

*Constitutional Law:*5. RELIGION

H.C. 292/83 \*

O. THE TEMPLE MOUNT LOYALISTS SOCIETY et al.

v.

POLICE COMMANDER OF THE JERUSALEM REGION

In the Supreme Court Sitting as a High Court of Justice

Barak J., S. Levin J., Avnor J.

M. Drori for the petitioners

S. Zur, Senior Deputy State Attorney, for the respondent

JUDGMENTBarak J.:

The first petitioner is a society that would "cultivate the heritage of the Temple Mount." Among other things it aspires "to promote, encourage, cultivate and act for the revival of prayer and pilgrimage and the restoration of the Temple Mount to its stature at the center of the life of the nation and the State." The other petitioners, who are officers in the society, "are religious Jews who wish to pray on the Temple Mount." On 27 April 1983 there was a meeting between petitioners 2 and 3 and the Commander of Police in the Jerusalem Region, who is the respondent in this case. At this meeting the petitioners requested that they and others that respond to their call, be allowed to pray on 11 May 1983 -- which is the Day of the Liberation of Jerusalem -- near the Temple Mount's western gate of entrance, which is to the south of the Western Wall and named

\* (1983) 38 P.D. (2) 449

Translation copyright, 1985, by Carmel Shalev

"the Gate of the Moghrabis". The respondent refused the request -- hence the present petition. The respondent was requested to show cause why he would not allow the petitioners to pray on the Day of the Liberation of Jerusalem near the Gate of the Moghrabis. The petition was moved to a panel of three, and a representative of the Attorney General was summoned to the hearing. On 10 May 1983 the hearing was held before the panel. Due to the urgency of the matter the Attorney General did not have time to prepare his response in writing, and Mr. Zur conveyed his statement orally. The parties agreed that the petition should be heard as if an order nisi had been issued, and that Mr. Zur's explanations be regarded as a substitute for the written affidavit of the respondent himself.

2. The main reason for the respondent's refusal is the fear that the holding of prayers near the Gate of the Moghrabis, and especially on the Day of Jerusalem will cause a disturbance of the public order. This might occur by way of groups of Moslems rushing out from the Temple Mount through the Gate of the Moghrabis towards the worshipers. The respondent is aware of the fact that the petitioners have in the past held prayers at the entrance to the Gate of the Moghrabis without any disturbance of the public order. It is also possible -- and the respondent argued that this point had not been clarified -- that prayers have been held in the past near the Gate of the Moghrabis on the Day of Jerusalem in coordination with various police officials. Nevertheless, the respondent was of the opinion that the said instances differed from the present instance in light of the

special sensitivity of late to matters attaching to the Temple Mount. This sensitivity is attributed to the shootings on the Temple Mount in April 1982, following which a charge of murder was made, and also to an attempt by a group of Jews in March to steal into the Temple Mount and hold prayers there. In addition information has been received that there are many Jews who wish to hold prayers on the Day of Jerusalem on the Temple Mount, which increases the fear of a massive fracas. Even if a substantial police force is posted at the location it would not be able to prevent the swelling of passions and a public brawl between the Arab worshipers on the Temple Mount and the Jewish worshipers at the Western Wall. Therefore, even if prayers had been held at the location on the Day of Jerusalem last year, that would not provide assurance of order and security this year in light of the aforementioned extreme over-sensitivity.

Conversely, it was argued by Mr. Drori for the petitioners, that prayers have been held many times in the past near the Gate of the Moghrabis in coordination and with the approval of police officers. Such prayers have been held during the past fifteen years even on the Day of Jerusalem, and all proceeded in meticulous order. Last year two prayer services were held near the Gate of the Moghrabis on the Day of Jerusalem and passed peacefully, despite the fact that the shootings on the Temple Mount had occurred a short time previously. As for the attempt of Jews to pray in March on the Temple Mount, it was neither here nor there, since a short time later, during the holiday of Passover, prayers were held near the Gate of the Moghrabis in coordination with the police, and also passed without any

---

disturbance. Mr. Drori claimed that there are good relations between the worshipers and the people of the Wakf [the Moslem charitable endowment] and there is no fear of a disturbance of the peace. Mr. Drori also pointed out that the Gate of the Moghrabis can be locked quickly, which should mitigate or eliminate any fears of a violent outburst through it. In any event, the prayer service itself will not last longer than half an hour to one hour. It will be held at some distance from the Gate itself, so that a barrier could be created between the Gate and the worshipers. The time of the service could be coordinated so that there would be not many Moslem worshipers at the same time on the Temple Mount itself. Mr. Drori estimated that approximately one hundred and fifty persons would take part in the service, but that the number could be reduced if the police thought that advisable for security reasons.

3. In light of these facts Mr. Zur contended before us that the respondent had exercised his discretion lawfully. According to his contention, the Temple Mount is a very sensitive place and maximum caution should be taken without undue risks. The respondent respects the petitioners' wish to hold prayers, but, in his opinion, it should not be realised on the Day of Jerusalem. In these circumstances, Mr. Zur argued, there is no room for the Court's intervention. Mr. Drori, however, argued that just as the petitioners had in the past held services on the Day of Jerusalem near the Gate of the Moghrabis, so too should they be permitted to do so in the present instance. The respondent's fear is unfounded, since if a service had been held at the place

without violating the public order and security a short while after the special events that the respondent referred to (the shootings and the attempt to hold prayers on the Temple Mount), then a fortiori that the services would pass peacefully now, a long while after those events. According to Mr. Drori's argument, the respondent's conduct amounts to unlawful obstruction to the effectuation of the freedoms of worship, expression, assembly and gathering, and we should therefore interfere in his discretion.

4. After the parties concluded their arguments -- and having failed in our attempt to bring the parties to an agreement -- we decided to make absolute the order nisi in the sense that the respondent must refrain from preventing the petitioners from holding prayers on 11 May 1983 near the Gate of the Moghrabis, subject to the following conditions: the service shall be held at approximately 3:30 in the afternoon and shall end no later than 5:00. The worshipers shall remain at a distance of at least 5 meters from the Gate of the Moghrabis; the number of worshipers shall not exceed the number determined by the police officers in charge of the entrance to the Gate in accord with standards of security and the capacity of the area. We added that the aforesaid in no way restrains the respondent from exercising his powers, including prevention of the services, in the event that there occur new developments in the area to the extent that a substantial fear of violent outbursts comes into existence.

5. The hearing in this petition -- as has been the case in similar petitions in the past -- was held a short while before the event and under pressure of time. In such case an order nisi

is not issued, and it is usual to regard the hearing on its issue as a hearing on the merits of the petition. The respondent does not normally have sufficient time to present a written affidavit, and his counsel's oral statements are taken as its substitute. In the hearing itself it can be the case that the full scenario does not unfold since with each passing moment the essence of the petition might be at stake. In such circumstances many questions are likely to remain open. Such was the case in the present instance. The petition was aimed at the respondent who refuses to permit the petitioners to hold services at the Gate of the Moghrabis on the Day of Jerusalem. It is clear from the text of the petition that the petitioners are not complaining that the respondent did not grant them the police protection that they requested. However, the full scope of the petitioners' grievance has not been clarified. Did they apply to the respondent for a permit to hold an assembly or demonstration (as required under Section 84 of the Police Ordinance [New Version], 1971), and does their grievance consist in the respondent's unlawful refusal of such (by virtue of his power under Section 85 of the Ordinance)? Or perhaps the application to the respondent did not fall at all within the law of assembly and demonstration -- since the matter does not at all concern an assembly or demonstration -- but was rather a preventive measure to allay the petitioners' fears that the respondent would order them to leave the place or consider their conduct a criminal matter? Furthermore, it was not clear from the respondent's argument in reply that considerations of public security were grounds for his refusal, whether such

considerations were a restriction on the petitioners' freedom of assembly and demonstration, or on their freedom of prayer and worship, or, perhaps, on all of these freedoms. This state of affairs is unsatisfactory, but apparently unavoidable due to the urgency inherent in petitions of this kind. In such circumstances it is necessary to analyse the law in terms of either and both possibilities (the freedom of assembly and demonstration, on the one hand, and the freedom of religious worship, on the other) without deciding whether the matter under discussion falls within the one framework or the other.

6. The right of assembly and demonstration is a fundamental civil right in Israel (HC 148/79 Sa'ar v. Minister of the Interior & Police 34(2) P.D. 169). It is not an absolute right but rather a relative right. Where it conflicts with other rights or interests it might be required to give way in accord with an appropriate balancing formula. In the present matter there is need to weigh the freedom of assembly and demonstration, on the one hand, against the public security, on the other. We have held on this matter (HC 153/83 Levi v. Commander of the Southern Region of the Israel Police 38(2) P.D. 393) -- following the Kol Ha'am case (HC 73, 87/53 Kol Ha'am v. Minister of the Interior 7 P.D. 871) -- that the proper balancing formula is that of "the proximate certainty". If violation of the public security, by way of violating the bodies of the assemblants and demonstrators, is a proximate certainty then such probability justifies denial or restriction of the freedom of assembly and demonstration. Not so when the violation of public security is assessed at a lower degree of probability. It follows that if

the present petition is viewed as a matter of the law of assembly and demonstration then the question that must be answered is whether under the circumstances the respondent was faced with a proximate certainty that the public security would be violated.

7. Every person in Israel enjoys freedom of conscience, faith, religion and worship. This freedom is secured to every person in every enlightened democratic regime, and is therefore secured to every person in Israel as one of the fundamental principles upon which the State of Israel is constituted. (Cr.A. 112/50 Yosephov v. AG 5 P.D. 481, at 486; HC 262/52 Peretz v. Local Council Kfar Shmaryahu 16 P.D. 2101, at 2113.) This freedom is in part anchored in Section 86 of the King's Order in Council over Palestine, 1922, and is otherwise one of those fundamental "unwritten rights which derive directly from the democratic freedom-loving character of our State" (Landau J in HC 243/62 Israel Film Studios Ltd. v. Geri 16 P.D. 2407, at 2415; see also HC 103/67 American-European Bet-El Mission v. Minister of Welfare 21(2) P.D. 325, at 329; and Z Berinson, Freedom of Religion & Conscience in Israel, 3 Iyunei Mishpat 405 (1973)). Under these rules of law -- and in accord with the Declaration of Independence -- every law and power will be construed as recognising the freedom of conscience, faith, religion and worship (HC 262/62, at 2107; A. Rubinstein, The Constitutional Law of the State of Israel (3rd ed., Schoken, (1981) 134). "The Declaration of Independence guarantees freedom of religion and worship to every citizen of the State . . . The way of life of the citizens of the State is determined by it and its fundamental nature obliges every



authority in the State to be guided by it." (Sussman J in HC 262/62, at 2116).

8. The freedom of conscience, faith, religion and worship, to the extent that it has concrete expression, is not an absolute freedom (see Cantwell v. State of Connecticut 310 US 296 (1940)). My right to pray does not allow me to trespass on my neighbor's land or to perpetrate a nuisance on him. The freedom of conscience, faith, religion and worship is a relative freedom. It must be balanced with other rights and interests that similarly merit protection, such as private and public property and the freedom of movement. "The freedom of religion must be qualified: no society can accept the notion that its fundamental concepts as to public order may be frustrated for the sole reason that they are incompatible with the commands of a certain religion" (Rubinstein, op.cit., at 135). The same point was related to by Justices Black and Douglas in West Virginia State Board of Education v. Barnette 319 US 624 (1943), at 643-644:

"No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the state, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are...imperatively necessary to protect society as a whole from grave and pressing imminent dangers".

It follows that the freedom of conscience, faith, religion and worship is restricted and qualified to the extent that is required and rendered necessary for maintaining the public security and the public order. Of course, before any action is taken that might affect and limit such freedom because of violation of the

public security, it is proper that the police take all reasonable measures at its disposal to prevent the violation of the public security without affecting the freedom of conscience, faith, religion and worship. Therefore, if there is a fear that violence will be perpetrated against the worshipers by a hostile crowd, the police must take action against such violence and not against the worshipers. But if reasonable police action is not sufficient, due to its inherent limitations, to actually remove the danger to the public security, there is no escape from restricting the freedom of religion and worship to the extent required for maintaining the public security.

9. But what is the law when an actual violation of the public security is not proven to be a certainty and all that can be shown is a fear of such violation? It is clear that even in these circumstances the police must take all the necessary reasonable actions, in accord with its capability, so as to remove or reduce such danger. The police should not be deterred by violent elements that wish to affect the realization of personal rights. A hostile group ought not be accorded a right to veto the effectuation of fundamental constitutional rights (HC 153/83). "In all the situations in which the police is asked for assistance there is danger of a violent encounter, and the police must withstand these tests. It may not take the easy way out and shrink from the use of force against, for example, various criminals and persons who take the law into their own hands" (Witkon J. in HC 222/68, Motion 15/69 Hugin Leumiya v. Minister of Police 24(2) P.D. 141, at 167). Notwithstanding, the force at

the disposal of the police is not unlimited. It is assigned many tasks. The police has a duty to protect the freedom of conscience, faith, religion and worship, but it is not its only duty. It must also protect other freedoms, including the freedom of conscience and religion of other persons. Therefore a situation might occur in which despite police action there will still be fear of a violation of the public security. Does the existence of such fear, when it falls short of a proximate certainty, justify denial and restriction of the freedom of conscience, faith, religion and worship?

10. This question -- as to the effect of a threat to the public security on the effectuation of fundamental constitutional rights -- is not special to the freedom of conscience and religion but is common to this right and similar ones, such as the freedom of expression (HC 73, 87/53; HC 243/82 Zichroni v. The Directing Committee of the Broadcasting Authority 37(1) P.D. 757) and the freedom of assembly and demonstration (HC 148/79; HC 153/83). The principle that has been determined is that the freedom of expression and the freedom of assembly and demonstration must give way to considerations of public security only when the probability of a violation of the public security reaches a degree of "proximate certainty". A mere fear is not, therefore, sufficient, but neither is an absolute certainty required. Israeli law takes the middle stance of proximate certainty. This principle is not found in the construction of the text of any legislated provision but rather reflects "a broad ideological base" (in the words of Landau J. in HC 243/62, at 2411) that stems from the democratic character of Israel. It

appears to me therefore that this test of a "proximate certainty" should also serve to determine the "balancing formula" between the freedom of conscience, faith, religion and worship, on the one hand, and the public security, on the other. In such manner the harmony of our system will be achieved, and similar rights will be accorded similar protection. We shall not create further distinctions, that would be hard to justify, but rather follow the course laid down in the Kol Ha'am case (HC 73, 87/53), the holdings of which "have become a corner stone of our legal system, and the principles inherent in them accepted widely to the extent that they can no longer be questioned" (D. Levin J. in HC 243/82, at 765). In taking such course, we will also indicate adherence to the customs and usages of other enlightened democratic states (see, e.g., in the USA: L. Pfeffer, Church, State and Freedom (Boston, 1953) 500; P. Marcus, The Forum of Conscience: Applying Standards Under the Free Exercise Clause, 2 Duke L.J. 1217 (1973). The test that guides us properly balances the various considerations that are to be taken into account. On the one hand, full recognition is accorded to the freedom of conscience, faith, religion and worship, and a principle is laid down according to which "only exceptional circumstances that indicate a clear and apparent causal relation may justify denial of such freedom" (HC 153/83, at 409). On the other hand, "it gives full consideration to the need for protecting life and persons, and to the view that maintenance of the order of a democratic regime and the public security may justify denial of the freedom" of conscience, faith, religion and worship. Indeed,

where the issue of balancing the freedom of conscience and religion with the public security has been presented for a ruling by the Supreme Court, it has taken a position that accords with our approach in this case. In HC 222/68, Motion 15/69 it was held by several justices that the Minister of Police had lawfully exercised his discretion in refusing to allow the praying of Jews on the Temple Mount. In discussing that matter Witkon J. noted (at 168) that "the situation is highly unusual, and I doubt whether it is comparable with any other in the history of our nation or the entire world. The situation is sensitive and pregnant with dangers within an inter-factional context, and the place is inducive to disaster." In HC 99/76 (Cohen v. Minister of Police 30(2) P.D. 505) this Court noted again (at 507) "the degree to which the situation in this place is sensitive" while pointing out (at 506) that "on the same morning there were disturbances and tension on the Temple Mount, and a grave fear of breach of the public order. In such circumstances there can be no complaint against the police's treatment of the petitioner."

11. It is therefore apparent that whether the present affair raises questions as to the freedom of assembly and demonstration or as to the freedom of conscience, faith, religion and worship, the circumstances are such that the solution to these questions will be found in the application of the same single standard which is that of the proximate certainty of danger. With this test as our guide we have reached the conclusion that the danger indicated by the respondent in the present case does not meet the said test. It should be emphasized that we are dealing with the holding of a prayer

service outside the Temple Mount, and the special and extraordinary sensitivity that exists in the case of services held on the Temple Mount itself does not pertain to the present matter. Indeed, services have been held near the Gate of the Moghrabis for decades and there has not been any violation of the public security. Notwithstanding, even a service held near the Gate of the Moghrabis could create a certain fear of violent reaction. But that fear is remote and does not amount to a proximate certainty. In this respect one may learn from past experience. Services have been held near the Gate of the Moghrabis on the Day of Jerusalem, even following those exceptional events in which the respondent found a special danger to exist, and they have passed in an orderly and peaceful fashion. The respondent did not have any specific information, nor cause to assume, that there would be any change in the situation with special respect to the service on 11 May 1983. The respondent showed excessive sensitivity that is inconsistent with the need to maintain and preserve the right of conscience and religion. Of course, the police must prepare itself -- within the limitations of the forces at its disposal -- even as against a danger that is not a proximate certainty. If there is fear of violence, policemen should be assigned to protect the worshipers. We have therefore ordered that the prayers should not be held in immediate proximity to the Gate of the Moghrabis but at a distance of some five meters away from it, so as to allow the posting of a police force which should anticipate dangers that amount to less than a proximate certainty. The

actual area in which prayers can be held is relatively small, and we have therefore ordered that the number of worshipers may be limited in accord with security considerations. Of course, with respect to security a situation is not frozen, and it may at times change rapidly and sharply. A fear of violation of the public security that was remote yesterday could be very close today. The events take place rapidly and a calm situation might deteriorate swiftly into a violent one. Therefore the respondent must and may constantly assess the reality. If he becomes informed that the holding of prayers at the Gate of the Moghrabis creates a danger that did not exist beforehand, he has the power to take new action. We have therefore noted that the absolute order which we issued does not prevent the respondent from exercising his powers anew if so required by the demands of the moment. The petitioners do not have a vested right to pray near the Gate of the Moghrabis under all circumstances and at any cost. Their right is to pray near the Gate of the Moghrabis provided that such prayer does not create a proximate certainty of danger of violating the public security. Such danger has not been established in the circumstances of the instant matter.

These are the reasons for our decision to make absolute the order nisi. We have also ordered that the respondent bear the petitioners' expenses, including legal fees, to the total amount of 200,000 shekels.

Judgment given on 18 May 1984.