Military Youth Court of Judea, Case 2030/16
Judge Lt. Colonel Yair Tirosh

Military Prosecutor
(Captain Daniel Goldhamer)

v

Anonymous (minor)
(Attorney Neri Ramati)

22 February 2017

Partial arguments for a decision as to the inadmissibility of a defendant's statement

1. Facts of the case

The Defendant was indicted on charges of an offense involving complicity in the throwing of an incendiary object in accordance with regulation 58(a) of the Defense (Emergency) Regulations, 1945, and article 199c(a) of the Security Provisions Order (hereby referred to as The Order) (number 1651), 2009.

The Prosecution claims that on 1 December 2015, or close to that date, the Defendant, together with additional persons, came to an area where a military sentry post is located (hereby referred to as the Peelbox) in the Tel Rumeida neighborhood in the city of Hebron, with several Molotov cocktails at their disposal.

According to the Prosecution, when they arrived at the scene, the Defendant and his friends began to light up the bottles and they even threw two of them towards the Peelbox. At this stage two soldiers who were posted nearby recognized the events and shot towards the Defendant and his friends' lower body, as a result of which the Defendant and another person were injured.

As detailed in the indictment, five additional bottles were found at the scene following the incident.

The Defendant was arrested around two months after the incident, and one week later the indictment under discussion here was served against him.

Following the indictment, the Defendant was released from detention. At the start of his trial, he pleaded not guilty and the case was referred to an evidence hearing. As part of the evidence stage, with the agreement of both sides, most of the evidence in the case has been submitted, and a testimony of the police investigator who recorded the Defendant's statement on the day of his arrest was given. In addition, the recording of the interrogation was submitted to the court.

Following the hearing of the investigator's testimony in court, and in view of that which is said in the recording which was played in this court during the testimony, the Military Prosecution wishes to submit the Defendant's statement to the court. The Defense objects to this, claiming that the Defendant's statement is inadmissible evidence, due to the faults which had occurred in defendant's interrogation, in violation of the law and court rulings.

2. The Defendant's Police Interrogation

As follows from the recording of the interrogation, which has been played in the courtroom and submitted in the court case, whose content is under no dispute between the two parties, at the beginning of the Defendant's interrogation, the following conversation took place between him and the police investigator (hereby referred to as the preliminary conversation):

Interrogator:	*You have a lawyer*
Defendant:	*There's a lawyer ...*
Interrogator:	(Interrupts the defendant) *You have a lawyer now?*
Defendant:	*I will get a lawyer...*
Interrogator:	(Interrupts the defendant) *You have a lawyer now? And we're talking about now only, do you have?*
Defendant:	*Not now..*
Interrogator:	*No lawyer no, OK. Later, and we will speak to a lawyer in court.*

At this stage, the Defendant's interrogation continues and there is no dispute that following this exchange the Defendant was not granted any option of consulting a lawyer in spite of this statement of his, and the investigator began to collect his statement.

This exchange at the start of the interrogation is the focus of the following key questions which are disputed by both parties: What is the legal significance of that preliminary talk between the investigator and the Defendant, and are this exchange and other events which took place close to the time at which the testimony was collected a pretext for disqualifying the Defendant's statement at the Police.

3. Claims by the two parties as to the legal significance of the preliminary talk between the defendant and the police investigator

The main claim put forward by the Defense is that the investigator's decision to ignore the Defendant's statement that he had a lawyer, and additional faults in the investigation, which have denied the Defendant the possibility of fulfilling his right granted by law to consult with a lawyer. In addition, the Defense makes several additional claims, including one that the minor had not been notified in accordance with the law of his right to consult with a lawyer, and that during his interrogation additional rights were violated, such as a failure to notify his family of his arrest. In view of these facts, considering the minor's young age during the investigation (15 years) and the instructions of the law and court rulings, the Defense argues that the Defendant's statement should be inadmissible.

The Military Prosecution believes that the Defendant's statement is admissible based on numerous reasons. One of the Prosecution's main claims is that even if faults had occurred during the collection of the Defendant's testimony, these faults are not substantial and they have not violated the fairness of the legal procedure. Furthermore, the Military Prosecution believes that it has not been proven that these faults had indeed violated the Defendant's rights in said case. In addition to this, the Military Prosecution argues that the Defense's claims should be heard at the end of the trial and following a hearing of the Defendant's testimony and the rest of the evidence in the case. The Military Prosecution has also stated that only at the end of the trial and following the presentation of the complete factual picture, can the court decide on the Defense's claims.

In view of the two parties' claims, we shall briefly discuss the normative background which regulates the matter at hand.

4. Legal defense of the Defendant's right to consult a lawyer

In case 5121/98 *Raphael Isacharov v The Military Prosecutor*, an expanded plenary of the Supreme Court discussed the significance of the right to consult a lawyer and has stipulated the following which applies in our case (clause 14 of the ruling):

> **"The significance of the right to counsel**
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> **14. A detainee's right to be represented by a lawyer and to consult them has been recognized as a central basic right in our legal system in the very first days of this court (See case 307/60 Yasin and Others v Attorney General, p. 1541, p. 1570l case 96/66 Tau v Attorney General, p. 545-546; also see case 533/82 Zakai v State of Israel,**

p. 57, 67; case 334/86 Sabah v State of Israel, p. 857, 865; case 747/86 Eisenman v State of Israel, p. 447, 453) ...

... The significance of the right to meet and consult a defense attorney during the interrogation stage follows from the fact that, as a rule, an interrogation by officials of authority amounts to a complex and stressful situation to anyone interrogated under conditions of detention while they are facing their interrogators alone. The common view is that the right to representation and counsel assists in upholding the rights of defendants, ensuring the fairness of the interrogation procedures and preventing the exploitation of the structural power imbalance between the detainee and the officials of authority who are interrogating them. In this context, one can point out several reasons supporting the detainee's right to legal counsel at the interrogation stage: Firstly, The detainees consultation with their lawyer helps ensure that the detainee is aware of all their rights, including the right to a fair interrogation without being subjected to illicit interrogation methods, the immunity from self incrimination and the right to remain silent. The assumption is that the lawyer would make sure to provide the detainee with an explanation as to their rights during the interrogation, in an understandable and simple manner, and also clarify to them the implications of not providing their own account during the police interrogation. In this court's ruling, it has already been stated that:

"The right to a defense attorney includes the legitimate possibility that a lawyer would advise the suspect or the defendant to remain silent, and provide the police with no account" (case 747/86 Eisenman as cited above, p. 452 of Judge Goldberg's ruling). For this reason, it is customary to view the right to counsel as another aspect of the right to remain silent (see case 307/60 Yassin as cited above, p. 1570); case 96/66 Tau as cited above, p. 546; case 747/86 Eisenman as cited above, p. 452; case 3412/91 Sufian Abdallah v Commander of IDF Forces in the Gaza Strip, p. 843, p. 847, in Deputy President Elon's ruling; case 1437/02 Association for Civil Rights in Israel and Others v Minister of Interior Security and Others, p. 746, p. 764, in Judge Rivlin's ruling) ...

... The right to consult a lawyer, therefore, assists in ensuring that the detainee is aware of all their rights during the interrogation. In addition, the detainee's attorney may contribute to the upholding of a proper interrogation and legality of means used in it, and also assist in ensuring the credibility of evidence obtained as part of it. (See for example case 648/77, in which President Shamgar addressed the reasons in favour of a presence of a defense attorney while a line-up is held for the suspects. Also see an article by D. Bein.) Furthermore, some argue that the detainee's representation by a lawyer contributes to the efficacy of the interrogation, in the sense that the lawyer may help the investigating officials to locate evidence which corroborates the

detainee's account, and even assist in preventing the delivery of false admissions on the part of detainees (See article by Y. Tirosh). In view of all these reasons, no one disputes the high and central status of the right to counsel in our legal system".

The legal conclusion of this guiding ruling, and additional rulings which have addressed the issue, have been summarized in D Tzmarion's article, 2012:

"... Until the Isacharov case, the violation of the right to remain silent and the right to counsel was perceived, in the context of the possibility of disqualifying the admissibility of evidence, as a relative rather than absolute violation, which must be addressed with a fine balance between the defendant's rights and relevant public interests. In the ruling on the Isacharov case, the Supreme Court ruled that Basic Law: Human Dignity and Liberty mandated a change in the principled legal conclusion by which the means of obtaining an admission do not affect its admissibility.

It was ruled that one should adopt a ruling-based disqualification doctrine for the disqualification of evidence obtained in an illicit manner. This is a relative disqualification rule, the use of which shall be done moderately and carefully and in accordance with the circumstances of the case, and only when two cumulative conditions are met: The evidence has been obtained illicitly and its admission would significantly violate the defendant's right to a fair process. The disqualification rule set in the Isacharov case stipulates that the violation of the two basic rights - the right to remain silent and the right to counsel - shall be examined from now on not just as part of the condition of "given of the defendant's free will", but also in the context of "the right to a fair criminal process", and that there is a possibility of disqualifying an admission for this reason only. This is the ruling-based rule as to the disqualification of an admission, pertaining to the fairness of the criminal procedure" (Also see Y. Kedmi's book "On Evidence", 2007):

In accordance, the court ruled in case 10049/08 Abu Assa v State of Israel, 2012, that if a defendant does not insist on their right to counsel, this shall not be viewed as a waiver of their right to counsel. The following, from clauses 105-109 of the ruling, are relevant to this case:

"An implied waiver of the right to counsel is not possible

105. The Respondent claims further that the Appellant's right to counsel has not been violated, since the latter had never demanded to meet an attorney and had never asked for the interrogation to be stopped until he can consult one. The Respondent also claims in this context that the right to counsel is the suspect's right rather than

their attorney's, and therefore the suspect may waive this right. The Respondent claims that a lack of a demand to see an attorney on the part of the suspect is tantamount to an implied waiver of the right to counsel. I would like to state right away that I do not accept this claim by the Respondent as to the possibility of existence of an "implied waiver" in view of the great importance of the right to counsel, as hereby specified.

Was the Appellant asked whether he would waive the right to counsel? Did the Appellant sign some waiver form? Was the Appellant made aware of the fact that Attorney Meroz wishes to meet him and the Appellant responded that he was not interested in meeting the former and that he wished for the interrogation to proceed? The answer to these questions is strictly in the negative.

I believe that interrogating officials bear the responsibility to enquire, at their own initiative, whether the suspect indeed waives the right to counsel, and they must document the waiver in audio-video recordings, and as a last resort - in writing, in order to allow for a judicial review at a later stage, as to the implementation of the suspect's basic rights during their interrogation.

106. The claim regarding an implied waiver of rights in criminal law is a complex one which one should address with the appropriate prudence. While in civil law, a waiver of rights may take place by way of implied consent, an implied waiver of basic rights in the criminal procedure is the exception to the rule by which the waiver must be willful and explicit, since human lives are at stake in criminal law ...

107 Over the years, this court has had to decide on "implied waiver" of rights in the criminal procedure. This court has recognized a number of limited exceptions which allow for inferring a waiver of rights in the criminal procedure as a result of the suspect or defendant's conduct. Thus for example, it has been stipulated that it is possible to infer from the conduct of a person under interrogation that they have waived the immunity from self incrimination, for example when that person was aware of their rights and in spite of that issued an incriminating statement (see for example case 196/85 Silberberg v State of Israel, Judge Kedmi, pages 31,34; compare to: David Libai, "Interrogation of a Suspect and the Immunity from Self Incrimination", Hapraklit 29, p. 92, 101 (1973).

108. *Nota bene*, these are the exceptions which attest to the rule. As to the right to counsel, I believe one should not allow for a conclusion as to an implied waiver of the right to counsel. The reason for this is that the right to counsel is the key to the upholding of the other rights of the suspect and the defendant in a criminal

procedure, since, as stressed here, the purpose of a meeting with one's attorney is to allow for a consultation which informs the person under interrogation of all their rights and allows for the monitoring in real time of the way in which the interrogation is being conducted. The right to counsel is the pillar and a sine qua non condition for the upholding of all the rights of a suspect and defendant in the criminal procedure.

However, one must bear in mind that during their interrogation at the police the suspect is under heavy mental stress, also due to the allegations hurled at them, and due to being detached from their natural surrounding and their family, and in view of the structural imbalance of power between the person under interrogation and their interrogators. In these circumstances, the suspect does not pay full attention to insisting on the right to counsel, and therefore I believe that one cannot regard the latter's failure to explicitly insist on their right to counsel as a waiver of this right.

109. And let it be stressed, what I have stated here does not amount to a prohibition, or the lack of recognition of a suspect's right to waive the right to counsel (compare to a view that a suspect cannot waive their right to counsel whatsoever: Lernau, page 63 and the references cited thereby). And *nota bene*, I believe that recognition of the possibility of an implied waiver of the right to counsel is an opening to numerous manipulations. Therefore, the manner in which the right to counsel is waived must ensure that the person under interrogation understands the significance of waiving their right. Therefore, even if a waiver of the right to counsel is possible, the right must be waived willfully and explicitly. This approach corresponds to this court's ruling in the Ben Hayim case, according to which a waiver of a suspect's basic right in a criminal procedure must be wilful and explicit (ibid, clause 31).

... To summarize this sub-chapter I would like to stress the principles of my view with respect to a suspect's waiver of their right to counsel:

(a) A waiver of the right to counsel must be clear and explicit, and the possibility of an implied waiver shall not be recognized.

(b) The waiver must be issued of the defendant's free will. Interrogators may not strive to influence the defendant into waiving their right to counsel by interrogation tricks of various sorts.

(c) Even if the suspect is willing to grant their explicit agreement to a waiver of the right to counsel, the interrogation team must make sure that the suspect understands the meaning of the waiving act, in order for it to be a willful waiver.

(d) The interrogating team must document the act of waiving in audio-video recordings or, for no other choice, in a clear and explicit written form, which the defendant will sign".

This binding legal doctrine of the Supreme Court, as summarized here, points to the grave difficulty of accepting the claim that in the circumstances of this case the defendant had waived his right to counsel.

It should be noted that said legal doctrines of the Supreme Court apply directly to the military courts in the Region by force of instruction 36 of the Order. For this matter, see also N, Benishu, 2005. This grave difficulty in accepting the claim that the defendant had waived the right to counsel in this case is intensified to a great extent in view of the fact that the defendant was a minor aged 15 when he was interrogated at the police station alone without the presence of his parents.

5. The special significance of the right to counsel in youth interrogations

The above, as to the right to counsel, becomes even more applicable when the interrogation of minors is concerned. The legislator, who was aware of the special significance of the right to counsel in youth interrogations, has issued an explicit legal instruction for this matter, put forward in article 136c of the Order.

The District Court in Lod, in a ruling in which two minor defendants were acquitted of the charge of committing the offense of murder, due to significant flaws in their interrogations in the police, addressed extensively the substantial difference between an interrogated minor and an interrogated adult, making the following ruling, which applies to our case:

> **"The interrogated minor is different from the interrogated adult, in their personality structure, in their sensitivity threshold, in their maturity and in their dependence upon adults. The legal literature and rulings have acknowledged that a minor's response to the denial of their liberty and to the pressures of an interrogation places them under an increased threat of false confessions, and therefore interrogation methods which are permissible as to an adult may be prohibited as to minors".** (Case 10101-01-09, 29.11.15).

As one can see, according to the legislation and court rulings, interrogating authorities must exercise due diligence when a minor is involved, to ensure their rights during the interrogation are upheld including the right to counsel (for this matter, also see case 2451/16 Anonymous v

Military Prosecution, yet to be published) and the Military Appeals Court in case 2683/11 Military Prosecution v Anonymous, yet to be published):

> **"The caution which must be exercised prior to the arrest of a minor mandates, *inter alia,* that one refrain from arresting or interrogating a minor while violating the rules stipulated by law on this matter, and also mandates that one explain to the minor, in a language that is clear and understandable to them, their full rights from the beginning of the interrogation".**

6. The violation of the defendant's rights during his interrogation at the police

After I heard the testimony of the police interrogator, I listened to the recording of the Defendant's interrogation at the police and considered the arguments of both sides, I have concluded that in the circumstances of this case the interrogating authorities had blatantly violated the rights granted to the Defendant by force of law and court rulings. Among others, the investigating authorities had violated the Defendant's right to counsel during his interrogation at the police, while acting in violation of the instructions of the law and of court rulings.

I would like to stress that these are not slight and minor faults which had occurred at the interrogation, as had been argued, but grave and significant ones which bear clear legal implications according to the instructions of court rulings. The violation of rights is all the more grave considering the Defendant's young age during his interrogation at the police. I conclude that this illicit conduct of the investigating authorities amounts to a significant violation of the Defendant's rights to a fair process in the circumstances of the case.

In view of this, following a review of all tests set in court rulings and the entirety of the case circumstances, the violation of the Defendant's rights during his interrogation at the police, including his right to counsel, mandate the disqualification of the admissibility of the Defendant's statement at the police.

7. Summary

The Defendant's statement at the police is disqualified and is inadmissible as evidence. The complete arguments for this decision will be published separately.

Issued on 22 February 2017, in chambers.