C.A. 358/63

C.A. 362/63

State of Israel

v.

Joseph Schwarz and others

C.A. 358/63

Josheph Schwarz

v.

State of Israel and others

C.A. 362/63

The Supreme Court sitting as a Court of Civil Appeal.
[December 31, 1963]
Before Agranat D.P., Witkon J. and Manny J.

Tort - vicarious liability of State for acts of assault by its servants - ratification - Civil Wrongs (Liability of the State) Law, 2952, sec. 2.

Joseph Schwarz sued the State. the Governor of Shatta Prison and several warders for damages for injuries he had sustained from blows whilst under arrest and in prison. Against the State he claimed vicarious liability. In the District Court he was successful on the ground that the acts perpetrated were done by an organ of the State and impliedly with its permission. The State appealed.

HELD The State, like every other corporate body, may become vicariously liable in tort for the acts of its servants done in the course of their duties. It may also become liable by express authorization or ratification of acts not coming within such duties.

Israel case referred to:

(1) C.A. 176/62 - *Ben-Zion Lev and Baruch Bloshinski* v, *Zahava Tordzman* and others (1962) 16 P.D. 2625.

English cases referred to:

(2) *William Ranger* v. *Great Western Railway Co.* (1854) 10 E.R. 824.
(3) *Lennard's Carrying Co. Ltd.v. Asiatic Petroleum Co. Ltd*. (1915) A.C. 705.

M*rs. H. Evnor* for the appellants in C.A. 358/63.
E. Haetzni for the appellant in C.A. 362/63.

Manny J.: Joseph Schwarz (hereinafter called "the plaintiff") took action in the Tel Aviv District Court, against the state of Israel, the Governor of Shatta Prison and three of its warders claiming a sum of IL. 54,000 for bodily injuries he had sustained from blows by three Israeli police detectives when arrested on suspicion of having committed a crime, and by three of the defendant warders whilst in Shata Prison.

Paragraph 2 of the Statement of Claim reads:

> "The (State of Israel) is sued for the actions of the following persons
>
> (a) the Israel Police, Tel-Aviv District, Central Branch for Surveillance and Detection, three officers of which struck the plaintiff;
>
> (b) the Prison Service, Shatta Prison, several members of whose staff struck the plaintiff twice and, together with (the Governor of Shasta Prison) and others, prevented or delayed treatment after he was badly injured."

Paragraph 29 of the Statement of Claim claims:

"(State of Israel) is liable to pay the sum (claimed) for vicarious liability, since the defendants 2 - 5 are policemen or warders in the State Service and/or (the State of Israel) is their employer. The actions or omissions of defendants 2 - 5, the subject of this action, were effected in the course and within the confines of their service and/or work for (the State of Israel)."

The plaintiff applied by motion for leave to amend the Statement of Claim in two respects:

(1) The addition of the following paragraph:

"29a: Further and/or alternatively (the State of Israel) is liable for the injurious acts, the subject of the action, by reason of tortious negligence. Its negligence manifested itself in failing to take sufficient care, and/or not maintaining sufficient disciplinary control over its officers and subordinates (including those responsible for the imposition of discipline) and/or in not taking suitable measures of control over its officers and other subordinates (including those whose task is to exercise control over lower grades) and/or in not suitably supervising its various officers and subordinates (including those whose task is to supervise lower ranks), and/or in not adopting suitable instructive and explanatory methods and/or in appointing officers, commanders, policemen and warders (and senior grades of command in general) who are not suitable to their tasks and/or in leaving such unsuitable functionaries in their posts despite their unsuitability and/or in committing acts or omissions (through its various functionaries, from the Minister of Police and below) which tended to encourage, and in any event did not deter the actions which caused the injuries, the subject of this action."

(2) The addition of the following paragraph to paragraph 29 of the Statement of Claim:

> "(The State of Israel) expressly authorised the acts of the other defendants before, and alternatively after, the acts, the subject of the action.
>
> Such subsequent authorisation was given by a series of acts and omissions by (the State of Israel) which constituted express ratification of the following acts (here appears a long description of the acts and omissions which according to plaintiff's counsel constitute such express ratification)."

The District Court gave the plaintiff leave to amend paragraph 29 of the Statement of Claim "to the extent that he intends to show that the State expressly authorised the actions of the other defendants, before the acts, the subject of the claim", but refused to permit the other amendments.

In allowing these amendments, the court added:

"Indeed, it is true to say that this also seems to me superfluous, because I see the State's liability for the beatings during arrest as its act, since the assault was done by people who are regarded as an organ of the State or, in other words, what they did is an act which according to written law, they must carry out with State permission." In the course of his decision the court develops a theory on which to base the above ruling.

Against this decision the State of Israel as well as the plaintiff appealed.

The State asks for the following:

(a) annulment of that part of the court's decision which lays down that an act of assault committed by a warder or State employee, is an act of the State itself, and

(b) in so far as the court's decision is understood to mean that the plaintiff will be permitted to rely on the acts and omissions specified by him for founding the plea of

ratification in order also to prove express prior authorisation, a finding that the plaintiff is not entitled to do so.

Let me say at once in relation to this ground of appeal that from reading the District Court's decision and the plaintiff's application for amending the Statement of Claim, no such interpretation arises. From the second particular of the plaintiff's application it clearly seems that the use the plaintiff wants to make of the series of acts and omissions detailed in the application, is merely to create a basis for the plea of "ex post facto authorisation", "the ratification", and the court's decision itself leaves no room for drawing the conclusion that the court indeed allowed use of this series of the acts and omissions in order to prove the plea of express preceding authorisation. I do not think therefore that there is any foundation whatsoever for this ground of appeal.

As to that part of the court's decision in which it lays down and develops the idea that the acts of assault should be regarded as acts of the State because they were committed by people who carry out the duties of a policeman or warder, it seems to me that this idea is basically erroneous since there is no authority for it neither in law or even in the cases.

Section 2 of the Civil Wrongs (Liability of the State) Law, 1952**,** expressly provides that:

> "For the purposes of civil liability, the State shall, save as hereinafter provided, be regarded as a corporate body**."**

It is notorious that a corporate body can act and bear responsibility only through its agents and employees. The liability of such a body for civil wrongs committed by its agents or employees in the course of their work is therefore vicarious liability:

Pollock on *Torts,* 15th ed., p. 51;
Salmond on *Torts,* 13th ed., pp. 70, 71;
Halsbury-Simonds, Vol. 37, p. 133;
Palmer's *Company Law,* 20th ed., p. 131;

James, *General Principles of the Law of Torts,* 1959, p. 34;
Ranger v. *Great Western Railway Co.* (1854) 10 E.R. 824, 830.

As distinct from such vicarious liability, an incorporated body can also be liable under the well-known principle that whoever authorises or ratifies the commission of a civil wrong by another person is liable as though he himself committed it. (Section II(1) (a) of the Civil Wrongs Ordinance, 1944). But for that, it is necessary that the authorisation or ratification be given by the highest controlling authority of the corporate body or by somebody else to whom the general powers of the corporate body have been transferred. (Salmond on *Torts,* 13th ed., pp. 70 - 73; *Lennard's Carrying Co.* v. *Asiatic Petroleum* (3)) In addition, in the event that the civil wrong is assault, the authorisation or ratification needs to be express (Section 26 of the Civil Wrongs Ordinance).

In applying these rules to the State, it seems to me:

(a) that a person who fulfils the function of a policeman or warder in the State, is only an employee or agent of the State and the relations created beween it and them are employer/employee relations, and the State's liability for their acts and omissions is vicarious liability;

(b) that the body corresponding to the highest governing authority in a corporate body is the Government.

Hence, in order to impose on the State direct liability for the assaults committed by the policemen and warders, the plaintiff must prove that the Government or someone else to whom it transferred its powers in this matter, *expressly* authorised or *expressly* ratified those acts of assault.

And indeed in the application to amend the Statement of Claim, the plaintiff petitioned the court that he should be permitted to amend paragraph 29 by adding the cause of action that "the State of Israel expressly authorised the defendants' actions before ... the acts", and the court granted the application. But it seems to me that the court made a mistake in so doing.

Amendment of a Statement of Claim is not a routine matter allowed anyone who applies for it, but in every case lies in the discretion of the court. When the amendment applied for is the addition of a new cause *of* action to the Statement of Claim, that cause of action must be pleaded before the court can exercise its discretion.

In the present case, the cause of action was pleaded very vaguely and it was seriously defective; it did not set out how express authorisation was given; it did not set out when and by whom it was given; and thus we know nothing from its wording and contents.

For these reasons, I think, the court erred in the exercise of its discretion and leave should not have been given at all.

The District Court tries to find express authorisation for the acts of assault in regulation 128 of the Prison Regulation, which forbids an officer to hit a prisoner unless forced to do so in self-defence or to prevent his escape. I quote from the court's decision:

> "Warders and policemen are expressly empowered by the Regulations to apply force, as stated in Section 24 of the Civil Wrongs Ordinance. The only justification is defence, and the State therefore is liable for the assault it expressly authorised, even if the assaulter did not abide by what is provided in the Prison Regulations."

It seems to me that this claim is also mistaken. The authorisation given by regulation 128 above is limited to those cases mentioned in the regulation, and it does not extend to intentional and unjustifiable acts of assault. In order to impose liability on the State for the latter, the plaintiff must prove that there was *express* authorisation or *express* ratification for *those* acts of assault: *Lev v. Tordzman* (1), and implicit authorisation or ratification would not help him.

For these reasons, I am of the opinion therefore that that part of the District Court's decision should be annulled, in which it determines and reasons that the policemen's or

warders' acts of assault are acts of the State itself, and so also the amendment to paragraph 29 of the Statement of Claim that it permitted.

The plaintiff's appeal is against the court's refusal to permit use of acts and omissions detailed in the application for proving *"implicit* ex post facto authorisation of the acts of assault" and the addition of paragraph 29a to the Statement of Claim.

As to the first complaint, I went into all those acts and omissions which the plaintiff sets out in his application and I could not discover in them any *express* authorisation for the acts of assault. Therefore, the District Court was correct in refusing to allow their inclusion in the Statement of Claim.

As to the amendment of the Statement of Claim by the addition of paragraph 29a, it seems to me that the District Court was not right in rejecting the application. The cause of action in paragraph 29a is based on negligence. It is absolutely different and separate from the cause of action of assault and its elements are also totally different from the cause of action of assault. In certain cases a duty rests on an employer to see that his employees are competent and suitable. This rule possibly applies also to people employed in the police and prison services, and therefore, *prima facie,* there was no room for rejecting the plaintiff's application to include that paragraph in the Statement of Claim.

For the said reasons I am therefore of the opinion that we must:

(l) uphold the State's appeal in part, in the sense that that part of the District Court's decision (extending to the end of the decision) is to be set aside in which it holds that the acts of assault can be regarded as acts of the State; and also the amendment which it permitted to paragraph 29 of the Statement of Claim;

(2) uphold the plaintiff's appeal in part, in the sense that the amendment of the Statement of Claim by the inclusion of paragraph 29a should be permitted;

(3) subject to what was said in (a) and (b) above, to dismiss to State's appeal and the plaintiff's appeal without an order for costs.

AGRANAT D.P.: I concur.

WITKON J.: I concur.

Appeals allowed in part and dismissed in part.

Judgment given on December 31, 1963.