

***Translation of decision from Hebrew to English by Adalah***

**At the Supreme Court, Sitting as the High Court of Justice**

**HCI 5887/17**

Before: The Honorable Justice Y. Danziger  
The Honorable Justice D. Barak-Erez  
The Honorable Justice D. Mintz

The Appellants: 1. Ahmed Musa Jabareen  
2. Ahmed Mfadi Jabareen  
3. Hamed Jabareen

V.

The Respondents: 1. The Israel Police  
2. The Police Investigations Division

Petition for an Order Nisi

Date of hearing: 2 Av 5777 (25.07.2017)

Representatives of the Appellants: Attorney Hassan Jabareen, Attorney Mohammed Bassam

Representative of the Respondents: Attorney Avi Milikovsky

**Judgment**

1. The petition before us is directed at the Israel Police decision to demand various commitments from the petitioners as a condition for returning the bodies of the three assailants who on 14 July 2017 committed the terror attack in the Temple Mount compound. The police officers Kamil Shanani and Hael Sathawi were killed [during this event]. In addition, it was requested that an autopsy will be performed on the bodies. The petitioners are the assailants' parents.
2. The police stipulate the return of the bodies to the parents upon the consent of the latter to the conditions according to which the funerals will be held. These [conditions] include

various restrictions, such as the number of participants and the time the funerals will take place.

3. Over the past few days, we have held many extensive hearings in order to bring the parties to an agreement on the arrangements for the funeral, but to no avail. Unfortunately, there remain various differences between the parties regarding the time the funerals will be held and the number of persons who will be allowed to participate in them. As we have not succeeded in bringing about an agreement between the parties, we have no alternative but to render a judgment on the petition before us.
4. Indeed, there can be no dispute that there are grounds for the police's fears of disturbances and incitement which may accompany the assailants' funerals. However, this is not the issue that was raised in the petition before us. There is no doubt that the police has numerous powers in the realm of maintaining public order, and that it is entitled and even obligated to exercise these powers in all that regards gatherings that are accompanied by disturbances, should these occur. The petition, however, raised a different question – whether the police are authorized to condition the return of the bodies to the families upon consent to certain funeral arrangements (as opposed to the question, regarding which there is no dispute, of its authority to oversee public order afterwards). This question must be answered negatively. In principle, we believe that the petition will be accepted insofar as the principal remedy requested: the State did not indicate a source of [legal] authority that allows it to hold bodies until consent to certain funeral arrangements is given.
5. At first, the police sought to rely on Sections 3 and 4A of the Police Ordinance (New Version) 5731-1971 (hereinafter: **the Police Ordinance**) as a source of [legal] authority for refraining from returning the assailants' bodies. However, we did not find this position to be of substance.
6. Section 3 of the Police Ordinance is merely a general section that defines the functions of the police and determines that it must handle “the prevention of offenses and their detection, the seizure and prosecution of offenders, the safe custody of prisoners, the maintenance of public order, and the protection of life and property.” It does not constitute an independent [legal] source of authority.
7. In contrast, Section 4A of the Police Ordinance includes a list of powers granted to police officers. However, it also does not contain a [legal] authority to refrain from returning bodies for burial, beyond the arrangements prescribed in the law. In order to briefly explain our position, it is appropriate to quote this section, as it is relevant to our matter:
  - (A) Should a policeman find that there is a tangible threat of serious injury to life or property he is authorized to –
    - (1) Issue a reasonable order to any person in the area or place where the said threat exists which is vitally necessary to save life or property or

to prevent the said harm, including an order denying access to an area or a place, or the exit from it;

- (2) Order a rescue service, as defined in Section 90A, to act within the framework of its duties and powers under the law;
- (3) In order to save life or property he is authorized to –
  - (a) Enter any location whose entry is essential and to use reasonable force against a person or property for the purpose of executing this authority, providing that the police officer identifies himself to anyone who is present at the location and informs him of the purpose for which the entry is required, requests his consent to enter, and warns him that he intends to use force in order to enter; the above obligation of identification, notice and warning shall not apply if the police officer realizes that no one is present at the location;
  - (b) Perform any essential action, and to use reasonable force against a person or property for the purpose of carrying out this action.”

8. In the police’s view, this section which concerns the performance, “of any essential action, and the use of reasonable force against a person or property for the purpose of carrying out this action” applies to “all actions”, including refraining from returning bodies for burial.
9. This position is inconsistent with the requirement for "explicit" authorization for all actions that violate fundamental rights. In the case at hand, there are a number of fundamental rights at stake, first and foremost human dignity.
10. The requirement of explicit [legal] authorization for the violation of fundamental rights is unavoidable today according to the Basic Law: Human Dignity and Liberty. Nevertheless, in practice, this is not a new development. Already in its first years, this Court explicitly refrained from recognizing auxiliary powers that involve a violation of human rights (see for example: CA 40/58, **the Attorney General v. Ziyad**, PD 12, 1358 (1958)). It is superfluous to state that this requirement has since been adopted in many other contexts, including those of law enforcement (see for example: HCJ 6824/07, **Mana v. the Tax Authority**, PD 64(2) 479 (2010)). The above has been reinforced by the fact that Section 4A of the Police Ordinance grants these powers to every “policeman” as it must not be assumed that the legislator chose to grant such broad powers to each and every police officer.
11. Notably, in the course of the hearing before us, the police sought to refer to additional directives in the Police Ordinance as possible sources of [legal] authority, for example, the requirements for obtaining a license for assemblies and processions (Articles 83-90 of the Police Ordinance). However, if the truth be told, even in the police’s view, these articles only apply to assemblies and processions as defined in the Police Ordinance and cannot be literally applied to a funeral that does not include components of an assembly of a procession.

12. We wish to clarify that in practice, this judgment focuses on only one question: is the police authorized to refrain from returning the bodies of assailants to their families for burial. Our pronouncements do not detract from the authority and obligation of the police to fully exercise its powers for the purpose of maintaining law and order, including overseeing gatherings, or to condition holding processions by the appropriate licenses. In this context, we will note that it was not argued before us that the actual return of the bodies, as opposed to the funerals themselves, may lead to a serious harm to life or property.
13. On the other hand, we did not see fit to accept the petitioners' request that we order the performance of an autopsy on the bodies of their children in light of the existence of an alternative remedy in the form of the appeal to the Magistrates Court pursuant to Article 19 of the Investigation of the Causes of Death Law 5718- 1958.
14. We cannot conclude without noting that we were impressed that both the petitioners and the State have the public interest in mind and are striving to ensure that the funeral and burial events will proceed in an orderly fashion without harm to public safety. In the framework of the hearings, clear undertakings were provided on behalf of the families, as well as on behalf of the relevant public figures headed by the mayor of Umm al-Fahem, to do their utmost to ascertain that the funerals will not disrupt public order. We wish to express our hope that this will be the case.
15. In conclusion, the following order shall be rendered absolute:
  - A. After giving the Petitioners a two-hour advance notice at the very least, the Israel Police will give the Petitioners their sons' bodies so they can be brought for burial at the cemetery adjacent to the Al Farouk Mosque in Umm al-Fahem. The notice will be given no later than 30 hours from the time this judgment is issued.
  - B. It is superfluous to state that the Israel Police will be entitled to set terms and conditions, according to its upmost discretion, in order to ensure that the funerals themselves will be held without the disruption of public order, and in order to prevent disturbances of order and violence.
  - C. The declarations and commitments of the Petitioners, the Petitioners' counsel, the representative the Petitioners' families and the mayor of Umm al-Fahem, in which they undertook to ensure public order and to prevent its disturbance immediately before, during and following the funerals have been noted.

D. The declarations of Knesset Members [Yousef] Jabareen and [Usama] Sa'adi – submitted by the Petitioners' counsel – that they also intend to act to ensure the maintenance of public order and to prevent its disruption as specified above have been noted.

E. The declaration of the Petitioners' counsel that all the agreements reached between the Petitioners and the Respondents on subjects that were initially in dispute between the parties will be honored by the Petitioners and their representatives have been noted.

16. No order is rendered regarding costs.

Delivered today, 2 Av 5777 (25 July 2017).

Justice

Justice

Justice