Israel Defense Forces

The Military Appellate Court

Administrative Appeal 1782/14
Administrative Appeal 1783/14

Heard by The honorable President, Judge Colonel Netanel Benishi

The Appellants:
K.T.
E.T.
(Represented by Defense Attorney Neri Ramati)

Vs.

The Military Prosecution
(Represented by Captain Asher Silver)

Appeals following decisions by the Military Court of Judea (by The honorable Judge Lt. Colonel Zeev Affik) in cases 4403/14 and 4404/14 on 25.6.14
(appeals were accepted)

Date of session: 27 May 2014

Decision

General

The current appeals have raised an issue on which this court has already decided several times. However, it seems that there is no way around the need to make another decision, and I will elaborate on several issues which seem important to me.

The appellants, minors, have been indicted on charges of stone throwing.

During the hearing of the request to have them remanded in custody, pending all proceedings against them, the defense attorney asked that the appellants be allowed to undergo an arrest expert opinion process, conducted by a welfare officer. When the military prosecution objected to this expert opinion process, citing the lack of legal authority, the defense attorney asked that an expert representing his clients be allowed

to meet the appellants, in order to submit an opinion as to the impact which the detention would have on them, and as to whether they can be released on conditions.

The military prosecution has objected to this request too.

In its decision, the lower court ruled that the court was authorized to instruct that an expert opinion be submitted on the issue of detention of minors. However, when the defense attorney asked the court to postpone the hearing of the request to remand the defendants in custody, it followed that this court would also have to decide on the issue of expert opinions.

The Appeals and the Prosecution's Response

The defendants' attorney has appealed the decision. He believes that an immediate decision should have been made about the submission of an expert opinion, in order to minimize the arrest term pending a decision on the request for detention until the end of procedures.

However, during the hearing over which I have presided, and in view of the prosecution's claim that this court has no authority to instruct the submission of a expert opinion, the defendants' attorney has ceded this demand, stating that he would settle for a professional opinion on his clients' behalf. For that purpose, he asked that I instruct that the appellants be allowed to meet the aforementioned professional.

The military prosecution has argued that there was no reason to intervene in the decisions made by the lower court, as it had not decided on the matter itself and had merely postponed the discussion. The prosecution has presented its principled view that in the current legal situation, the military court is not authorized to instruct the submission of a detention expert opinion, as opposed to a sentencing expert opinion. The prosecution has also argued that the court must not instruct the Israel Prison Service to grant the appellants a meeting with a professional. In any case, the prosecution reiterated its view that the resolution of these issues was premature, considering that they had not been resolved by the previous instance.

Discussion and Decision

I would like to state right now that normally I would have been inclined towards accepting the prosecution's claims that one should wait for a principled ruling by the lower court before this court issues its decision.

However, during the hearing, the defense attorney has narrowed down his request to allow for a meeting between the appellants and a professional on his behalf, in order to submit an opinion.

Two conclusions follow from this position, in my view:

The first conclusion is that there is sound logic behind the approach taken by the defense attorney, seeking to decrease the term of detention until the court's ruling on a request to remand the defendant pending proceedings, while simultaneously allowing for the submission of a professional report. And nota bene, things would have been different had the court been required to instruct the submission of an expert opinion on its own behalf, a situation in which it would have had to decide in the first place whether such an opinion is necessary under the circumstances of the case.

The second conclusion is that we are exempt from discussing the fundamental question of whether the military courts have the authority to instruct the submission of an arrest expert opinion in the cases of minor defendants.

However, I would like to reiterate that the opinion of military court judges who are involved in the trials of minors has always been that granting such an authority is highly important. On this matter, let us quote what we had decided in the case of Alami:

"Firstly, the case before us has put the importance of an arrest expert opinion back on the agenda, and this possibility has unfortunately not been recognized by the legislative authority in this area. I agree with those who believe that in most cases of ideological delinquency, the judge can reach a rational decision on detention according to the evidence and the arguments put forward by both sides, without requiring an expert opinion. Having said that, there are quite a few cases in which the court reaches the conclusion that beyond the scope of the specific criminal act, one needs to broaden the picture as to the personal profile of the defendant, his personality, his actions, his workplace, his social and familial connections, as well as an assessment of the possibility of his release under various frameworks and restrictions. Such is the case regarding numerous minors who stand trial on charges which are not the most grave known to us in this area. This holds true in the current case, in which it seems that personal circumstances, or even family circumstances, are at the background of the criminal act, and it also seems that these circumstances could not have been examined properly during the legal procedure. Therefore, I believe that these circumstances could have been made known to both sides more fully, and in a more qualified manner, in the framework of an expert opinion or a report by a professional in the field of social work (Administrative Appeal 1488/12, the Military Prosecution Vs. Alami, 29.3.12)

A similar view was expressed in the matter of Qadara:

"During the hearing of the appeal, I have made several comments as to the strongly felt lack of an expert opinion or a report by a professional in the field of social work, which could have allowed for the consolidation of a more qualified assessment of the risk posed by the respondent, and indicate various alternatives to detention.

In this matter, I can only reiterate what has already been expressed and written several times. In my opinion, and here I share the views of quite a few judges, the legislation in our area has the salient lack of not allowing for the submission of such an expert opinion as early as during the arrest. It should go without saying that this lack is felt more strongly in the cases of minor defendants.

Since the legislator has recognized the importance of obtaining expert opinions in the cases of minors, and has therefore amended the law so that it would be possible to obtain a post-conviction expert opinion, it is only natural that he should complete the legislative work and also allow for the submission of an expert opinion during the arrest stage. This stage is critical, and it is the time when the court is required to decide whether to deprive the defendant of his liberty, possibly for a long time, on the basis of prima facie evidence only, and an impression of the defendant at that stage. In view of the essential nature of this procedure, and the sparsity of the database which is available to the judges, the need to thicken the factual framework as much as possible arises, with the goal of enabling the judge to make a well founded and intelligent decision. Within this need, the arrest expert opinion plays a pivotal role, as it is is edited by a professional, who can meet the defendant and his relatives face to face.

In view of the above, I can only call upon the legislator to take note of this issue and find a solution which would allow the court to obtain the aforementioned expert opinion, in the appropriate cases"

(Administrative Appeal 2616/11, The Military Prosecution Vs. Qadara, 1.12.11), and see also The Military Prosecution Vs. Faqia, Administrative Appeal 1406/13, The Military Prosecution Vs. Moussa, Case 1600/09 (Judea district), and The Military Prosecution Vs. Zaid).

I believe that the time has come for the legislator to heed with great alert the recurring calls voiced increasingly since the establishment of the youth court in 2009.

However, even if an explicit authority does not exist within the current law in our area, this does not mean that the prosecution cannot agree to the submission of a voluntary expert opinion by an independent party, be it the welfare officer of the Judea and Samaria unit or a social work professional acting on behalf of the Israel Prison Service, as was the case on a few occasions.

This alternative is better, in my opinion, than the military prosecution's current position, which rules out any possibility of the court referring to a professional therapeutic authority or to a social worker, in order to obtain the relevant expert opinion. The reason for this is that the prosecution's strict approach leaves the defense attorney with no choice but to propose that the court rely on an expert opinion on its behalf.

Although this is not the preferred alternative, it seems that there is no reason to prevent the defense attorney a priori from submitting the aforementioned expert opinion, just like any other evidence which may assist the court in formulating its opinion (such as medical opinions, study certificates, sick notes and numerous other documents which are regularly submitted). The weight of such an opinion would obviously be scrutinized and examined by the court when it decides on the issue of arrest.

In the vein of this reasoning, we have ruled that:

"... Even if the current legal situation is unsatisfactory, and perhaps in view of this situation, the defense attorney may not dodge his fundamental responsibility to present in court as many arguments and data in favor of the defendant. Within this framework, one can also include personal details, medical details, information on the defendant's family, and other details which may be relevant for making a decision on the issue of arrest. In addition, the defense attorney is expected to come up with concrete proposals for alternatives to an arrest. That is the fundamental obligation of any defense attorney towards her/his client and even towards the court, which the former must assist in the conduct of the trial. These obligations arise with greater intensity in our area, where the tools available to the court are fewer, as mentioned above." (Qadara case)

Based on that, there is no doubt that the court has the authority to instruct the Israeli Prison Service to facilitate a meeting between a defendant and the professional authority asked to submit an expert opinion, as explained above.

This authority follows both from the court's explicit authority to summon witnesses and instruct that certain documents be submitted (article 109 of the Security Provisions Order [combined version] (Judea and Samaria) (number 1651), 2009). This includes the attached (additional) authority to allow these people to take the required actions in order to prepare the relevant documents, as well as the court's inherent authority to issue instructions which are directly related to the criminal procedure. within the scope of this authority, courts may instruct that a medical or psychiatric examination of the defendant be conducted, by an expert on behalf of the defense attorney, during various stages of the criminal procedure. On this matter, one can also refer to the Israeli Prison Service regulations which allow for meetings between prisoners and private therapists or private rehabilitation professionals, without any

direct links to the criminal procedure. And if that is the case, the justification in our case follows as an a fortiori conclusion, when there is no legal framework for obtaining an expert opinion from a governmental authority, and when the requested expert opinion is directly related to the criminal procedure.

Conclusion

Therefore, since this court lacks the explicit authority to instruct that an expert opinion be submitted, and in view of the prosecution's objection to allowing this court to refer the defendants voluntarily to the IDF welfare staff officer for submitting an expert opinion, and when it is deemed justified by the court, I cannot but allow the defense attorney to submit an expert opinion on his behalf. For the purpose of this, there is no way of avoiding a meeting between the appellants and a professional authority.

In view of the above, I have come to the conclusion that the appeal submitted by the defense is justified. Therefore, this court instructs the Israeli Prison Authority to allow for a meeting between the appellants and a qualified professional, whose details have been provided by the defense attorney at this hearing, according to the Israeli Prison Service regulations.

This court accepts the defense attorney's appeals.

May 27 2014
Signed by the judge
The honorable President, Judge Colonel Netanel Benishi