CrimFH 8613/96

State of Israel
v.
Jabarin

The Supreme Court Sitting as the Court of Criminal Appeals
[November 27, 2000]
Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, Y. Kedmi, D. Dorner J. Türkel

Petition to the Supreme Court sitting as the High Court of Justice

A further hearing on the judgment of the Supreme Court (Justices E. Goldberg, E. Mazza, and Y. Kedmi) in CrimA 4147/95 *Muhammad Yousef Jabarin v. State of Israel* on October 20, 1996.

Facts: A further hearing on the judgment of the Supreme Court in CrimA 4147/95 *Muhammad Yousef Jabarin v. State of Israel* in which the appellant was convicted of an offense under section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 for an article he had published. This further hearing addresses the question whether the construction of section 4(a) of the Prevention of Terrorism Ordinance requires a causal connection between the publication of the words of praise, sympathy, or encouragement and the risk of the occurrence of acts of violence pursuant to the publication, for a conviction. The court further addresses the question whether section 4(a) of the Prevention of Terrorism Ordinance relates only to "acts of violence" of a terrorist organization or to any "acts of violence".

Held: The Court held in an opinion by Justice T. Or that section 4(a) relates to acts of violence of a terrorist organizations and the words of praise and encouragement relate to acts of violence of a terrorist organization. Justice Or further held that the words and praise and encouragement in the publication which was the subject of the conviction do not constitute acts of violence of a terrorist organization. Therefore, the Court held that the defendant was to be acquitted of the offense under section 4(a) of the Ordinance.
Justice Y. Kedmi in a separate opinion was of the view that the further hearing should have been denied. Justice Kedmi agreed with the construction given to section 4(a) in the *Elba* case [2], as it was adopted by the Justices in the panel in the first hearing of this matter. Justice Kedmi was therefore of the opinion that the appellant's conviction should have been upheld. Justice Kedmi further stated that even according to the narrower construction of section 4(a), the appellant's conviction should have been upheld as the actions for which the appellant showed support, also meet the requirements of section 4(a) when narrowly construed.
Vice-President S. Levin in a separate opinion stated his general agreement with Justice Or and disagreed that section 4(a) is to be interpreted as referring to "acts of violence" of a terrorist organization alone, but rather should include the type

of violent activity that characterizes terrorist organizations. In his view the appellant's article satisfied this definition and therefore the conviction should have been upheld.
Justice E. Mazza in a separate opinion was of the view that the appellant's conviction should have been upheld and referenced his judgments in CrimA 2831/95 *Elba* v. State of Israel and in CrimA 4147/95 *Jabarin v. State of Israel* which was the subject of the further hearing.

For the petitioner—Dan Yakir
For the respondents —Talya Sasson, Eyal Yannon

Legislation cited:
Prevention of Terrorism Ordinance 5798-1948, ss. 1, 2, 3, 4, 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g).
Penal Law 5737-1977, ss. 136(c), 144B(a), ch. H, sections A, A1.

Regulations cited:
Emergency Regulations for Prevention of Terrorism 5708-1948

Israeli Supreme Court cases cited:
[1] CrimA 4147/95 *Jabarin v. State of Israel* (not yet reported).
[2] CrimA 2831/95 *Elba v. State of Israel* IsrSC 50(5) 221.
[3] HCJ 58/68 *Shalit v. Minister of Interior* IsrSC 23(2) 477.
[4] CrimA 317/63 *Tzur v. Attorney General* IsrSC 18(1) 85.
[5] CrimA 697/98 *Susskin v. State of Israel* IsrSC 52(3) 289.
[6] CA 2000/97 *Lindorn v. Karnit, Fund for Compensation of those Injured in Traffic Accidents* IsrSC 55(1)12.
[7] CrFH 1789/98 *State of Israel v. Benyamin Kahane* (not yet reported).
[8] CrimA 6696/96 *Kahane v. State of Israel* IsrSC 52 (1) 535.
[9] CrimA 401/79 *Lamdan v. State of Israel* IsrSC 34(4) 46.

Israeli books cited:
[10] Barak, *Interpretation in Law,* Vol. 2*, Statutory Construction* (1993)

Foreign books cited:
[11] *D.E. Long The Anatomy of Terrorism (New-York, 1990).*

Jewish law sources cited:
[12] *Ecclesiastes* 8, 8.

JUDGMENT

Justice T. Or

A further hearing on the judgment of the Supreme Court (Justices E. Goldberg, E. Mazza, and Y. Kedmi) from October 20, 1996 in CrimA 4147/95 *Muhammad Yousef Jabarin v. State of Israel* [1] (hereinafter*: "*the *Jabarin* case [1]"). In the judgment the appellant (hereinafter*: "Jabarin"*) was convicted of the offense

established in section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 (hereinafter: "Prevention of Terrorism Ordinance" or "the Ordinance") of support of a terrorist organization. This further hearing revolves around the question of the construction of this offense. The special importance of the issue stems from its ramifications for freedom of expression, as this freedom retreats within the borders of the deployment of this offense.

The Facts and the Processes

1. Over the course of the years 1990-1991, Jabarin, a reporter from *Umm El Fahm* published three articles. In the third article which, as we shall clarify below, was the only article that remained relevant to our matter, Jabarin wrote, among other things:"Truth be told, I will tell you my friend, that whenever I said: 'hurray', 'hurray' and threw a stone I was overwhelmed by the feeling that victory was calling us: 'continue to throw, increase the patience, contribute and insist more, and the dawn will come which you have been awaiting for so long' I will not deny my friend, that whenever I shouted: 'hurray, hurray' and threw a Molotov cocktail I feel that I am adorned in majesty and splendor, I feel that I have found my identity and that I am taking part in defending that identity and that I am a person worthy of leading a respectable life. This feeling awakens within me beautiful feelings."Consequent to the publication of the three articles Jabarin was charged with support of a terrorist organization, an offense under section 4(a) of the Prevention of Terrorism Ordinance. This offense establishes:

> "4. A person who:
>
> (a) Publishes either in writing or orally praise of, sympathy for, or encouragement of acts of violence that may cause the death of a person or his bodily injury, or of threats of such acts of violence;
>
> . . .
>
> will be prosecuted and if found guilty will be liable for imprisonment of up to three years, or a fine of 1000 Israeli lira, or both."

The Magistrate's court convicted Jabarin of the offense attributed to him. *Jabarin* appealed to the District Court. His appeal was denied. The applicant filed leave to appeal to this court and was granted leave as requested. In the framework of consideration of the appeal, the respondent informed the court that it agrees to the acquittal of the applicant for his conviction as far as it relates to the first two articles he published, however, it supports his conviction as to the third article. In reliance on the case law decided in CrimA 2831/95 *Rabbi Ido Elba v. State of Israel* [2] (hereinafter: "the *Elba* Case") as relates to the construction of section 4(a) of the Prevention of Terrorism Ordinance, the Court denied Jabarin's appeal of his conviction for publication of the third article.

Jabarin filed an application for a further hearing on the judgment. In his decision the President determined that it would be proper to grant the application and hold a further hearing on the question:

> "whether the interpretation of section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 requires that there exist a causal connection -- and if so what is it – between the publication of the words of praise, sympathy, or encouragement and the risk of the occurrence of acts of violence pursuant to the publication."

On February 16, 2000 we asked the parties to relate, by way of written summations, to an additional question and that is: whether section 4(a) of the Prevention of Terrorism Ordinance relates to any "acts of violence" or only to "acts of violence" of a terrorist organization. As far as I have been able to ascertain, this question has not yet arisen and has not been considered until the proceedings in this case.

The Positions of the Judges as to the Construction of Section 4(a) in the Elba [2] *and Jabarin* [1] *Judgments*

2. The further hearing before us in fact focuses on the *Jabarin* case [1], however, its foundations are anchored in the case law regarding section 4(a) of the Prevention of Terrorism Ordinance in the *Elba* judgment [2]. The *Elba* judgment [2] was handed down by a special panel of seven judges. The core of the discussion in the *Elba* case [2] surrounded the offense of incitement to racism established in section 144B (a) of the Penal Law 5737-1977, however it included reference by some of the Justices to the offense we are dealing with.

In the *Elba* case [2] Justice Mazza determined that the prohibition specified in section 4(a) includes among its elements, a probability potential for risk. In his view, the phrase "may" that is in the section relates to "acts of violence" and not to the published words. The expression "the death of a person or his bodily injury" which appears after the phrase "may" was intended only to describe the type of acts of violence. Justice Mazza determined further that the prohibition specified in section 4(a) is derived from the character of the violent activity and not from its attribution to a terrorist organization.

> "For the realization of the offense according to section 4(a) it is sufficient that the words of praise, sympathy, or encouragement relate to the type of activity which characterizes a terrorist organization, meaning 'acts of violence that may cause the death of a person or his bodily injury, or of threats of such acts of violence.' However, it is reasonable to think that not every publication of a word of praise or encouragement for an act of violence which may, by its nature, cause the death of a person, can constitute an offense according to section 4(a) of the Ordinance (while it is possible it will constitute another offense). From the purpose of the Ordinance it ostensibly necessarily arises that only publications which praise or encourage acts of violence of the type that characterize terrorist activity will be

> included in the framework of said prohibition. Nevertheless, it is clear that the prohibition also applies to the publication of words of praise, sympathy or encouragement for violent activity of this type, even if the activity is by an individual, or a group that is not identified as a member of a terrorist organization. Meaning: the prohibition on publication is derivative of the terrorist character of the violent activity, and not from its attribution to a terrorist organization, or from its doers belonging to such an organization." (para. 44 **Ibid**. emphasis in the original.)

In conclusion Justice Mazza determines that:

> ". . . the risk that pursuant to the publication defined as prohibited, violent activity will actually take place is not of the elements of the offense. The presumption inherent in the prohibition is that the very publication of words of support of activity which characterizes a terrorist organization can endanger the peace and security of the public. We find that the prosecution meets its obligation by proving the publication and that it supports (via words of praise, sympathy or encouragement) the types of activities that are characteristic of a terrorist organization; and it does not have to prove that the publication itself may (at a certain level of probability) cause violent action" (para. 45 of his opinion).

Justice Goldberg supported the view of Justice Mazza both relating to the attribution of the phrase "may" to "acts of violence" and to the absence of a probability test.

President Barak agreed with the view of Justice Mazza according to which the phrase "may cause the death of a person or his bodily injury" relates to the "acts of violence" and not to the words of praise. From hence, that even in his view the section does not include within it an element of potential risk of the occurrence of acts of violence pursuant to the publication. However, and in contrast to Justice Mazza, the President was of the view that the section includes within it, in the framework of the circumstantial element, a probability test. This test relates to the character of the actions described and its function is to examine whether acts of the type described may cause death or severe injury. The judgment in the *Jabarin* judgment [1] was handed down about five months after the *Elba* judgment [2]. Justice Mazza referred to that case and adopted the interpretation given there to section 4(a) of the Prevention of Terrorism Ordinance. Justices E. Goldberg and Y. Kedmi shared his view.

The Position of the Parties in the Further Hearing

3. Counsel for Jabarin claims that the construction the court adopted in the matter of section 4(a) of the Prevention of Terrorism Ordinance is an overly broad construction that does severe and unjustified harm to the foundational principles of our legal system. According to his claim, the

status of freedom of expression, which constitutes a "supra" value in our law, necessitates narrowing the area of deployment of the offense, in order not to harm it more than is necessary. It is justified to harm this freedom only when there is a probability that a danger is posed from the expression. As to the degree of probability of the danger, in his view the test of near certainty is to be adopted, a test that was adopted in Israeli case law as the balancing formula that is to be preferred when freedom of expression on the one hand and public peace on the other are placed on the scales. The respondent, for its part, seeks to adhere to the construction given to section 4(a) of the Prevention of Terrorism Ordinance in the *Elba* judgment [2] and the *Jabarin* judgment [1]. Although it makes a point of emphasizing that it is not oblivious to the importance of freedom of expression, nonetheless, in its view, this principle does not have ramifications for the question of the existence of a probability test in the framework of section 4(a) of the Prevention of Terrorism Ordinance and does not constitute grounds for narrowing the limits of the prohibition beyond that which is established in it. In the balance between the system of values the section protects and freedom of expression, the first prevails. The State also claims that applying a probability test that analyzes the influence of the words of praise on an audience exposed to it will place an unreasonable, if not impossible, burden of proof on the prosecution.

As for the Court's question whether section 4(a) is to be interpreted as relating to "acts of violence" of a terrorist organization only, the position of Jabarin's counsel is that such construction is indeed consistent with the foundational principles of the system and with the purpose of the Ordinance. On the other hand, the respondent is of the opinion that giving a narrow definition of the expression "acts of violence" in the section such that it relates to terrorist organizations only, is not consistent with the purpose of the provision in the section and therefore objects to it.

I will preface and say that I reached the conclusion that Jabarin is to be acquitted of the offense according to section 4(a) of the Ordinance. In my view section 4(a) relates to acts of violence of a "terrorist organization" according to its meaning in the Ordinance (hereinafter: "terrorist organization") and the words of praise and encouragement for acts of violence that were described in said publication do not satisfy this requirement. I will preface and explain my rationale for limiting the range of deployment of section 4(a) of the Prevention of Terrorism Ordinance to words of praise, sympathy or encouragement for acts of violence of a terrorist organization. Following that, I will examine whether the words of praise and encouragement in said publication constitute acts of violence of a terrorist organization. As said, my answer to this is in the negative.

Attributing the Provision in Section 4(a) to Acts of Violence of a Terrorist Organization

4. Section 4(a) deals with the prohibition of a publication which relates to "acts of violence that may cause the death of a person or his bodily injury, or of threats of such acts of violence." From a textual

standpoint, when one reads section 4(a) on its own, the section does not include a limitation according to which the acts of violence mentioned in it include only acts of violence of a terrorist organization or acts which are characteristic of a terrorist organization. However, my colleague Justice Mazza was of the opinion, as quoted above, that the section is not to be interpreted in such a broad manner, and that according to the purpose of the Ordinance the acts mention in section 4(a) are to be limited to actions and activities which **characterize** terrorist activity, even if they are done by an individual who is not connected to a terrorist organization.

I accept my colleague's view that the deployment of section 4(a) is not to be broadened to include any acts of violence which may cause a person's death or injury. But, in my opinion, the application of the clause is to be limited further, such that it will apply only to acts of violence of a terrorist organization. While my colleague is of the opinion that the section deals with terrorist activity, in my opinion it deals with the activity of terrorist organizations. I will detail my reasoning below.

5. In construction of a section in a statute it is not sufficient to examine a given statutory provision detached from the overall statute in which it appears. It is not a "lonely island" which stands on its own detached from its surroundings. The law is "a creature living within its environment" (Justice Sussman in HCJ 58/68 *Shalit v. Minister of Interior* [3] at 513). The proximate environment of the statutory sections is the overall statute within which they are found. Such a statute radiates and affects the manner of construction of each of the sections which make it up:

> ". . . the interpreter must review the legislation in its entirety. The words of Justice Frankfurter are well known that there are three laws to statutory construction: "read the law, read the law, read the law." Indeed, the organic unit which the judge interprets directly was not legislated on its own. It was legislated as part of a broader unit – the entire piece of legislation. Just as one is not to interpret a section in a literary or musical composition without looking at the entire composition, so too one is not to interpret a provision in the law without reviewing the law in its entirety." (A. Barak, *Interpretation in Law*, Vol. 2, *Statutory Construction* (1993) [10] at p. 308)

When examining the Prevention of Terrorism Ordinance in its entirety it is immediately apparent that the phrase "terrorist organization" is scattered throughout it. All the offenses established in the Ordinance, including section 4, apart from subsection (a) in it, relate directly to terrorist organizations. The Ordinance does not make do with dealing with the direct doers of the acts of violence who act on behalf of terrorist organizations. The prohibitions established in it are directed at the broad foundation of these organizations; it also covers members of terrorist organizations who are not direct partners of the acts of violence and their supporters and accomplices from without. Reading the Ordinance as one

unit reveals a clear and unified picture as to its purpose. This purpose is dealing with terrorist organizations with the goal of eliminating them.

The purpose of the Ordinance also radiates on identification of the purpose of section 4(a). Indeed, section 4(a) according to its text, when it is examined on its own, does not associate the words of praise and encouragement to the acts of violence of a terrorist organization specifically. However, when section 4(a) is read as one unit with the rest of the provisions of the Ordinance, it becomes apparent that the offense specified in it is to be related to the context of terrorist organizations.

6. This conclusion is supported by the language of the margin headings of the sections of the Ordinance. Most of the margin headings, including the margin heading of section 4, include the phrase "terrorist organization". For example, the margin heading of section 2 is "Activity in a Terrorist Organization"; the margin heading of section 3 is "Membership in a Terrorist Organization"; the margin heading of section 4 is "Support of a Terrorist Organization" and the like. As to the role of margin notes in the framework of statutory construction, it has already been said:

> ". . .although it is true that neither chapter headings nor margin headings add or detract as compared with the clear and unequivocal language of the law's provision itself. . . **where it arises from the statutory provision itself the possibility of a limiting interpretation which is consistent with the goal that was expressed in the heading of the chapter or the margin heading it is my view that it is proper to interpret the statute narrowly as aforesaid, in particular when it is a matter of criminal law**" (my emphasis T.O) (CrimA 317/63 *Tzur v. Attorney General* [4] at 95 and see A. Barak, *supra* at pp. 316-321 and references there).

Indeed, the weight of margin headings in legal interpretation is not substantial, but it certainly may shed light on the purpose of legislation (**Ibid**.). In our matter the consistent use of the phrase "terrorist organization" in the margin headings of the sections of the Ordinance, strengthens the construction according to which the Ordinance overall deals with overcoming terrorist organizations.

7. Even the analysis of section 4, including all of its alternatives, supports this conclusion. As said, the margin heading of this section is "Support of a Terrorist Organization". Indeed, all of its subsections, apart from subsection (a), deal with a type of support of a terrorist organization. It prohibits support of a terrorist organization by way of publication of words of praise, sympathy or encouragement of its acts of violence. The section does not deal with publication of words of praise, encouragement or sympathy for acts of violence which are not attributed to such an organization. In short, the protected value in section 4 is the prevention of support of a terrorist organization, and this as part of the overall layout of the Ordinance, whose purpose is elimination of the foundation of these organizations.

It should be noted in this context that even in the text of section 4(a) there is a hint to the fact that the publication of the words of praise, sympathy or encouragement dealt with within it relate to acts of violence of a terrorist organization. The section deals with publication of words of praise, encouragement or sympathy for "acts of violence which may cause the death of a person or his bodily injury". The definition of terrorist organization in section 1 of the Ordinance is "a group of people that in its operations makes use of 'acts of violence which may cause the death of a person or his bodily injury'". Section 4(a) uses the very same words which constitute the backbone of the definition of "terrorist organization" in section 1. This rationale also provides support for the argument that the legislator specifically directed section 4(a) of the law at words of praise, sympathy or encouragement for violent activity of a terrorist organization.

8. The conclusion that the provision of section 4(a) relates to encouragement of acts of violence of a terrorist organization is only strengthened when one examines the historical background and the legislative history of the Ordinance. The Prevention of Terrorism Ordinance was legislated under the dark shadow of the murder of Count Bernadotte, representative of the United Nations Assembly and his aide Colonel Serot in Jerusalem on September 17, 1948. This murder hastened the legislation of the Ordinance, but its legislation had a broader background which was the attempt of the provisional government, after the government was established, to bring about the disbandment of the Jewish underground. Several days after the murder, on September 20, 1948, the Emergency Regulations for Prevention of Terrorism 5708-1948 were passed. On September 23, 1948, members of the Provisional Council of State gathered for their 19th meeting, in the framework of which said regulations were repealed and replaced with the Prevention of Terrorism Ordinance. The meeting was opened with the notice of the then-Prime Minister, David Ben-Gurion, as to the murder and a sharp condemnation of the act (see: *Minutes of the Meeting of the Provisional Council of State of September 23, 1948, The Council of the Nation and the Provisional Council of State, Minutes of Discussions*, Volume A at p. 31). From this notice, detailed below we learn of the purpose for which the Prevention of Terrorism Ordinance was passed:

"After consulting with several members of the government – those members that I could reach on Friday evening and Saturday morning – **I approached the Ministry of Justice, to immediately prepare emergency regulations against terrorist organizations, according to which it would be possible to punish not only those who commit acts of terrorism – for this the existing laws suffice – but also members of the terrorist organization, even if they themselves do not participate in the terrorist act, and their helpers, and those encouraging them with money, propaganda or other assistance**.

On Saturday night the government convened at the Ministry of Defense, heard a detailed report from me as to these activities and decided to proceed with them with full vigor, until the criminals will be caught and brought to justice **and the terrorist organizations uprooted**.

The government dealt that evening with the proposed Emergency Regulations **against Terrorist Organizations**, prepared by the Ministry of Justice, ratified it in principle, and assigned a committee of three ministers to draft a final draft for publication in the Official Register as an emergency regulation. The government weighed whether to delay the publication until the meeting of the Council of State and reached the conclusion – that delay would be wrong and that immediate action was necessary, and it was to publish the regulations within the authority it had, as emergency regulations, however, with the convening of the Council of State the government submits the regulations for the Council's approval so that the regulations will be made into an ordinance on behalf of the Council of State." (Emphases mine-- T.O.).

From these words it arises that the Prevention of Terrorism Ordinance was legislated in order to combat the phenomenon of terrorist organizations. This historical background strengthens the conclusion I reached according to what is said in the Prevention of Terrorism Ordinance overall, that the Ordinance deals exclusively with offenses which relate to terrorist organizations.

9. The conclusion I reached clarifies and provides a satisfactory explanation for the severity of the criminal prohibition established in section 4(a), a prohibition that contains an infringement on freedom of expression. When this section is examined detached from its legislative environment and from its historical and legislative background, the impression is created that the infringement on freedom of expression is severe and disproportionate in its degree. However, this first impression changes, when the section is examined against the background of its context the purpose is understood and the borders of its deployment are clarified. The prohibition specified in section 4(a), as the rest of the prohibitions in the Ordinance, was intended to defeat the foundation of terrorist organizations. Against the background of the special severity of this risk, the legislator was of the view that it would be proper to go even further and to also consider publication of praise for violent acts of a terrorist organization as an offense, even if they were done in the past, and even if the publisher of the words of praise is not a member of such an organization himself and does not pose a danger himself. Moreover, and this is to be emphasized, the section does not require the existence of potential for the realization of any harm as a result of the publication. One can become accustomed to such a prohibition in a democratic society, although it contains a significant infringement on freedom of expression, when we are dealing with terrorist organizations, with the great and unique risk they embody.

10. The respondent is aware of the historical background for legislating the Ordinance, but according to its claim, the language of section 4(a) enables its interpretation in a manner that does not limit the prohibition established in it to the description of violent acts of a terrorist organization, and in its view, such an interpretation is more desirable.

As for the language of the article, it is the claim of the respondent, that from review of section 4 one can reach a conclusion opposite to the one reached above. First, as opposed to each of its subsections, in

subsection (a) it is not explicitly noted that the prohibition specified in it refers to a terrorist organization. From this it can be concluded that there was no intention to limit what was said in it to acts of a terrorist organization. Moreover, the respondent also claims that limiting the scope of section 4(a) to describing acts of violence of a terrorist organization, will in fact make superfluous the prohibition found in it as this prohibition is covered by other alternatives in section 4. For example, section 4(b) establishes that a person will be charged with an offense who:

> "publishes, in writing or orally, words of praise, sympathy or calls for help or support of a terrorist organization."

It is the claim of the respondent, that words of praise, sympathy or encouragement for undertaking acts of violence by a terrorist organization are included within this general prohibition of publication of words of praise and encouragement of a terrorist organization. This act is in its view also covered by section 4(g) of the Ordinance which establishes that a person will be charged with an offense who:

> "commits an act that contains an expression of identification with a terrorist organization or sympathy for it, by waving a flag, presenting a symbol or a slogan or voicing an anthem or slogan, or any similar expressive act which clearly reveals such identification or sympathy, and all this in a public place or in a manner that people who are in a public place can see or hear this expression of identification or sympathy."

Such arguments are to be rejected. First, the argument according to which the interpretation which bounds the definition of section 4(a) to a terrorist organization, makes the prohibition established in it superfluous, is not to be accepted. The distinction between the prohibitions established in the various alternatives of section 4 is clear. The prohibition specified in subsection (b) prohibits publication which contains words of praise, sympathy or calls for help or support of a terrorist organization. On the other hand, subsection (a) relates to a publication which contains words of praise, sympathy or encouragement of violent acts of a terrorist organization. The emphasis is on acts of violence of a terrorist organization, and not the terrorist organization itself.

Second, as to section 4(g), from review of the case based description of the type of activities it applies to it is apparent that the section deals with expressions of support and identification via symbolic means, such as anthem, flag waving, slogan and the like (see on this issue CrimA 697/98 *Tatiana Susskin v. State of Israel* [5] at para. 35). It does not deal with a publication that contains direct literal support of acts of violence of a terrorist organization.

Third, indeed the language of section 4(a) itself can also be interpreted as applying to the type of violent activity that defines terrorist organizations, or even to any violent activity and not necessarily the violent activity of terrorist organizations. As I noted in the beginning of

my words, from a textual standpoint, this possibility is not to be ruled out. However, as explained above, this interpretation is not consistent with the purpose of the Ordinance, its margin headings, its historical and legislative background and the alternatives of section 4.

11. According to the respondent's claim, it is desirable to dismiss the interpretation that limits section 4(a) to publication of words of praise for terrorist acts of a terrorist organization alone also for the reason that it leads, in its view, to an unwanted result. The respondent brings as an example in support of this argument the fact that the publisher, for example, of words of praise for the massacre at the Cave of Mahpelah or the murder of Prime Minister Yitzhak Rabin, could not be charged with an offense according to section 4(a) of the Prevention of Terrorism Ordinance, and this because these terrorist acts were not carried out by agents of a terrorist organization but by individuals. In this context, the respondent emphasizes that the reality in Israel proves that the threat that is posed from individuals is no less tangible than the threat posed by organized groups. In its view, the special importance of section 4(a) of the Ordinance is to be understood in light of this reality. The prohibition on publishing publications which incite to severe acts of violence on an ideological background, established in section 4(a) of the Ordinance, constitutes a central tool in the effort to prevent terrorist acts in general and those by individuals in particular. Its importance stems from the fact that its task is to prohibit these seditious publications and thereby prevent an atmosphere which grants the lone damaging person the necessary support to carry out the terrorist act. In the view of the respondent, accepting the proposed interpretation will leave the prosecution without the tools to cope with the phenomenon of incitement by individuals to commit severe acts of violence with terrorist characteristics.

The respondent proposes to adopt the view of Justice Mazza, which was expressed in the *Elba* judgment [2] and the *Jabarin* judgment [1], according to which within the framework of the prohibition in section 4(a) will be included publications which praise or encourage acts of violence of the type that characterizes terrorist activity. The respondent even suggests a number of central components which make such activity unique in its view, and which distinguish it from "regular" acts of violence.

12. As I have shown above, the Ordinance was legislated in order to fight against terrorist organizations. However, the law is that a statute is to be given an updated meaning, in accordance with the changing reality (see A.Barak in his book *supra*, at p. 264; and see also, for example, CA 2000/97 *Lindorn Nicole v. Karnit, Fund for Compensation of those Injured in Traffic Accidents* [6] at paragraph 17). If this is the case, is it not desirable, in the face of the argued change in the character of terrorist activity over time, to walk in the pathway the respondent suggests and broaden the boundaries of the deployment of the prohibition specified in section 4(a) beyond the boundaries originally delineated? My view is that we are not to do so. The Ordinance deals with organized terror, and not with acts of violence undertaken by individuals. It deals with the risk entailed in the joining together of a band of people who undertake in

their activities acts of violence which endanger human life. Organizations of this type, to the extent that they are not cut off at their core, may spread like a cancer in the body of society, and endanger its foundations, and possibly even sabotage the foundations of the regime. In light of the severity of this risk, primarily during a period of emergency, the use of the severe means utilized by the Ordinance to eliminate this blight is understandable. I have clarified above, that the special severity of the means utilized are to be understood against this background, as this is also reflected in the essence of the prohibition established in section 4(a). Broadening the scope of 4(a) to additional circumstances, which it did not purport to deal with, may destroy the balance established in it, which enables severe infringement on freedom of expression, but only for the purpose of dealing with the extreme phenomenon of terrorist organizations.

13. As stated, the respondent expresses concern, that accepting the proposed construction will leave the prosecution without the tools to cope with the phenomenon of incitement to commit severe acts of violence with terrorist characteristics, when these are not connected to a terrorist organization. This claim, to the extent that it reflects the face of reality, indeed is not to be belittled. However, it cannot change the purpose of section 4(a) which was intended, along with the other offenses established in the Ordinance, to serve as a weapon in the fight against terrorist organizations. This purpose has not lost its force. Unfortunately, such organizations have not yet left this world. Indeed, at the time the Ordinance was legislated it was intended to deal with organizations of a different identity than those we are familiar with today. A change in times has also brought about a change in the identity of terrorist organizations which constitute a risk to the State. However, the risk rooted in terrorist organization has remained, and therefore the original meaning of section 4(a) as described above has not faded.

It will be noted, that in existing legislation there exist a number of provisions which may serve the state in its war against the phenomenon of incitement, as the offense of sedition found in Title A of Chapter H of the Penal Law 5737-1977, and the offense of Incitement to Racism established in Title A1 in it. According to the claims of the respondent the existing arsenal is not sufficient to battle the phenomenon of sedition. If that is the case, this is a matter for the legislator to address and regulate the prohibition of incitement, in its various aspects.

Based on what has been said above, my conclusion is that the Ordinance only applies to situations in which terrorist organizations are involved. It does not relate to violent activity, of any type, which has no connection to these organizations. Therefore, section 4(a) is not deployed over publications which contain words of praise, sympathy or identification with violent acts which were committed by people who are not associated with a terrorist organization. Limiting the scope of section 4(a) in such a manner, preserves the balance established in it between freedom of expression and the value protected within it. This prohibition eliminates the concern of a disproportionate infringement on freedom of

expression; the infringement is proportional in consideration of the special risk rooted in terrorist organizations.

The Question of the Association of the Described Acts of Violence with a Terrorist Organization

15. In our matter, Jabarin published, during the Intifada, an article which expresses support, encouragement and sympathy for the throwing of stones and throwing of Molotov cocktails. Did Jabarin commit an offense according to section 4(a) of the Prevention of Terrorism Ordinance with this publication? My answer to this is in the negative.

In order to establish whether a publication is included within the prohibition established in section 4(a), one is to examine whether the acts of violence described in it, which it praises, encourages or sympathizes, are the acts of violence of a terrorist organization. Section 1 of the Ordinance defines a "terrorist organization":

> "'a terrorist organization' is a group of people that uses in its operations acts of violence which may cause the death of a person or his bodily injury or threats of such acts of violence"

There is no doubt that throwing stones and throwing Molotov cocktails are activities which can endanger human life. But the question is, does *Jabarin*'s article, which praises and encourages acts of violence, relate to the acts of violence of a terrorist organization?

The acts of violence of the type described in said article were undertaken, during the course of the Intifada, both by individuals and by organized groups that fall under the definition of "terrorist organization". Stones and Molotov cocktails were thrown in a disorganized manner, by individuals including children, who acted independently. However, these activities were also undertaken by groups with an organized foundation that undertook acts of violence to achieve their goals. I clarified above, that in order to apply section 4(a) of the Ordinance, it is not sufficient that the acts described in the publication are of the type that characterize terrorist activity, but it is necessary that they be the acts of such an organization. Does section 4(a) apply to a publication of the type we are dealing with, a publication which praises and encourages acts of violence undertaken both by individuals and by terrorist organizations, and which in itself contains no indication, explicit or implicit, of whose activities it wishes to encourage and praise, and when the emphasis in it is on the acts of violence themselves without any connection to the characteristics of those undertaking them?

16. It is my view that section 4(a) does not apply to said publication. The reason for this is found in the purpose of section 4(a). I clarified above, that its purpose is not to prohibit a publication which encourages, praises or sympathizes with acts of violence of the type which characterize terrorist activity. It is intended, as are the rest of the alternatives of section 4, to prevent support of terrorist organizations, and this as part of an overall system in the Ordinance whose purpose is to eliminate the foundation of such organizations. In order for a publication to be included in the framework of section 4(a), it is necessary, in my

opinion, for it to be understood from it that it supports acts of violence of a terrorist organization. Indeed, it is not necessary that the publication contain explicit reference to such an organization. It is sufficient that it be implied from it that it supports violent activities undertaken by it. For example, a publication which praises acts of violence without relating to those undertaking it, when it is known to all that a terrorist organization is behind the act, will fall within the framework of section 4(a) of the Ordinance. However, a publication which praises and encourages acts of violence, from the content of which it is not to be understood that it is intended to support a terrorist organization, but the emphasis in it is on the acts of violence itself, without connection to the characteristics of those undertaking them, does not fall within the prohibition established in section 4(a).

In our matter, the publication includes words of praise and sympathy for acts of violence of the type of throwing of stones and Molotov cocktails. As said, it contains no indication that it was intended to praise an act of violence of a terrorist organization. My impression from reading the article is that the emphasis in it is on acts of violence, when the characteristics of those undertaking them do not add or detract. Moreover, in the major portion of the article, as can also be seen from the section quoted in paragraph 1 above, *Jabarin* relates to acts of violence that he himself undertakes, or seeks to undertake. The respondent is not claiming that *Jabarin* himself is a member of a terrorist organization. Therefore, words of praise for his actions, or encouragement to act like him, are not included within the framework of words of praise or encouragement for acts of violence of a terrorist organization.

17. In light of this, my conclusion is that the article does not support a terrorist organization, by means of sounding words of praise and encouragement for acts of violence undertaken by it. From hence that the publication we are dealing with does not include the required elements for formation of the offense of support of a terrorist organization established in section 4(a) of the Ordinance.

18. Based on the above, I will propose to my colleagues that the petitioner's appeal be allowed and that he be acquitted of the charge he was convicted of.

President A. Barak

I agree

Justice D. Dorner

I agree

Justice J. Türkel

1. I concluded my opinion in CrimA 2831/95 *Rabbi Ido Elba v. State of Israel* [2] with the words: "it is said in the book of *Kohelet* that "no man controls the spirit—to trap the spirit" [*Ecclesiastes* 8,8] Let us not hold back man's spirit." (**Ibid**. at 337)

In the view of the respondent's counsel in the briefs they submitted "there are expressions, and the petitioner's expression is included among these, that even if perhaps they express man's spirit it is appropriate to place limitations on this spirit as the entire purpose and goal of that spirit is to incite harm to the spirit and body of other people."

2. I go in my way, as in the *Elba* case [2] and as in CrFH 1789/98 *State of Israel v. Benyamin Kahane* [7] the decision on which is to be given alongside the decision here. In my opinion it is proper to narrow, by way of construction, the scope of deployment of the criminal law provisions which infringe on freedom of expression. As I said in the *Elba* judgment "according to my perspective, across the standard at one end of which is absolute freedom of expression and at the other end of which – its prohibition, the balancing point is to be set very close to the first edge." (**Ibid**. at p. 331).

Indeed the words that the petitioner wrote in the article that was published, for which he was convicted in CrimA 4147/95 *Muhammad Yousef Jabarin v. State of Israel* [1] are deserving of serious condemnation; however, such things are not to be prevented nor is their sting to be dulled, using the authority of section 4(a) of the Prevention of Terrorism Ordinance 5708-1948 (hereinafter: "the section"). In the battle for freedom of expression we should not lower our gaze to the close range of the throwing of a stone or hurling of a Molotov cocktail but rather raise our eyes to the horizon of Jewish and Democratic Israel, for which freedom of expression is one of its foundation stones. Protection of the petitioner's right to speak his words is not protection of his defamatory words, but it is protection of the right of the person holding another opinion to speak his mind. Protection of the right of the petitioner is protection of my right to speak my words, to sound the poetry of the poets that speak from my heart, and to cry out my cry of truth.

3. The construction of my colleague, Justice T. Or, narrows the range of deployment of the section and is favorable in my eyes. I agree with his view.

Justice Y. Kedmi

I read through the opinion of my colleague Justice Or, and unfortunately I cannot agree with his view. According to my approach, as it will be presented below, the construction that was given to section 4(a) of the Prevention of Terrorism Ordinance in the *Elba* case (CrimA 2831/95)[2] – by Justice Mazza – is the proper construction; and I have not found any justification to change it or deviate from it. Two topics are up for discussion in the case before us as to the construction of said section 4(a). The one, which is the issue for which the further hearing was granted – deals with the question, whether a "causal connection" is needed between the publication of words of praise, sympathy or encouragement of acts of violence, and the occurrence of acts of violence in fact. And the second -- deals with the question, whether section 4(a) speaks only of publication of words of praise for acts of violence that

were committed by a terrorist organization; or whether in its framework are also included words of praise for acts of violence that were committed by private persons not on behalf of a terrorist organization when they satisfy the characteristics of the acts detailed in the body of the article.

As to the causal connection , I accept, in principle, the approach that states: that lacking an explicit statement, noting a prohibited "character mark" of a circumstance – in this case the publication – is not sufficient to convey a requirement for the presence of any particular level of probability of the actualization of that "character mark"; and that there is to be seen in noting the prohibited character mark a requirement which relates to an inherent trait of the circumstance as opposed to its potential to occur. On this matter see the words of my colleague, Justice Mazza in CrimA 6696/96 [8] in connection with section 136(c) of the Penal Law: "the phrase 'of a seditious nature' is directed at the content of the publication and not the degree of probability that the publication will cause rebellion."

However, when it has become clear that there is no debate that the requirement that the acts of violence which the petitioner's article deals with, are acts of violence "which may cause the death of a person or his bodily injury" as in their meaning in said section 4(a), I do not find it appropriate to expand on this issue here; and in my view it remains "open for further discussion".

As to limiting the application of the prohibition established in said section 4(a) to words of praise and encouragement of acts of a terrorist organization only, I agree with the position that was presented by Justice Mazza in the *Elba* case, according to which: this section relates to the publication of words of praise and encouragement for violence **of the type that characterizes terrorist activity**; and it is of no consequence whether these are committed by a terrorist organization or a private individual not on behalf of such an organization.

From a textual perspective, there are two rationales at the basis of my approach. The first – the language of said section 4(a) does not include a requirement that the acts which are the subject of the encouragement and praise will be such that they are committed by **a terrorist organization** in particular; as opposed to all the other subsections of section 4, which speak specifically of terrorist organizations. And the second – in describing the acts subject to the prohibition established in said section 4(a) – "that may cause the death of a person or his bodily injury, or of threats of such acts of violence"—the legislator repeated, with vigorous precision, the acts which characterize a terrorist organization, as per the definition in section 1 of the Ordinance; when the reference in that definition to a "band of people" as the doers of the actions, was dropped from section 4(a). This situation teaches, in my approach, that the legislator intended to establish in said section 4(a) a general prohibition on words of praise and encouragement for acts which characterize a terrorist organization; and this – and Justice Or has described this at length – as an exception within its environment, which overall, speaks of the activity of a terrorist organization explicitly.

The language of section 4(a) is not suffering from a textual "failure" which must be healed by way of construction, as is necessitated by the approach of my colleague. "Omission" of the requirement according to which it is a matter of praise and encouragement for acts "of" a terrorist organization, repeats itself twice: first in the very absence of the mention of the terrorist organization; and later, in copying the definition of the acts which characterize a terrorist organization without mentioning the doer. The language of section 4(a) is clear, and deliberately does not include the requirement that the doer of the actions the subject of the encouragement and praise will be a terrorist organization. Adding the requirement which narrows the prohibition established in said section 4(a) as suggested by my colleague Justice Or, constitutes in the present case, "judicial legislation" as opposed to "construction".

The result I have reached is not necessitated just from the textual aspect of the version of the provision, as detailed above, but also fits in -- in my approach – with the legislative purpose and the framework in which it is found. Indeed, as is apparent from the legislative history of the Ordinance, the factor that led to its legislation was the need to create a tool to combat terrorist organizations; and apparently the conclusion is necessitated that section 4(a) is also directed to serve this tool. However, at the end of the day, the struggle is not with an "organization" as such, but the "activity" for which the organization was set up and which it carries out; and it is not surprising, to see the "intertwining" of a provision which is directed at deterring from "activity" which characterizes the organization, even when this is not carried out by a member of the organization, in its name or on its behalf. When the final result of the struggle is prevention of "terrorist activity", we do not see an absence of logic– requiring repair -- in that among the rest of the prohibitions there has also been established a prohibition which speaks directly to preventing "activity" of the type that a terrorist organization carries out. Prohibition of the publication of words of praise for "activity of a terrorist nature" that was carried out by one who was not a member of a terrorist organization, does not constitute, according to this approach, a "foreign seed" – lacking in logic – in the Ordinance – which is directed at blocking the activity of terrorist organizations.

Aside from and in addition to what is said above – and beyond what is needed – I feel it appropriate to add the following comment. Even if the language of the provision were to leave room for a restricting definition, I would reject such construction due to the "change of circumstances" since the legislation of the Ordinance; and this by authority of the rule which denies reliance on historical construction which was good in its day and which ignores the development which has occurred in reality.

> "legislative history must not control us 'from the graves'; but we also must not build our legislative structure without roots. The proper balance between past and future, between knowledge of what was, and knowledge of what should be, is what stands at the foundation of proper use of legislative history in establishing the purpose of the legislation." (A.

> Barak, *Interpretation in Law,* Volume 2*, Legislative Construction*, 1993 [13] at p. 351).

The phenomenon of terror has undergone many changes over the years. In the past, including at the time of legislation of the Ordinance, the phenomenon was focused on activity carried out by terrorist organizations; and the phenomenon of private terrorists – "freelancers" – was in its infancy. However, today the phenomenon of terrorism has ceased to be the exclusive activity of terrorist organizations; and the role of individuals, who mimic the members of the organizations but act on their own accord, has reached significant proportions. It is not without reason then, that the definition acceptable to the United States Government for terrorism also specifically includes within it reference to terrorism by individuals.

> ""Terrorism is the threat or use of violence for polotical [sic] purposes *by individuals or groups*, whether acting for or in opposition to established governmental authority, when such actions are intended to shock, stun, or intimidate a target group wider than the immediate victims." (D. E. Long, *The Anatomy of Terrorism* (1990) [11] at p. 3; emphasis added Y.K.).

Our State has recently witnessed the harsh dangers embedded in acts of terrorism of individuals – who do not act on behalf of an organization –with the murder of the prime minister Yitzhak Rabin (may his memory be a blessing), in the actions with a terrorist character by someone who was not acting on behalf of a terrorist organization. The danger embedded within those "unorganized" terrorists is continually increasing and its strength has lately surpassed that embedded in terrorist organizations; experience has shown that the task of foiling the activities of those individual terrorists is particularly difficult given their seclusion.

In such a situation, there is no justification for the distinction between words of praise for violent acts of members of an organization and words of praise for actions of the same type that were committed by those who are not members of any organization; as the purpose of the prohibition is to prevent the existence of activity of a terrorist nature; whoever those carrying it out may be.

And finally, I am not oblivious to the fact that my position as to the construction of the provision of said section 4(a) clashes with the basic right of freedom of expression. Indeed, such is the face of things. However, said right is not an absolute right but a relative one; where the legislator gnaws away at it from the authority of the right to life and security while preserving the necessary "proportionality" we must honor its provision. Said section 4(a) establishes such a provision.

Conclusion

According to my approach, the construction given to section 4(a) in the *Elba* case [2] is to be left standing as it was adopted by the Justices in the panel in first discussion in the matter before us; and it is not appropriate to intervene in the conviction of the appellant.

As an aside I would like to add that even if the opinion of my colleague Justice Or is accepted, according to which section 4(a) speaks only of words of praise for violent actions "of a terrorist organization" the appeal is still to be denied; and this, as the actions for which the appellant showed support, meet, at the end of the day, this requirement as well. It is well known that throwing stones and Molotov cocktails during the intifada, was committed first and foremost by members of Palestinian terrorist organizations on behalf of their organizations; when individuals, who are not members of organizations, were dragged in after them. The possibility and even the fact – that these acts were committed **also by individuals who are not members of a terrorist organization**, does not remove the words of praise the appellant published from the purview of said section 4(a) even according to the "restricting" formula proposed by my colleague. Review of the appellant's article shows, that it speaks of sweeping support of all acts of throwing stones and Molotov cocktails without distinction as to those committed by members of terrorist organizations and those committed by individuals that are not such; from hence that the support also refers to activities of terrorist organizations.

Vice-President S. Levin

1. I agree with my hon. colleague Justice T. Or that the language of section 4(a) of the Prevention of Terrorism Ordinance, on its own, can also encompass violent activity of the type that characterizes terrorist organizations, or even violent activity of any type, however, in my view, it must be so interpreted. I do not agree with him that the said paragraph is to be interpreted as referring only to "acts of violence" of a terrorist organization.

The thesis which bases the acquittal on a narrow interpretation of section 4(a) relies on the purpose of the Prevention of Terrorism Ordinance, the margin heading of section 4 and other sections of the Ordinance, the similarity between the language of section 4(a) and the definition of "terrorist organization" in section 1 of the Ordinance, the historical background of the Ordinance and the need to interpret said statute as much as possible in a manner that does not infringe on freedom of expression. I do not accept this position, for the purposes of the petition before us.

As to the purpose of the Prevention of Terrorism Ordinance said thesis creates circuitous reasoning (*inextricabilis circulus*): if you start with the assumption that the purpose of the Ordinance is only war with terrorist organizations, then the thesis is well based; if you start from the conclusion that the Ordinance has an additional purposes which is also to fight against the actions of individuals who publish words of praise, sympathy or encouragement for acts of violence which may cause a person's death or injury then the thesis is not well based and it assumes the desired result as the basis of its rationale. Moreover, a similar question came before us in CrFH 1789/98 [7] and the court determined there that a broad construction was to be given to the offense of sedition although it was also possible there to interpret the wording "to incite to seditious acts" as referring to an act that that causes harm to the structure

of the regime alone, and I do not see a significant difference in the means of interpretation of the two statutes.

2. The value of a margin heading in the construction of section 4(a) of the Ordinance is minimal and it is given sufficient weight in the approach of Justice Mazza in CrimA 2831/95 [2], that section 4(a) speaks of types of activity that are characteristic of a terrorist organization and not violent activity when it stands on its own; even in the similarity between the grounds of paragraph (a) of section 4 and the definition of "terrorist organization" in section 1 of the Ordinance there is not in my view support of the acquitting result and vice versa; the fact that in section 4(b)(c)(d)(e)(f) of the Ordinance a "terrorist organization" is mentioned, as opposed to in paragraph (a), can teach, by way of evidence from the contrary, that paragraph 4(a) does not refer specifically to a "terrorist organization"; the examples from the legislative history which led to the legislation of the Ordinance are in my view of little weight, if they did not find expression in the wording of the Ordinance, that with its legislation became a living thing that carries its own weight. Absent sufficient indication in the wording of section 4 of the Ordinance that the protected value in this section is only the struggle with a terrorist organization, it appears to me that text is to remain within its literal meaning and the protected interest in paragraph (a) is also the struggle with one who commits the types of activities that are characteristic of a terrorist organization.

3. The central question in this further hearing is whether proper construction of section 4(a) of the Ordinance requires limiting the scope of deployment of the section only to activity of a terrorist organization although this was not said in paragraph (a) and that is – in order to defend freedom of expression. The topic we are dealing with is the normative construction of a primary statute and not its application to a concrete instance, as in our matter it is possible that it will be necessary to utilize stringent criteria of probability in order to prevent infringement of freedom of expression. All agree that the deployment of the principle of freedom of expression can be pushed back in the presence of restrictions and limitations which relate to considerations which may narrow the scope of its deployment. Accepting the position of the petitioner in the normative sphere means closing off options for a conviction based on clear text for offenses of severe incitement to acts of violence characteristic of a terrorist organization, when, apparently there is no other statutory source to rely on in order to convict one who commits the act. Under these circumstances I am not of the view that the interpreter has the option of applying a general norm of freedom of expression that can limit the statute's words resulting in the release of the accused from criminal liability. Just as it is true that the law is a "a "creature living within its environment" for the purpose of restricting the scope of its deployment in the appropriate case in the face of the application of general principles, so too is it a "a creature living within its environment" for the purpose of applying its exacting words, if it turns out – in the appropriate case – that a restrictive construction of the section will harm the interest which the law comes to protect; compare:

the judgment of Justice Landau in CrimA 401/79 *Lamdan v. State of Israel* [9] **at p. 56 near the letter "a"**. Such, in my view, is the situation in the present case.

4. Were my opinion to be heard we would therefore decide that section 4(a) of the Prevention of Terrorism Ordinance also applies to those who commit acts of terror which characterize terrorist organizations and I have no doubt that the content of the article meets this definition. Therefore, in theory I should have expressed my view also as to the question for which the further hearing was granted which relates to the existence of a causal connection between the publication of the words of praise, sympathy or encouragement to the risk of the occurrence of acts of violence as a consequence of the publication; and the degree of its strength; as my honorable colleague, Justice Kedmi, I have been satisfied that the content of the articles also meets the more stringent test of "clear and present danger". Therefore I do not see a need to express an opinion as to the first question brought before us for determination.

I have therefore reached the conclusion that the judgment of the Supreme Court in the first hearing is to be upheld and the conviction of the petitioner is to be left as is.

Justice E. Mazza

I cannot agree with the opinion of my colleague Justice Or. I have expressed my stance relative to the construction of section 4(a) of the Prevention of Terrorism Ordinance 5708-1948 in my judgment in CrimA 2831/95 *Elba v. State of Israel* [2] at pp. 282-286, and in my judgment in the appeal which is the subject of the further hearing before us (CrimA 4147/95 *Jabarin v. State of Israel* [1]) The reasoning of my colleagues, the Vice-President and Justice Kedmi, only strengthened me as to the correctness of the position I expressed in these judgments. If our views were to be heard, this appeal would be denied.

It has been decided by a majority of opinions as per the judgment of Justice T. Or.

29 Kislev 5760
November 27, 2000

Editor's note: Following this judgment and the Court's determination that section 4(a) of the Prevention of Terrorism Ordinance 5798-1948 applies only to sedition by a terrorist organization and does not apply to sedition by individuals, the Ordinance was amended such that section 4(a) of the Ordinance was nullified and in its stead an offense of sedition to violence or terror was established in the Penal Code.