The Jerusalem District Court

Before The Honorable Judge Moshe Sobel

Arrest Appeal 23834-04-13

Appellant	**State of Israel**
	v.
Respondents	**1. Bonnie Riva Ras**
	2. Lesley Sachs
	3. Valerie Stessin
	4. Sylvie Rozenbaum
	5. Sharona Kramer

Decision

1. On April 11, 2013 – Rosh Hodesh Iyyar 5773 – the Jerusalem Magistrates Court (Judge Sharon Lari-Bavli) denied the State's request to release the Respondents on a recognizance that would prohibit their access to the Western Wall for the Rosh Hodesh prayer services scheduled for the next three months (Sivan, Tamuz and Av). In denying the request, the Magistrates Court held that the Respondents had not disturbed public order, and there were, therefore, no grounds for imposing terms of release. That is the subject of the appeal brought before me by the State.

2. The Respondents are members of the group "Women of the Wall". On April 11, 2013, the Respondents arrived at the Western Wall Plaza to take part in the prayer service held by the group every Rosh Hodesh, together with the other women at the site. In its request for release on recognizance, the State wrote: "**While in the women's section at the Wall, the suspects wrapped themselves in tallitot, and read aloud from the Torah, in violation of the local custom under the Holy Places Regulations, and thereby directly caused a disturbance of public order at the site, and violated the law**." In respect of these acts, the request ascribed the following offences to the Respondents: Conduct in a public place in a manner liable to cause a breach of the peace (under sec. 216(a)(4) of the Penal Law, 1977 (hereafter: *the Penal Law*); violation of a lawful directive (under sec. 287 of the Penal Law); and a prohibited act in the area of the Holy Places (under regulation 2(a)(1a) and 5 of the Regulations for the Protection of Holy Places to the Jews, 1981(hereafter: *the Holy Places Regulations*). In the course of the hearing before the Magistrates

Court, the police representative added that for several months the Women of the Wall have held prayer services in the Western Wall Plaza, contrary to the law and contrary to decisions by the High Court of Justice in 2000 and 2003, which held that they must conduct their services at the adjacent Robinson's Arch site, and not in the Western Wall Plaza. Initially, the police showed restraint and patience in regard to the group, and refrained from detentions or arrests. But tension has been rising from month to month, until the last service – for which the release on recognizance was sought – when tempers heated up: male and female worshippers opposed to the actions of the Women of the Wall gathered and protested loudly, the police at the site separated the opposing sides, and one protester, who stood in the area of the *mehitza* between the men's section and the women's section, burned a book and was arrested. The police further argued that imposing terms of release upon the Respondents, as requested, would help "**to calm tempers, and remove those women who were performing provocations from the site**."

3. The Magistrates Court examined the evidence, briefly viewed a video clip presented by the police representative, and ruled that it was not the women who had disturbed the peace and who had initiated the provocation. To the extent that order was disturbed, responsibility lay with the others who were present at the site, who expressed their opposition to the Women of the Wall. It therefore ordered that the Respondents be released unconditionally.

4. In its appeal, the State reiterated the arguments it raised before the Magistrates Court. According to the State, the Respondents committed an offence of violation of a lawful directive by defying the decision in Additional Hearing 4128/00 *Director General of the Prime Minister's Office v. Hoffman* (hereafter: *the Hoffman case*), in which it was held (by a five-to-four majority) that the Government prepare the Robinson's Arch site for entry and visiting within 12 months, "**so that the Women of the Wall will be permitted to pray there in their manner**" and "**it will be possible to deem it an alternative to prayer at the Western Wall Plaza**". In addition, the Respondents violated regulations 2(a)(1a) of the Holy Places Regulations, which establish an offence in regard to anyone who takes part in "**conducting a religious ceremony that is not in accordance with the local custom, that offends the sensitivities of the praying public in regard to the place**". The State identifies the "**local custom**" referred to in regulation (a)(1a) with the *status quo*, that is, the custom prevailing for generations at the Western Wall Plaza, according to which women's prayer is not held at the site. This interpretation is based upon the regulation's purpose in ensuring public order and preventing disturbances at a sensitive, holy site. Obviously, the State disagrees with the finding of the lower court that the Respondents' conduct did not constitute a provocation. The State argues that the very fact of the Respondents' arrival at the Western Wall Plaza, wrapped in tallitot (and some even wearing tefillin), constituted a provocation, and a violation of the law and of the High Court's decisions. In view of the currently tense atmosphere at the site, such conduct is liable to foment the atmosphere and stir up intense conflict. Therefore, the Court should grant the request, and condition the Respondents' release upon barring them from the Western Wall Plaza for the next three Rosh Hodesh services. The State refers the Court to a previous decision of the Jerusalem Magistrates Court that granted its request to release another member of Women of the

Wall upon a recognizance that included exclusion from the Wall. The State adds that it is not opposed to the Respondents' visiting the Robinson's Arch site during the next three months, and following their custom there.

5. The appeal must be denied. The Respondents were detained and brought to the police station in accordance with sec. 67 of the Criminal Procedure (Powers of Enforcement – Arrests) Law, 1966 (hereafter: *the Arrests Law* or *the Law*), which grants a policeman detention authority where there are "**reasonable grounds for suspicion that a person perpetrated an offence ... liable to endanger the safety or security of a person, or public peace, or state security**". Upon being brought to the police station, the officer-in-charge is required to act in accordance with sec. 27(d) of the Arrests Law: "**If a person comes to a police station, or is brought there when he is not under arrest , *and the officer-in-charge finds that there are grounds for arrest under sec. 13*, he may, after explaining his considerations to the suspect, arrest him and impose bail**" (emphasis added) [Translator's note: the term "bail" is employed here as equivalent to the general Hebrew term "*arvut*", which comprises "bail", "surety" and "recognizance". A person held under arrest is "released" on bail, whereas bail is "imposed" upon a person who is not under arrest]. The officer-in-charge saw fit to impose a recognizance that would bar them from the Western Wall Plaza on Rosh Hodesh for the following three months. However, inasmuch as the officer-in-charge is not authorized to include a term of release excluding a person from a place for more than 15 days in the recognizance (sec. 42(b)(3) of the Arrests Law), the provisions of sec. 42(d) of the Law apply: **"...if the officer-in-charge was of the opinion that the suspect should be released upon terms that are not within his authority, or if bail was not provided at the designated time, the suspect shall be placed under arrest and brought as soon as possible, and not later than within 24 hours, before a judge**". The Respondents were, therefore, brought before the court in order that it exercise its authority under sec. 44(a) of the Law: "**A suspect against whom an information has not been filed ... *and who is under arrest* or imprisoned, the court may, at his request, release him on bail...**" (emphasis added). As opposed to the officer-in-charge, the court may require exclusion for a period in excess of 15 days in the terms of release (sec, 48(a)(3) of the Law), as long as an information will be filed against the suspect within 180 days (sec. 58 of the Law).

As we see, a condition for imposing bail by the officer-in-charge or by the court – more precisely: a condition for imposing bail comprising a prohibition to be in a certain place, as opposed to bail under sec. 44(b) of the Law, intended to ensure the suspect's presence at trial – is the existence of grounds for arrest under sec. 13. As Y. Kedmi explains: "**The court may: impose bail instead of release on bail, when it has arrest authority, in which case it is not limited in 'conditions of release'; and to impose bail when it is not authorized to order release on bail, in which case it is limited as to conditions of release, as required under sec. 44(b) of the Criminal Procedure (Arrests) Law**" (Y. Kedmi, *Al Hadin Biflilim*, I, 336 (2008) [Translator's note: Sec. 44(b) treats of terms of release of a defendant or an appellant where the court lacks authority to arrest under sec. 21].

6. We will, therefore, proceed to examine whether there are grounds for arresting the Respondents under sec. 13 of the Arrests Law. Section 13 states:

> **A judge will not order the arrest of a person unless it is convinced that there is a reasonable suspicion that the person committed an offence that is not a misdemeanor, and one of the following causes exists:**
> **(1) There are reasonable grounds to fear that releasing the suspect, or not arresting him, will lead to an obstruction of the investigation or legal proceedings, to evasion of investigation, legal proceedings, or serving a prison sentence, or will lead to the disappearance of property, to influencing witnesses or other harm to evidence;**
> **(2) There are reasonable grounds to fear that the suspect will endanger the security of a person, public security, or state security;**
> **(3) The court is convinced, by special reasons that will be recorded, that it is necessary to adopt investigative procedures that cannot be carried out unless the suspect is under arrest. The court will not order an arrest for this cause for a period exceeding 5 days. If the court be convinced that the investigative proceedings cannot be carried out in the said period, it may order a longer period of arrest, or extend it, provided that the total of the periods not exceed 15 days.**

The first condition of a cause for arrest is, therefore, the existence of a reasonable suspicion that the suspect committed an offence that is not a misdemeanor. As stated, three offences were attributed to the Respondents in the request for their release on recognizance: violation of a lawful directive; a prohibited act in the area of the Holy Places; conduct in a public place in a manner liable to cause a breach of the peace. Is there a reasonable suspicion that these offences were committed?

7. We will begin with the offence of violation of a lawful directive. The only lawful directive that, according to the Appellant, was violated by the Respondents is the decision in the *Hoffman* case. The Appellant does not allege any other violation of a lawful directive, nor does it allege that the Respondents failed to obey any instruction by the police in the course of the incident. The allegation in regard to violating the decision in the *Hoffman* case must be rejected. **First**, the respondents were not party to the proceedings in the *Hoffman* case, and therefore what was stated in that judgment cannot be deemed a lawful directive to the Respondents that they violated. **Second**, the decision in the *Hoffman* case did not comprise a directive forbidding the Women of the Wall to pray in the Western Wall Plaza. The operative result of the decision was worded as follows (pp. 318-319, 336):

> **At the very least, for the present, it would be *appropriate* for the Women of the Wall to pray in their manner beside the Western Wall at the Robinson's Arch site, if the site be prepared appropriately and properly for people to enter and visit there ... the Robinson's Arch site, in its present state, cannot be viewed as an appropriate site for prayer. But if the site be prepared appropriately and as required, *it will be possible to deem it* an alternative to the Western Wall Plaza for prayer. Therefore, if the Government prepares the**

> **Robinson's Arch site – appropriately and properly – within twelve months from today, then the Women of the Wall *will be permitted* to pray in their manner at that place. In stating that the Government must prepare the site 'appropriately and properly', I mean, inter alia, making appropriate safety arrangements to permit easy, safe access to the place of prayer and to the Wall itself.** (emphasis added)

The result of the decision was not worded as a directive to the Women of the Wall, but rather as a recommendation ("**appropriate**"). The practical consequence of the decision was entirely in relaxing the order directed at **the Government** in the case that was the subject of the Additional Hearing, in which a final order was issued "**instructing the Government to establish suitable arrangements and conditions for the Respondents to realize their right to pray according to their custom in the Western Wall Plaza"** (HCJ 3358/95 *Hoffman v. Director General of the Prime Minister's Office* (hereafter: *the second Hoffman case*). The decision in the Additional Hearing offered the Government a way to avoid fulfilling its obligation under the second *Hoffman* case, i.e., it provided the possibility to prepare the Robinson's Arch site, within 12 months, as an alternative to the obligation to permit the Women of the Wall to pray in the Western Wall Plaza. The decision in the Additional Hearing did not impose a prohibition on prayer upon the Women of the Wall – at least not a prohibition that, if violated, would incur criminal sanction – in some place or other. Moreover, the Respondents' maintain that the Government did not fulfill the conditions established in the Additional Hearing, and has not, to date, prepared the Robinson's Arch site properly and as required for a place of prayer. Bearing in mind that the result of the Additional Hearing was phrased as a condition, and in the absence of a judicial finding at the time of the commission of the alleged offences by the Respondents confirming that the Government had fulfilled the condition established in the Additional Hearing, the said decision cannot be viewed as a final order that comprises a final , unambiguous directive that could give rise to criminal responsibility for its violation.

Thus, there is no reasonable suspicion of the commission of an offence of violating a lawful directive by the Respondents.

8. Similarly, in this matter there is no reasonable suspicion of the commission of the offence of a prohibited act in the area of the Holy Places under regulations 2(a)(a1) and 5 of the Holy Places Regulations. That offence is committed by "**conducting a religious ceremony that is not in accordance with the local custom, that offends the sensitivities of the praying public in regard to the place**". The question of the interpretation of the term "**local custom**" was addressed in HCJ 257/89 *Hoffman v. Director of the Western Wall* (hereafter: *the first Hoffman case*). Deputy Chief Justice Elon was of the opinion that although the manner in which the Women of the Wall pray was not formally contrary to Orthodox halakha, it was contrary to the manner of prayer in an Orthodox synagogue, and as such, it was contrary to the local custom, as the "**'local custom' and the *status quo* are one**" (at p. 344). That was not the view of Justice S. Levin, who wrote (at p. 357):

> **In my view, the expression "local custom" need not be interpreted specifically in accordance with halakha or the existing situation. It is the nature of custom to change with the times, and in its framework expression should be given to a pluralistic, tolerant approach to the views and customs of others, subject to the limitations that I have noted above.**

Chief Justice Shamgar did not dissent from the view of Justice S. Levin, but was of the opinion that it was premature to decide upon the petitions as they were not ripe. In other words: Chief Justice Shamgar also recognized the right of the Women of the Wall to pray at the Western Wall Plaza according to their custom, which was not to be viewed as infringing the local custom. See, for example, what was said in that regard in the Additional Hearing (at pp. 306-307, 315):

> **In this matter, Chief Justice Shamgar concurred with the opinion of Justice S. Levin, *viz.*, that the Women of the Wall have the right to pray in good faith at the Western Wall according to their custom. Indeed, as we saw, Chief Justice Shamgar was of the opinion that: "The legal starting point is indeed the existing situation. However, the doors should not be barred before the possibility of the good-faith right of a person who wishes to pray in his own way, as is clear from the provisions of the above laws" (at p. 355). At the same time, although Chief Justice Shamgar's opinion was the same as that of Justice Levin on point, the two differed as to the operative relief, and for reasons that we addressed above, the Chief Justice was of the opinion that the order nisi be revoked and the petition denied.**
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> **The summary of the first petition is, therefore, that the majority granted the Women of the Wall the right to pray according to their custom at the Western Wall. At the same time, their petition was denied (by a different majority).**
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> **I have a hard time accepting the claim of the State Attorney's office that the question of the Women of the Wall's right was not determined in the first petition. We have quoted the opinions of the judges in the first petition at length, and it appears to us that the Court decided in favor of the right of the Women of the Wall to pray according to their custom before the Western Wall.**

The Court similarly stated in the second *Hoffman* case (pp. 364-366):

> **This position, which sanctifies the "*status quo*", was supported in the first decision only by Deputy Chief Justice Elon, and was entirely rejected by Chief Justice Shamgar and Justice S. Levin. This comment is also true for the balancing formula that guided the Ne'eman Committee, which also granted weight to the consideration of "not infringing the local custom"... The first decision recognized, in effect, the Petitioners' right, in principle, to conduct prayer according to their custom in the prayer plaza beside the Wall.**

Even Justice Emeritus Englard, who dissented from the majority opinion in the Additional Hearing, noted that the pluralistic-secular-national construction that should be given to the term "**local custom**" is "**the interpretive approach that was adopted by this Court**" (Additional Hearing, pp. 333-335).

That interpretation of the term "**local custom**" is sufficient to say that there is no reasonable suspicion that the Respondents violated the prohibition under the Holy Places Regulations, of which one of the necessary elements is "**conducting a religious ceremony that is not in accordance with the local custom**".

9. This brings us to the third offence, in regard to conduct in a public place in a manner liable to cause a breach of the peace. Even if I assume that there is a reasonable suspicion that the Respondents committed that offence, there would still be no grounds for their arrest under any of the alternatives established in section 13 of the Arrests Law. The Appellant is of the opinion that the grounds for arrest arise from the dangerousness of the Respondents, in other words, that the grounds for arrest derive from section 13(a)(2): "**There are reasonable grounds for a suspicion that the suspect will endanger the safety of another person, public security, or state security**". The problem is that the offence with which we are concerned, under section 216(a)(4) of the Penal Law, refers to conduct "liable to cause a breach of the peace". We are not concerned with conduct liable to threaten public **security** or the **security** of an individual, regarding which section 13(a)(2) of the Arrests Law establishes grounds for arrest, but rather with conduct liable to breach the peace, which is a different matter. As is well known, the 1996 Arrests Law changed the pre-existing law by omitting endangerment of "public peace" as grounds for arrest (compare section 21A(a)(1) of the Criminal Procedure [Consolidated Version] Law, 1982 with sections 13 and 21 of the Arrests Law). That omission is of consequence (see: R. Kitai-Sangero, "Does Stealing a Bottle of Perfume from a Cosmetics Store Endanger Public Security?" 4 *Aley Mishpat* 325, at pp. 326, 358 [Hebrew]). "**It would seem that the term 'public security' is somewhat narrower than the term 'public peace'**" (HCJ 6624/06 *Pashko v. Ministry of the Interior*). The distinction between "**public security**" and "**public peace**" is expressed by situations like the one before the court. Even according to the Appellant, the fear is that the Respondents' prayer will provoke clashes among prayer groups in the Western Wall Plaza. The mere fear that such clashes may arise, in the absence of a claim that any of the Respondents engaged in any (physical or verbal) violence whatsoever, is insufficient to give rise to reasonable grounds to fear that the **Respondents** pose a threat to public **security** or the **security** of any person present in the Western Wall Plaza. In this regard, the present case differs from those decided in CrArr 2712/96 *Hershkowitz v. State of Israel*, and CrArr 5523/00 *Federman v. State of Israel*, that treated of conduct that causes riots on the Temple Mount, which is a particularly charged and sensitive venue from a security standpoint. In any event, the *Hershkowitz* case clearly stated that "**the court must act with care and reserve in imposing terms of**

release that may infringe the rights of the suspect prior to establishing prima facie evidence of a suspicion of a criminal offence .... limiting a suspect's movement prior to the filing of an information must be reserved to exceptional cases, and only when he presents a real, substantive threat if he not be restricted by appropriate terms." Applying those standards to the Respondents, against whom no information has been filed, and regarding whom it is very difficult to see how they may present a threat to security, leads to the conclusion that there is no basis for imposing restrictions, in the framework of recognizance, upon their freedom of movement and access to the Western Wall Plaza.

10. In light of the above, the appeal is denied.

The Clerk will deliver this decision to the attorneys of the parties.

Given in the absence of the parties, this 14th day of Iyyar 5773, April 24, 2013.

Moshe Sobel, Judge