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Israel: Military Court Decision on Killing Neutralized Palestinian Assailant

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SUMMARY On January 4, 2017, Israel’s Military Court convicted a sergeant in the Israel Defense Forces of manslaughter and of “unbecoming conduct” for shooting and killing an injured Palestinian assailant without justification and in violation of military rules of engagement. The Court rejected as untrustworthy statements made by the defendant during the trial, holding that they contradicted prior statements made by the defendant immediately before and after the shooting, as well as the testimony of witnesses who were at the scene. The Court also rejected medical experts’ testimony on behalf of the defendant, which attempted to introduce doubt as to whether the defendant’s shot was the direct cause of the assailant’s death.

The Court rejected the defendant’s request to quash the indictment in the interest of justice based on alleged irregularities by military authorities in conducting the investigation and commencing criminal proceedings against him. The Court decided that the military’s handling of the investigation, information sessions it provided to soldiers after the event regarding rules of engagement, and references to the defendant’s shooting were not improper and did not influence the testimony of soldiers who testified at the trial.

The Court ruled that the defendant’s act was not intended for the performance of a defined mission. Taking a person’s life after he has been subdued—even the life of a “terrorist,” as the assailant is referred to throughout the decision—is prohibited and violated military ethical rules, the Court said, and as such did not coincide with the behavior expected from a soldier at the rank of the defendant.

I. Facts

On January 4, 2017, Israel’s Military Court, Central District¹ unanimously convicted an Israel Defense Forces (IDF) sergeant (the defendant) of manslaughter for lethally shooting a Palestinian assailant in violation of section 298 of the Penal Law.² The Court further convicted the defendant of “conduct unbecoming [an officer]” under section 130 of the Military Justice Law.³

As described by the Court, on March 24, 2016, at about 8:00 a.m., two Palestinian assailants attacked IDF soldiers with knives in the Hebron area of the West Bank. The assailants managed

¹ File 182/16, Military Prosecutor v. Sergeant Elor Azaria (Jan. 4, 2017), *available at* the Nevo Legal Database, <http://www.nevo.co.il> (in Hebrew, by subscription; last visited Jan. 11, 2017).

² Penal Law, 5737-1977, SEFER HAHUKIM [SH] [BOOK OF LAWS (official gazette)] 5737 No. 864 p. 226, *as amended*.

³ Military Justice Law, 5715-1955, SH 5715 No. 189 p. 171, *as amended* (all translations by author).

to injure one of the soldiers before being shot by other soldiers. One of the assailants was killed and the other, Abel Al-Patach Yusri Abed Al-Patach (the assailant), was injured, having been hit with six bullets. After arriving at the scene the defendant shot the injured assailant at 8:33:22 a.m. with one single bullet to the head. The assailant's death was declared shortly thereafter.⁴

The following is a summary of the Court's decision regarding the criminal liability of the defendant for the killing of the assailant.

II. The Indictment

According to the indictment, the defendant, a battalion medic, arrived at the scene a few minutes after the two assailants had been shot. He treated the injured soldier and accompanied him to the ambulance. After some time he picked up his helmet and handed it to another soldier for safekeeping, approached the assailant and shot him with one bullet in the head at close range. The prosecution alleged that the defendant's action violated IDF rules of engagement and had no operational justification. When the defendant shot him the assailant was injured and lying on the ground, had not committed any additional attack, and did not pose any clear and immediate danger to civilians and soldiers present at the scene. The defendant's act therefore unlawfully caused the assailant's death and was not appropriate for the defendant's military rank and position.⁵

III. Defendant's Response

A. Factual Dispute

The defendant did not dispute that the assailant had been injured in his lung and hip by the IDF soldiers that the assailant and another had previously attacked. He disagreed, however, with the prosecution's assertion that after initially being shot by the soldiers the assailant no longer posed any clear and immediate danger to civilians and soldiers at the scene.⁶ He also rejected the claim that his actions were unjustified and negated IDF's rules of opening fire. He argued that he believed that he and his friends faced clear and immediate danger.⁷ Moreover, he claimed, the harm to the assailant's lung and hip that resulted from having previously been shot by the other soldiers before the defendant's arrival at the scene could not be ruled out as the real cause of death. The passage of more than two hours from the time the assailant was first shot until he actually died, the defendant argued, raised the possibility that the death was caused by the earlier injury and that the defendant's shot merely neutralized the assailant but was not the cause of his death.⁸

⁴ Military Prosecutor v. Sergeant Elor Azaria ¶¶ 1–2.

⁵ *Id.* ¶¶ 6–7.

⁶ *Id.* ¶ 12.

⁷ *Id.* ¶ 14.

⁸ *Id.* ¶¶ 15–16.

B. Criminal Liability Defenses

The defendant also argued that he wrongly believed the assailant had explosives wrapped around his body that could be easily activated at any minute. Had the explosives been detonated, the explosion would have resulted in many casualties. This belief, the defendant stated, was based, among others, on calls heard at the scene cautioning the soldiers not to touch the assailant until the sapper (combat engineer) arrived, and on the fact that the assailant wore a black, heavy coat on a warm day.⁹

The defendant further stated that he had complied with the rules of engagement and that under the circumstances he was not under an obligation to pull back or give notice to other forces that remained close to the assailant.¹⁰ His action, he claimed, was based on necessity, as he was convinced that it was immediately necessary to save his and his fellow soldiers' lives.¹¹

The main justification raised by the defendant was that of self-defense based on what he perceived was a real danger to his and his fellow soldiers' lives from an unlawful attack. Accordingly, he argued that his immediate action was reasonable and proportionate in comparison with the threat to his life that the defendant believed he was subjected to.¹²

C. Defense in the Interest of Justice

In addition, the defendant alleged that the indictment against him should be voided in the interest of justice. He asserted that the case against him represented “an unbearable persecution by the authorities.” This is because soon after the shooting event the battalion commander decided to subject him to disciplinary adjudication. Only after news about the event was reported in the media and public statements were made by heads of the military, the defendant argued, was it decided to initiate criminal proceedings against him. This decision, he alleged, was reached in spite of the fact that “whoever was present at the scene itself and heard first-hand from anybody who was there did not think that a criminal offense was committed.”¹³ The defendant argued that, given these circumstances, the authorities engaged in a policy of differential enforcement by discriminating against him in comparison with other cases.¹⁴

⁹ *Id.* ¶ 18.

¹⁰ *Id.* ¶ 19.

¹¹ *Id.* ¶ 20.

¹² *Id.* ¶¶ 21–22.

¹³ *Id.* ¶ 23.

¹⁴ *Id.* ¶ 24.

IV. The Decision

A. The Offense of Manslaughter

In accordance with section 298 of the Penal Law, “[a] person who by an unlawful act or omission causes the death of another is guilty of manslaughter and liable to imprisonment for twenty years.”¹⁵

The Court noted that, based on prior judicially established interpretations, a conviction under section 298 requires proof of causation—namely, that the death occurred as a result of the defendant’s action. Intent or recklessness by the defendant regarding the possibility that his action would result in the death of another must also be proved.¹⁶ In the circumstances of the case at hand, the Court stated, it was indisputable that the defendant aimed and shot the assailant in the head at close range. It was also indisputable that the shooting constituted “a danger to the life of another.”

1. Causation

The Court noted that the defense’s position regarding causation had developed in the course of hearing evidence in the case. Having evaluated the testimony of medical experts, one for the prosecution and two for the defense, the Court rejected the theory presented by the defense that the assailant was already dead when the defendant shot him. The Court stated that, in raising this defense later in the trial, “the defendant in fact wishes to hold the rope from both its sides: on the one hand to argue for an honest mistake as to the level of the risk posed by the terrorist, among others, because of the [terrorist’s bodily] movement prior to the shooting; and on the other hand to argue that at the time of the shooting the terrorist was already dead.” The Court accepted the determination of the prosecution witness that “a dead person cannot move,” a determination that was not contradicted by the defense experts.¹⁷ Evaluating the detailed testimony of the three medical experts who testified at the trial, the Court further accepted that the assailant was alive at the time he was shot by the defendant.¹⁸ Based on these determinations, the Court concluded that “the death of the terrorist was caused as a consequence of the defendant’s shot to his head.”¹⁹

2. Criminal Intent and Defenses of Justification, Necessity and Self-Defense

Having compared the first statement derived from the defendant at the scene after the shooting with his later statements and with those made by additional witnesses, the Court rejected the defendant’s claim that in shooting the assailant he acted out of fear. The Court disagreed that the defendant was worried that the assailant would use a knife found near his body or that he would

¹⁵ Penal Law, 5737-1977, SH 5737 No. 864 p. 226, *as amended*.

¹⁶ Military Prosecutor v. Sergeant Elor Azaria ¶¶ 21–22.

¹⁷ *Id.* ¶ 41.

¹⁸ *Id.* ¶ 64.

¹⁹ *Id.* ¶ 65.

detonate explosives the defendant suspected were wrapped around his body. Instead of acting out of fear of what the assailant might do next, the Court determined that the defendant acted in response to the assailant's past acts, namely, injuring the Israeli soldiers.²⁰

The Court found no fault in the answers provided by the defendant's commanders, which were verified by independent evidence. The Court also noted that during their testimony the commanders showed leniency towards the defendant and "did not minimize [their] praises [of him]." In comparison, the defendant chose to resort to personal attacks against the commanders, instead of providing substantive responses to questions directed at him. The Court determined that "this line of defense selected by the defendant bears evidentiary significance, either because the defendant did not respond in a substantive way to part of the questions that were directed at him during cross examination or because, when he responded to other parts of the questions, his statements were indirect and [constantly] developing."²¹

The Court evaluated the testimony provided by a number of witnesses who talked with the defendant after the event and by psychiatrists who later interviewed him. The Court also reviewed films documenting the event, which were entered into evidence.²² These evaluations further supported rejection of the defendant's claim that he feared that the assailant was strapped with explosives because he was wearing a coat that was too warm considering the weather on the day of the event. Such a coat, the Court held, was not unusual for persons living in the area at that time.²³ The Court similarly rejected each and every claim raised by the defendant to prove his fear of a clear and immediate danger, and the reasonableness of his error in suspecting such a danger existed.²⁴

Based on an examination of all the evidence submitted, the Court rejected the defendant's statements as unreliable. The Court decided that the defendant did not err, and that there was not even a reasonable doubt, regarding his understanding of the circumstances. Consequently, the Court concluded, there was no basis for the defendant's claims for justification, necessity, and self-defense.²⁵

3. *Dismissal in the Interest of Justice*

The Court clarified that a dismissal in the interest of justice, as requested by the defense, requires

- evidence substantiating the claim that the authority acted wrongly by initiating criminal proceedings or by issuing an indictment against the defendant based on extraneous considerations;

²⁰ *Id.* ¶¶ 76–98.

²¹ *Id.* ¶ 99.

²² *Id.* ¶¶ 100–138.

²³ *Id.* ¶ 139.

²⁴ *Id.* ¶¶ 141–162.

²⁵ *Id.* ¶¶ 163–166.

- a determination of the extent of harm caused by the authority's actions;
 - a balancing of the severity of the harm to the defendant against the public interest in pursuing the legal process; and
 - an evaluation by the Court of whether the remedy required is proportional.²⁶
- a. Fault in Initiation of Criminal Proceedings and in Decision to Indict

The Court rejected the claim that the decision to start an investigation and indict the defendant had been reached based on extraneous considerations. Such considerations allegedly included an improper transformation of the military disciplinary inquiry into an investigation by the military police. Another allegedly faulty consideration was the “desire of the Chief Military Advocate . . . to satisfy the political echelon (the Minister of Defense) and top brass (the [IDF] Chief of Staff) that denounced the defendant's actions immediately following the event and before the operational review had been completed.”²⁷

Having evaluated the uncontested testimony of relevant witnesses on the procedures undertaken regarding the investigation of the case, the Court concluded that there was no fault in the determination to order a military police investigation in lieu of a disciplinary inquiry. The Court stated that the military commanders were under an obligation to order a military police investigation in lieu of a mere disciplinary inquiry “when a suspicion arose for the commitment of an offense in violation of the Penal Law, for which there is no parallel under the Military Justice Law.”²⁸

The decision to conduct a criminal investigation of the circumstances of the case, the Court clarified, also derives from the “military sensitivity in our area [I]f the actions of the defendant are proven, detrimental harm to the image and the morality of the military and its officers and soldiers may emerge.”²⁹

Additionally, the Court held, the defense had not presented any evidence to prove that the decision to order the commencement of the military police investigation had been influenced by statements previously made by the Minister of Defense and the Chief of Staff and designed to please them.³⁰ The Court further rejected the defendant's claim for extraneous considerations for indictment, holding that the defense had not presented any evidence to substantiate such a claim.³¹

²⁶ *Id.* ¶¶ 195–203.

²⁷ *Id.* ¶ 204.

²⁸ *Id.* ¶ 218.

²⁹ *Id.* ¶ 220.

³⁰ *Id.* ¶ 221.

³¹ *Id.* ¶¶ 223–229.

b. Selective Enforcement

The defense identified a single case to substantiate the claim of selective enforcement. The Court determined that there was a substantive difference between that case and the case at hand. Unlike in the current case, the case referred to by the defense involved a continuous event in which the shooter was involved from the start to the end, attempting unsuccessfully to make an arrest. In the circumstances of that case, the Supreme Court determined, from an objective point of view the danger posed by the suspect lying on the road before being shot and the subjective belief of the shooter in such a possibility could not be ruled out.³²

Moreover, the Court stated, to substantiate a claim for selective enforcement the defendant would have to show that “over time and systematically, or almost [systematically] the authorities adopted in similar cases decisions that are different from those received in his case.” A show of one single case, the Court held, even if it was factually similar, would not be sufficient to prove a claim of selective enforcement.³³

c. Interfering with the Legal Process

The defense asserted that following the event IDF top brass conducted discussions with lower-ranking officers and soldiers in the defendant’s unit in which they clarified their objection to the defendant’s actions and made references to his lack of veracity. Such discussions, the defense argued, impacted the testimony of the witnesses.³⁴ The prosecution responded that the discussions were conducted in view of the duty “to convey to the soldiers the lessons learned from the event, to avoid repeating the errors that were made in the next operational activity.” Additionally, the prosecution alleged, there was no proof that there was any impact on subsequent testimony.³⁵

The Court accepted that the discussions were conducted by commanders based on their official duties. Having reviewed all the testimony regarding statements made by the commanders in these discussions the Court was convinced that the discussions did not influence any witnesses.³⁶ Moreover, the Court held, testimony is usually corroborated by other forms of evidence. The final decision is ultimately made based on the totality of the evidence, which according to the Court may reduce the risk of tainting the legal process. This is because the Court has the authority, in addition to the expertise and experience, to make determinations “according to the behavior of witnesses, the circumstances, and signs of truth revealed during the duration of the trial.”³⁷

³² *Id.* ¶ 242.

³³ *Id.* ¶ 243.

³⁴ *Id.* ¶ 246.

³⁵ *Id.* ¶ 247.

³⁶ *Id.* ¶¶ 248–257.

³⁷ *Id.* ¶ 258.

The Court rejected additional claims purporting to allege that the legal process had been tainted by the disclosure of operational inquiry findings to the media. The Court similarly rejected defense claims for harm caused to the defendant by the return of the assailant's body to the Palestinian Authority before the defense had the opportunity to appoint its own forensic medicine expert to independently examine the corpse. The Court held that although it was known that the assailant's family had petitioned to obtain his body, the defense did nothing to prevent it at the time.³⁸

In the absence of any evidentiary basis, the defendant's claim of harm to his defense caused by the alleged actions of the military following the event was therefore rejected.³⁹

4. Summary of Findings Regarding the Offense of Manslaughter

In accordance with section 298 of the Penal Law, a person who causes the death of another by an unlawful act is guilty of manslaughter. Based on judicial precedents an unlawful act is any act that endangers the life of another, which was done with criminal intent and which causes a fatal result. In this case, the Court said, it is undisputable that the defendant shot the assailant in the head at close range after aiming the weapon at his head. There cannot be any disagreement that the shooting constituted a danger to the life of the assailant. The defendant was aware that the shooting would neutralize the assailant and could kill with high probability, the Court added. The parties differed regarding the causal connection between the defendant's shooting and the assailant's death, as well as on whether there was any justification for the shooting that would exempt the defendant from criminal responsibility.⁴⁰

Having evaluated all the testimony of medical experts submitted at trial, the Court concluded as a matter of fact that the assailant's death was caused from the gunshot directed at him by the defendant. Pursuant to previous judicial precedents, a person who shoots another in the head at close range is presumed to have intended to cause death, anticipating that his act would almost certainly cause death. The Court rejected the defendants' testimony at trial and determined it contradicted statements that, according to a number of witnesses, the defendant spontaneously provided before and immediately after shooting the assailant. The Court stated that an examination of the evidence indicated that the defendant's testimony further contradicted objective evidence on a number of issues and did not match the depiction of the event in films that documented the shooting. In addition, the Court noted, "the defendant's assertion does not meet the rules of engagement and does not correspond with the professional estimation of his commanders regarding justification of the shooting from an operational perspective."⁴¹

The Court rejected the defendant's statement based on its internal contradictions and its contradiction of statements made by other witnesses. The Court determined that the defense intentionally refrained from calling upon essential witnesses to support the defendant's assertion,

³⁸ *Id.* ¶¶ 270–290.

³⁹ *Id.* ¶ 291.

⁴⁰ *Id.* ¶ 292.

⁴¹ *Id.* ¶¶ 242–294.

and from posing substantive questions to central witnesses. This, combined with statements made by the defendant shortly before and after the shooting, supported the conclusion that the reason for his act was not his belief in the danger posed by the assailant, but rather revenge for the assailant's previous stabbing of his friend.⁴²

Having rejected the defendant's statements as unreliable, the Court further determined that the defendant did not establish that he acted based on an honest mistake. An evaluation of the defenses of justification, necessity, and self-defense was therefore not necessary. The Court similarly rejected as unsubstantiated by the evidence the defendant's request to quash the charges against him based on the interest of justice. As a consequence the Court decided that the elements of the offense of manslaughter were proven in this case beyond any reasonable doubt.⁴³

B. The Offense of "Unbecoming Conduct"

The second offense for which the defendant was charged was a violation of section 130 of the Military Justice Law, which provides that any soldier with the rank of sergeant or higher who behaves in a way that does not fit his rank or position is subject to one year of imprisonment.⁴⁴

According to the Court this offense was reserved only for those holding the rank of commander in accordance with the military hierarchy. Such higher-ranked soldiers have been previously recognized by the Supreme Court as expected to lead by personal example. A leading Supreme Court decision cited by the Court recognized the special framework under which the military system operates. Considering the special status of the military system, the Supreme Court opined in that case, extra care in the enforcement of ethical norms for the use of weapons is necessary.⁴⁵

Respect for human life and the preservation of human dignity, even the life and dignity of those that belong to the enemy, "were anchored in the character of the state as a Jewish and democratic state," the Supreme Court determined. As such, these values must be reflected in the enforcement of the criminal laws against anyone who violates those laws. This enforcement, the Supreme Court added, was an important component in the security of Israel, and in protecting IDF's military ability. "IDF's strength depends on its spirit no less than on its physical might and the perfection of its tools. The spirit and the ethical character of the army depend, among others, on preservation of the purity of arms and in defending the dignity of the individual, whoever his is."⁴⁶

The Court determined that the defendant shot the assailant, who for several minutes prior was lying on the road, having been previously injured by gunshots directed at him when he attempted

⁴² *Id.* ¶ 295.

⁴³ *Id.* ¶¶ 296–299.

⁴⁴ Military Justice Law, 5715-1955, SH 5715 No. 189 p. 171, *as amended*.

⁴⁵ H CJ 7195/08, Abu Rachma v. Chief Military Advocate ¶¶ 89–90 (July 1, 2009, amended June 24, 2013), <http://elyon1.court.gov.il/files/08/950/071/r09/08071950.r09.pdf>, archived at <https://perma.cc/R76G-3MJ6>, cited in Military Prosecutor v. Sergeant Elor Azaria ¶ 303.

⁴⁶ Military Prosecutor v. Sergeant Elor Azaria ¶ 303.

to kill the IDF soldiers. At the time he was shot by the defendant, the Court held, the assailant did not endanger the defendant and others present at the scene and shooting the assailant was not done to prevent danger, but rather as revenge for his past actions.⁴⁷

As stated, the offense of “conduct unbecoming an officer” was designed, among others, to protect the ethical strength of IDF and its soldiers. The Court stated that the current security reality in Israel forces IDF soldiers and officers to tackle daily operational challenges that may involve the use of force. The use of force, the Court opined, must not be in excess of what is needed and must not violate IDF’s values, including that of “purity of arms.”⁴⁸ The principle of purity of arms requires any IDF servicemen and women to use their weapons and force only for the purpose of their mission, only to the extent necessary, and while maintaining their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity, and property.⁴⁹

The Court concluded that a use of force other than for the performance of a defined mission that results in the taking of a life, even the life of a terrorist such as the assailant, is prohibited. Moreover, the defendant’s acts violated IDF’s ethical rules and did not coincide with the behavior expected of a commander.⁵⁰

The Court noted that the offense of unbecoming behavior applies to the defendant based on his military position and duties. As a battalion medic the defendant’s job involved the provision of care. Under these circumstances, the Court concluded, “there was a sharp contradiction between the defendant’s job to treat and save life, and his action of taking a life.”⁵¹

The Court reached the conclusion that the elements of the offense were proven by the defendant’s act of shooting at the assailant’s head, as revenge for the assailant’s previously injuring the defendant’s friend, knowing that it would cause death and while serving as a battalion medic wearing the insignia of a sergeant.⁵²

The sentence for the convicted soldier will be determined at a later date.

⁴⁷ *Id.* ¶ 305.

⁴⁸ *Id.* ¶ 306.

⁴⁹ *Id.*; see also *IDF Code of Ethics*, IDF, <https://www.idfblog.com/about-the-idf/idf-code-of-ethics/> (last visited Jan. 10, 2017), archived at <https://perma.cc/832Z-UQNY>.

⁵⁰ *Military Prosecutor v. Sergeant Elor Azaria* ¶ 306.

⁵¹ *Id.* ¶ 307.

⁵² *Id.*