i), in the light of those considerations. It obviously

follows that the draftsman of the rules in no way gave thought to the fact that the task of definition placed in his hands was restricted and limited to preserving both "good order" and "discipline" in the Force. Neither of these two objects by itself is capable of serving as an element in the definition of the offence. Alternatively, offence No. 47 actually consists of: first, "disorderly conduct", and I doubt whether this is a definition at all, or whether "disorderly conduct" is not simply the opposite of the term "conduct contrary to good order", which the draftsman set out to define; secondly, conduct likely to bring discredit on the reputation of the Force. Let us assume that a policeman in civilian clothes disturbs a theatrical performance, like the army officer mentioned in the notes to the Manual. It may be that he will be guilty of one of the two offences under offence No. 47. There is prejudice to good order here, but no prejudice to police discipline, since the police officer's act has not been done within the framework of the police or in connection therewith. It follows, therefore, that the authority which made the rules defined as an offence something liable to be prejudicial to good order only, and took no account of the fact that an act cannot be treated as an offence unless it is *also* prejudicial to the discipline of the police. By reason of the fact that the offence as defined also includes within its description an act which, according to section 18(1) (i), is not regarded as an offence, we are obliged to invalidate the whole rule: *Scott v. Pillimer* (7); so that it does not matter that, in the present case, the petitioners' acts were also to the prejudice of police discipline, since they cannot be convicted of an offence under a rule which is devoid of any effect.

11. The result is that the charges, to the extent that they derive from offence No. 47 have no foundation. But the petitioner Sapoznikov was also convicted according to the fact count in the charge sheet of offence No. 23, and we have found no ground for not upholding that conviction. Mr. Tunik contends that were it not for a charge sheet which contained three charges, one of offence No. 28 and two of offence No. 47, the Inspector General would not have constituted a court and would not have transferred the petitioner's case to it for investigation on one charge only. We cannot guess whether the Inspector General would have reached that or any other decision; at all events, since no defect has been disclosed in that conviction, it is not for us to interfere with it.

Accordingly, in my opinion, the order nisi issued in H.C. 47/53 ought to be made absolute. The order nisi in H.C. 268/52 ought to be made absolute insofar as it relates to the

conviction on the second and third counts in the charge sheet, and must be discharged insofar as it relates to the fact count therein.

SILBERG J. I concur with the judgment of my learned colleague Sussman J. Mr. Tunik's argument that in specifying offence No. 47, the High Commissioner exceeded the powers conferred upon him by section 50(1)(e) of the Police Ordinance, seems to me to be sound. In my opinion, he not only exceeded the limits of his powers, but assumed an authority which had not been conferred upon him. Section 50(1)(e) empowers the High Commissioner in Council :

"to define offences to the prejudice of good order and discipline."

"To define", in this context, means to fill that bare description with concrete content by naming actual deeds. What, in fact, did he do? He substituted one vague meaningless concept - "the prejudicing of good order and discipline." – with another bare concept, no less ambiguous than the first, namely, "disorderly conduct or other conduct likely to bring discredit on the reputation of the Force". Is that to be treated as a definition? How much wiser are we now than we were with the first description? Moreover, by the "interpolation" of the new, meaningless definition, he has in fact changed the content and meaning of the description given in section 50(1)(e), for he has thereby set out a different standard for evaluating the act and classifying the offence.

It follows that the specifying of offence No. 47 was not only *"ultra vires",* but altogether *"extra vires"* of section 50(1)(e), that it has no effect and is invalid. That being so, since the charge against the petitioner Mimran and the two convictions, the second and the third, of the petitioner Sapoznikov are based on offence No. 47, they have no foundation and the order in relation to them ought to be made absolute.

OLSHAN. It seems to me that the intention of the legislator in section 18 of the Police Ordinance was to confer jurisdiction on a disciplinary court to deal with the conduct of policemen for the purpose of stiffening the discipline of the Force and securing efficient service. Accordingly he intended to transfer to the Court of Discipline the trying of acts which are prejudicial to the discipline and good order of the Force.

The said Ordinance discloses no intention to grant a special status to a police officer regarding the liability attaching to every citizen for criminal acts, in accordance with the Criminal Code Ordinance or any other law. The maximum punishment that the Court of Discipline can inflict is that of imprisonment for two years. In the light of section 21 of the Criminal Code Ordinance, which forbids the imposing of criminal liability twice for the same act (except in the case of causing death), it cannot be that the legislator intended to tighten or lessen the measure of punishment in regard to a citizen simply because he is a police officer. Were it not for the said section 21, or if the power had been given to the Court of Discipline to inflict the punishment provided in the criminal law in every case where the act is also an offence according to the criminal law, or if the discretion of the Inspector General of Police to prefer the Court of Discipline had been limited to those cases where the punishment according to the criminal law does not exceed imprisonment for two years, it might have been possible to argue that the legislator intended to make the police officer's position more severe, because the police officer, by virtue of his position, ought to serve as an example of a law-abiding citizen.

These remarks relate in particular to criminal offences which have no special connection with the duties and work of a police officer.

It is true that in section 18 of the Police Ordinance, among the paragraphs laying down the offences which may be tried before a Court of Discipline, there are offences that are also offences according to the criminal law. Paragraph (a) deals with mutiny, (b) with incitement to mutiny, (e) with the use of force towards a superior officer, (f) with desertion. But these offences are closely connected with a police officer's duties, and the legislator expressly laid them down in the above-mentioned list of offences. Notwithstanding that those offences are closely connected with the duties of a police officer, the legislator did not regard them as being included in paragraphs (h) and (i), which speak generally of offences which are prejudicial to the good order and discipline of the Force, and so laid them down expressly. If it were necessary to set out those offences separately and expressly, because they cannot be regarded as included in paragraphs (h) and (i), *a fortiori* that would be so as regards other offences laid down in the criminal law that have no connection whatsoever with a police officer's duties.

With regard to paragraphs (a), (b), (e) and (f), since they are directly connected with a police officer's duties, it may be that the legislator treated them as cases where the efficiency of the police service would require speedy trial before a Court of Discipline. But in the absence of express provision in that Ordinance, a similar intention cannot be imputed to the legislator in regard to other offences provided in the criminal law, which have no connection whatsoever with the question of imposing discipline.

If it be said that it is hard to imagine an act which is an offence according to the criminal law but not prejudicial to good order and discipline when committed by a police officer, so that the view would be correct that in paragraph (i) in section 18 power is given to the Inspector General of the Police to put a police officer on trial before a Court of Discipline for my act constituting an offence according to the criminal law, then the question may be asked as to what was the necessity for the detail in paragraph (a) to (h) in section 18.

It seems to me that the construction of section 18 is that, generally speaking, the Inspector General of the Police may put a police officer on trial before a Court of Discipline for an act prejudicial to good order and discipline, and if such an act also constitutes an offence according to the criminal law, that power may be used only if the offence is mentioned expressly in the Police Ordinance, or if the element of prejudice to good order and discipline in the act imputed to the offender is decisive.

Moreover, according to section 50(1)(e), the High Commissioner in Council was given the power to make rules for defining offences to the prejudice of good order and discipline. In 1941 the Police Rules were published, in which the High Commissioner in Council specified 46 offences which are deemed to be offences to the prejudice of good order and discipline. To those offences was later added offence No. 47, which dealt with a police officer "acting in a disorderly manner or in any manner likely to bring discredit on the reputation of the Force."

In the present cases, the petitioners were brought before a Court of Discipline for tile offence specified in No. 47. There is no doubt that the act of rape imputed to the petitioner in File 47/53, constitutes disorderly conduct likely to bring discredit on the reputation of the

Force, but the question arises whether, in order to bring a police officer to trial before a Court of Discipline, the offence No. 47 may be construed as if an act of rape were such an offence. For this is an act which has no direct connection with the police officer's obligations in the matter of "good order and discipline" (with the emphasis on the word "and"), or at all events where the element of prejudice to "good order and discipline" is not *the* element. In other words, did the High Commissioner in Council intend to include the offence of rape in the general definition in offence No. 47? And if so, a second question immediately arises, namely, was it within the power of the High Commissioner in Council to do so by way of rule-making ?

I think that the answer is in the negative. According to Articles 39, 40 and 41 of the Order in Council, the trial of criminal matters is entrusted to the courts mentioned therein. The Court of Discipline is not numbered among them. Article 38 of the Order in Council (as amended in 1935) states :

> "Subject to the provisions of this part of this Order and 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. . . . ."

It states, "according to the provisions of any Ordinance", not "according to a regulation".

As stated, the trial of criminal offences is entrusted to the courts mentioned in Articles 39, 40 and 41. Then came the Police Ordinance which enabled a Court of Discipline to try, among other things, mutiny, incitement to mutiny and desertion when committed by a police officer. As this was done by Ordinance, it does not in any way offend against the Order in Council. But could the High Commissioner in Council (the intention being not the High Commissioner as legislator – see the Interpretation Ordinance) establish by Way of regulation a Court of Discipline with jurisdiction to try an act of rape, an offence under the criminal law which is not mentioned in the Police Ordinance? The answer seems to me to be in the negative, for the establishing of a court also involves defining its jurisdiction and jurisdiction cannot generally be created by regulation *(Lipshitz v Valero* (2)). And if it be

said that only the establishment of a court need be made by Ordinance and the extension or restriction of its jurisdiction can be effected by regulation then in the present case section 50(1)(e) of the Police Ordinance cannot be construed as conferring such a power on the High Commissioner in Council. The offences which can constitute the subject-matter of a trial by a Court of Discipline are laid down in section 18 of the Police Ordinance. The High Commissioner was only given the power to *"define"* the offences included in paragraph (i) of section 18. When the legislator wanted also to include in section 18 three or four offences under the Criminal Code Ordinance, because they are closely connected with police service, he did so expressly in the Ordinance itself. It cannot be that by giving power to define the acts constituting an offence "to the prejudice of good order and discipline", the power was also given to add other offences of the criminal law which have no direct and close connection with police service. The High Commissioner was given the power "to define" the offences that are "prejudicial to good order and discipline", but "to define" means to explain and enumerate the acts that are deemed to be included in the above-mentioned offences laid down in paragraphs (h) and (i) in section 18 of the Ordinance, and it is not to be construed as giving power to insert wholesale into section 18 of the Ordinance all the offences in the ordinary criminal law. As I have already explained above, had such an intention existed - because every offence without exception is to the prejudice of good order and discipline when committed by a police officer - then there would have been no necessity for all the detail in section 18 and for giving the High Commissioner the power under section 50(1)(e). Instead, one section alone would have sufficed, which contained a provision that any police officer committing any criminal offence or acting in a disorderly manner or in any manner likely to bring discredit upon the Force, may be put on trial before a Court of Discipline.

I think, therefore, that in offence No. 47, the High Commissioner in Council did not intend, nor could he possibly have intended, to include the offence with which the petitioner in H.C. 47/'53 is charged, namely, an act of rape.

Accordingly, I think that it is impossible to bring the charge of committing an act of rape before the Court of Discipline, for that offence is not included in offence No. 47. It should be emphasized that there is no charge here of using a police car for private benefit, a matter which could have been included among the offences that are within the jurisdiction of the Court of Discipline. Here the charge is of committing an act of rape, a matter which

is not, in my opinion, within the jurisdiction of the Court of Discipline. A distinction must be made between a charge of using a police car for private benefit without permission (be it even for the purpose of an act of rape) and a charge of rape, for they are separate acts, and section 21 of the Criminal Code does not apply to them.[1)] Let us assume that the petitioner had been brought before the District Court and found guilty of an act of rape. That finding could not serve to prevent the petitioner from being punished in n Court of Discipline for using a police car without permission (that no such additional charge would, out of fairness, be brought does not alter the principle). Or, let us assume that the petitioner had been brought before the District Court and acquitted because the act had been committed with the woman's consent. That, too, could not serve to prevent the petitioner from being punished for using a police car without permission.

It is not always easy to fix the line dividing a criminal offence according to the criminal law from an offence to the prejudice "of good order and discipline", which is included within the jurisdiction of the Court of Discipline. In such a case, the test is, in my opinion, whether the decisive element in the offence imputed to the police officer is the prejudice to good order and discipline.

When we read the offences in the second and third counts with which the petitioner Sapoznikov was charged, it can be seen at first glance that they are the offences mentioned in section 207 of the Customs Ordinance.

In the second count, the petitioner was charged with attempting to conceal from the customs officials a consignment of medical supplies, which had been brought into the country without a proper import licence, and which were hidden among knives, spoons and forks.

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1) Criminal Code Ordinance, 1936. s. 21:

Persons not to be twice criminally responsible for same offence.

21. A Person cannot be twice criminally responsible either under the provisions of this Code or under the provisions of any other law for the same act or emission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

In the third count, he was charged with inducing a customs officer to permit him to take the goods out of the customs warehouse.

It is clear that the charge against this petitioner was not that "being a police officer, he made an arrangement to prevent the seizure of goods liable to forfeiture." Furthermore, he was not charged that, being a police officer, he gave or promised to give the customs official a bribe or recompense in order to induce him to neglect his duty - offences included in section 207.

It was not stated in those charges that the petitioner had some part in the bringing in of the goods by the owner without an import licence; he was not charged with making an "arrangement" in order to prevent the seizure of forfeited goods; no mention is made at all of whether the goods were liable to be forfeited or not; nothing at all is said as to what was his purpose in trying to conceal from the customs official..... It is not even stated that he thereby assisted in the smuggling.

It is clear that the charges were not directed to offences under the Customs Ordinance, but only to the petitioner's conduct as a police officer who fulfilled no duty in the customs offices, and who instead of disclosing the matter to the customs officials, tried to conceal it.

It cannot be said therefore, that offence No. 47 does not apply here.

As to the application of offence No. 47, I regret that I must disagree with the opinion of my colleague, Sussman J.

I do not think that offence No. 47 specified by the High Commissioner is invalid. By section 50(1)(e), the High Commissioner is given the power to define the offences which are prejudicial to good order and discipline. Accordingly, it was the duty of the High Commissioner, as was explained in *Unfold v. Superintendent of Acre Prison* (1), to describe or to draft a series of acts which are to be regarded as offences to the prejudice of good order and discipline. For that purpose he specified not just one offence, but all forty-seven. Offence No. 47 comes only as an addition to all the offences which he had specified under the previous forty-six heads. It is true that the drafting of offence No. 47, unlike the others,

is too vague, but for all that there is in it an indication of certain conduct which is to be regarded as being to the prejudice of good order and discipline. Just as the first offence, for example, contains an instruction to the Court of Discipline that disobedience by a police officer to an order of a superior in rank is deemed to be an offence to the prejudice of good order and discipline, so offence No. 47 contains an instruction to the Court of Discipline that a police officer acting in a disorderly manner or in any manner likely to bring discredit on the reputation of the Force is deemed to be an offender guilty of an offence to the prejudice of good order and discipline.

By section 50(1)(e) of the Police Ordinance, the power is given to the High Commissioner to give such an instruction, that is, the power to order that such conduct shall be deemed an offence to the prejudice of good order and discipline, and it cannot be said that offence No. 47 is null and void just because in some cases the Court of Discipline may have difficulty in determining whether the given conduct, for which a police officer has been brought before it, is disorderly conduct, within the meaning of that offence. Also, should that difficulty arise, it will be a question of construing offence No. 47, and the construction is not so difficult if one remembers that it has to be construed in the light of section 50(1)(e), under the authority of which that offence was specified.

Also, in the example quoted by my learned colleague from the Manual of Military Law, if such a ease is brought before the Court of Discipline of our Police according to offence No. 47, that court will be able to reach the same conclusion. The Court of Discipline will pose the question whether the High Commissioner intended to include such conduct in offence No. 47, and will be able to arrive at the same conclusion and to answer the question in the negative. The outstanding factor in offence No. 47 is conduct likely to bring discredit on the reputation of the Force. Every police officer must act properly and he is ordered not to bring discredit on the reputation of the Force. The High Commissioner provided in offence No. 47 that conduct contrary to that offence is conduct contrary to good order and discipline. Since the Law granted him the power so to provide, we cannot say that by specifying that offence be exceeded his jurisdiction. As for the argument that his drafting is too vague, I do not think that that is a defect capable of invalidating the offence, in the same way that we would not on that ground invalidate, for example, the offence of "unprofessional conduct" in the Advocates Ordinance, or the offence in section 105 of the

Criminal Code Ordinance - an act causing public mischief, and the like. As stated, certain conduct was defined in offence No. 47, and I do not think that its drafting is more vague than the above-mentioned examples.

Accordingly, I find no ground for interfering in the case of the petitioner Sapoznikov, and I think that the order nisi issued on his application ought to be discharged. As to the petitioner Mimran, I think that the order nisi should be made absolute.

*Order nisi in the petition of Sapoznikov made absolute as to the conviction on the last two counts, and discharged as to the conviction on the first count; order nisi in the petition of Mimran made absolute.*

*Judgment given on May 31, 1953.*