

## HUMAN RIGHTS COMMITTEE

### Daley v. Jamaica

Communication No 750/1997\*

31 July 1998

CCPR/C/63/D/750/1997

### VIEWS

*Submitted by: Silbert Daley (represented by Allen & Overy, a law firm in London)*

*Victim: The author*

*State party: Jamaica*

*Date of communication: 17 April 1997 (initial submission)*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 1998,

Having concluded its consideration of communication No.750/1997 submitted to the Human Rights Committee by Silbert Daley, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Silbert Daley, a Jamaican citizen, born on 23 January 1957, currently awaiting execution at St. Catherine's Prison, Kingston, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Allen & Overy, a law firm in London, England.

## Facts as presented

2.1 The author was convicted of capital murder on 10 June 1992. His appeal against his conviction succeeded and on 30 January 1995 the Court of Appeal ordered a retrial. At the end of the retrial, on 26 October 1995, the author was again convicted of capital murder. His appeal was dismissed on 22 July 1996. His application for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 9 April 1997. Counsel notes that the author has not pursued a constitutional motion, and argues that in the circumstances of the author's case, this would not constitute an available remedy to the author, due to the high costs involved and the absence of legal aid.

2.2 At trial, the case for the prosecution was that the author, on 24 November 1988 at about 6.45 a.m., murdered one Neville Burnett, a security guard, in furtherance of a robbery. The case was solely based on the evidence of a witness, Dennis Dias, who identified the author as the perpetrator of the murder. According to his evidence, he was sitting in a parked van early in the morning of 24 November 1988, when he saw a man wandering back and forth along another road. He recognized him as 'Junior White' or 'Sleepy Boy', whom he had known since basic school. He then saw a car pulling up outside the Bank across the street. The driver of the car, Neville Burnett, removed a bag from the car and approached the night deposit box of the Bank. Junior White then walked up behind him and shot him in the head. The attacker walked away with the bag and got into a white motorcar which had two other occupants. The witness followed the car to 85 Red Hills Road, where the attacker was dropped off. According to the witness, Junior White was known to live at this address. At trial, Mr. Dias identified the author as the same person known to him as Junior White or Sleepy Boy.

2.3 Based on information given by Mr. Dias to the police, an arrest warrant was drawn up for the arrest of Junior White. He was however not found at the address given by Mr. Dias.

2.4 On 12 September 1991, nearly three years later, Mr. Dias was collected by the police and driven to a gas station where he identified the author as the person who killed Neville Burnett. The author was later arrested.

2.5 At trial, the author gave an unsworn statement from the dock in which he denied any knowledge of the killing. The defence case was based on mistaken identity.

## The complaint

3.1 Counsel claims that the author was only informed of the charges against him a month and a half after his arrest on 12 September 1991. This is said to constitute a violation of articles 9(2) and 14(3)(a) of the Covenant.

3.2 Counsel claims that after his arrest, the author was beaten by four policemen at Constant Police Station. After his transfer to Half Way Tree Lock Up, the author was allegedly kept in a cell with up to 14 other men and allowed out for only short periods of time. There was no bedding in the cell and he had to sleep on the floor. There were no proper toilet facilities. After his transfer to the General Penitentiary, the author claims that he was kept with three inmates in an insect-infested cell. He was not given slop buckets.

3.3 Counsel claims that the author's representative at the retrial was flagrantly incompetent, thereby depriving the author of a fair trial in violation of article 14(3) of the Covenant. It is submitted that the trial judge had to intervene on several occasions and that counsel made major errors: in particular, she failed to cross-examine properly the main prosecution witness, told the jury that the author's alleged accomplice had been sentenced to death in another trial, misquoted evidence, put false suggestions, mis-stated the basic law. In the summing-up, the judge pointed out several errors made by counsel and told the jury not to visit her mistakes upon the accused. It is further submitted that counsel failed to keep an appointment with a character witness who was to testify for the author, and then closed the case without asking for an adjournment in order to obtain the presence of the witness.

3.4 Counsel claims that the delay of 2 years and 7 months between the author's first conviction (10 June 1992) and the hearing of his appeal (30 January 1995), as well as the overall delay of 4 years and 10 months between the date of his original conviction and the hearing of the Privy Council appeal on 9 April 1997, is in violation of articles 9(3), 14(3)(c) and (5) of the Covenant.

3.5 With regard to the appeal, it is submitted that the author only met with his appeal lawyer on one occasion for about ten to fifteen minutes. Counsel claims that this was insufficient to ensure adequate preparation of the appeal and that this amounted to a violation of article 14(3)(b) of the Covenant. It is moreover submitted that at the hearing of the appeal in July 1996, the author's legal representative admitted that he could not support the appeal, thereby effectively abandoning the appeal and leaving the author without representation, in violation of article 14(3)(d) of the Covenant.

3.6 Counsel claims that the author is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, because of the length of time spent on death row. In this context, reference is made to the decisions of the Judicial Committee of the Privy Council in *Earl Pratt and Ivan Morgan v. the Attorney General of Jamaica* and in *Guerra v. Baptiste and Others*. In this connection, counsel points out that the author was imprisoned on death row from 10 June 1992 (the date of his first conviction) to 30 January 1995 (when a retrial was ordered). He was released on bail on 10 August 1995, but again imprisoned on death row since 26 October 1995, the date of his second conviction. It is submitted that the accumulated time spent on death row, in being taken off death row and sent back to it, results in an agony of suspense and amounts to a violation of articles 7 and 10 (1) of the Covenant.

3.7 After his conviction, the author was kept in detention in St. Catherine's District Prison. Counsel refers to several reports describing the conditions in the prison and submits that the author is kept in solitary confinement in a 9 x 6 foot cell for up to 23 hours a day. No mattress is provided and the author sleeps on a sponge. There is no integral sanitation and he has to use a slops bucket for his toilet. There is inadequate ventilation and no artificial lighting. It is submitted that the conditions of detention to which the author has been and continues to be subjected are in breach of the United Nations Standard Minimum Rules for the Treatment of Prisoners and constitute a violation of articles 7 and 10(1) of the Covenant.

3.8 It is further submitted that the author has been subjected to numerous assaults from other prisoners which, on one occasion, resulted in the author spending three weeks in hospital. According to the author, other prisoners are plotting to kill him. His requests to be moved to another prison

block have only been temporarily allowed. Counsel submits that he has written to the Superintendent and to the Commissioner of Corrections to no effect.

3.9 Finally, counsel argues that the imposition of the death penalty after a trial in which the provisions of the Covenant were not respected constitutes a violation of article 6 of the Covenant.

#### State party's observations and counsel's comments thereon

4.1 By note of 25 June 1997, the State party denies that any breaches of the Covenant occurred in the author's case.

4.2 With regard to the author's claim that he was detained for one-and-a-half month before being formally charged, the State party submits that in any event the author was made aware of the charges against him at the time of his arrest.

4.3 With regard to the delay of two and a half years between the first conviction and the hearing of the author's appeal, the State party acknowledges that such a delay is longer than is desirable, but submits that it did not lead to any prejudice to the author. It further notes that, once the appeal was heard, the subsequent proceedings were initiated without delay.

4.4 Concerning the behaviour of counsel for the author at the (second) appeal, the State party notes that the author was represented by a highly respected and competent Queen's Counsel. According to the State party, the manner in which counsel conducted the appeal is not the responsibility of the State unless agents of the State prevented him from doing his duty. Since this was not the case, the State party denies that it is responsible for a violation of the Covenant in this respect.

4.5 With regard to the competence of counsel during the trial, the State party submits that a thorough examination of the transcript will show that there are no reasons to criticise counsel's conduct and that no prejudice to the author occurred.

5.1 In his comments, dated 7 November 1997, counsel for the author notes that the State party has not made any observation in relation to the claims under articles 7 and 10, paragraph 1, of the Covenant, nor has it carried out an investigation into the assaults committed on the applicant by other inmates.

5.2 In support of his claim that a delay of one and a half month in formally charging the author constitutes a violation of article 9 and 14(3)(a), counsel refers to the Committee's Views in communication Nos. 707/1996<sup>1</sup> and 248/1987<sup>2</sup>. Counsel adds that during that period of time, the author was also denied access to a lawyer or contact with his family. According to counsel, in not being allowed access to a lawyer for six weeks, the author could not take proceedings on his own initiative to have the lawfulness of his detention determined.

5.3 With regard to the delay of two years and seven months between his conviction and the hearing of his appeal, counsel argues that the fact that further proceedings took place with dispatch is irrelevant, and reiterates his claim that this particular delay as well as the overall delay of 4 years and ten months between the date of his original conviction and the hearing by the Privy Council

constitutes a breach of articles 9(3), 14(3)(c) and 14(5) of the Covenant.

5.4 With respect to the conduct of the defence at the trial, counsel reiterates his claim that the transcript clearly shows trial counsel's incompetence and that this prevented a meaningful defence being put forward to the jury.

5.5 With regard to the abandonment of the appeal by counsel, reference is made to the Committee's jurisprudence.

#### Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has forwarded comments on the merits of the communication and that it has not challenged the admissibility of the communication. The Committee therefore declares the communication admissible and proceeds, without further delay, to an examination of the substance of the claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 The author has alleged that he was not informed of the charges against him until six weeks after his arrest. The Committee notes that the State party has replied that even if he was not formally charged, he was made aware of the charges against him. At his second trial (October 1995) the author himself testified that the two policemen who arrested him told him that "they were taking me for the death of Neville Burnett on the 24th of November 1988". However, the State party's reply implies an acknowledgement that the author was not brought before a judge or judicial officer until after six weeks of detention. The Committee refers to its jurisprudence<sup>3</sup> under the Optional Protocol, according to which delays in bringing an arrested person before a judge should not exceed a few days<sup>4</sup>. A delay of six weeks cannot be deemed compatible with the requirements of article 9, paragraph 3.

7.2 The Committee notes that the State party has failed to address the author's claims that he was beaten up by policemen after his arrest and that he was kept in deplorable conditions of detention before his trial. In the absence of a reply from the State party, due weight must be given to the author's detailed allegations. The Committee finds that the beatings and the conditions of pre-trial detention as described by the author constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

7.3 The author has claimed that the bad quality of the defence put forward by his counsel at trial resulted in depriving him of a fair trial. In this context, the Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was

or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case, and consequently, there is no basis for a finding of a violation of article 14, paragraph 3, in this respect.

7.4 Counsel has claimed that the delay between the author's first conviction and the hearing of his appeal, a period of 2 years and 7 months, constitutes a violation of articles 9, paragraph 3, and 14, paragraph 3(c). The State party has acknowledged that such a delay is undesirable, but has not offered any explanation justifying the delay. In the circumstances, the Committee finds that the length of the delay is in violation of article 14(3) (c), in conjunction with article 14 (5), of the Covenant.

7.5 With regard to counsel's claim that the author was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence<sup>5</sup> that under article 14, paragraph 3(d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Daley should have been informed that his legal aid counsel was not going to argue any grounds in support of his appeal, so that he could have considered any remaining options open to him. The Committee concludes that there has been a violation of article 14, paragraph 3(d), in respect to the author's appeal. In the light of the above, there is no need for the Committee to address the author's claim of a violation of article 14 (3) (b) in relation to the preparation of the appeal.

7.6 The author has claimed that his continued detention on death row in itself, as well the conditions of this detention, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee reaffirms its constant jurisprudence<sup>6</sup> that detention on death row for a specific period - in this case two years and seven months after his first conviction, and two years and eight months after his second conviction - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however, constitute a violation of articles 7 and 10 of the Covenant. Mr. Daley alleges that he is detained in particularly bad and insalubrious conditions on death row; this claim is supported by reports which are annexed to counsel's submission. There is lack of sanitation, light, ventilation and bedding. Counsel's submission takes up the main elements of these reports and shows that the prison conditions affect Silbert Daley himself, as a prisoner on death row. Furthermore, the author has claimed that he has been assaulted regularly by other inmates, leading to his hospitalization, and that the State party has taken no measures to protect him. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Daley directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

7.7 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6

of the Covenant if no further appeal against sentence is possible. In Mr. Daley's case, the final sentence was passed without the guarantee of a proper defence at appeal, in violation of article 14, paragraph 3(d), of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 3, 10, paragraph 1, 14, paragraph 3 (c) & (d) juncto paragraph 5, and consequently of article 6 of the Covenant.

9. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Silbert Daley with an effective remedy, including commutation, compensation and early release. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, and Mr. Maxwell Yalden.

1/ Patrick Taylor v. Jamaica, Views adopted on 18 July 1997.

2/ Glenford Campbell v. Jamaica, Views adopted on 30 March 1992.

3/ See inter alia the Committee's Views in cases Nos. 702/1996 (Clifford McLawrence v. Jamaica), adopted on 18 July 1997, paragraph 5.6, and 704/1996 (Steve Shaw v. Jamaica) adopted on 2 April 1998, paragraph 7.3.

4/ See also General Comment 8 {16} of 27 July 1982, para.2.

5/ See, inter alia, the Committee's Views in cases Nos. 734/1997 (Anthony McLeod v. Jamaica), adopted on 31 March 1998, paragraph 6.3; 537/1993 (Paul Anthony Nelly v. Jamaica), adopted on 17 July 1996, paragraph 9.5.

6/ See inter alia, the Committee's Views in cases Nos. 588/1994 (Erroll Johnson v. Jamaica), adopted 22 March 1996, paragraphs 8.1 to 8.6; 554/1993 (Robinson Lavende v. Trinidad & Tobago), adopted 29 October 1997, paragraphs 5.2 to 5.7; and 555/1993 (Ramcharan Bicharoo v. Trinidad & Tobago), adopted 29 October 1997, paragraphs 5.2 to 5.7.