HUMAN RIGHTS COMMITTEE

Gallimore v. Jamaica

Communication Nº 680/1996**

23 July 1999

CCPR/C/66/D/680/1996*

VIEWS

Submitted by: Lancy Gallimore (Represented by Mr. Anthony Poulton of Macfarlanes, a London law firm)

Alleged victim: The author

State party: Jamaica

Date of communication: 29 April 1995

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

Meeting on 23 July 1999

Having concluded its consideration of communication No.680/1996 submitted to the Human Rights Committee on behalf of Lancy Gallimore, 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 Lancy Gallimore, a Jamaican citizen imprisoned at the General Penitentiary in Kingston. He claims to be a victim of violations by Jamaica of articles 7, 10, paragraph 1, 14, paragraphs 1, 3 (b) and 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. Anthony Poulton of Macfarlanes, a

London lawfirm. The author's offence has been reclassified as non-capital.

The facts as submitted by the author:

2.1 The author was arrested on 8 May 1987 for the murder, of one Angela Bess, which took place on that day and was charged on 12 May 1987. On 18 November 1987, the author was found guilty as charged and sentenced to death by the Kingston Circuit Court. The Court of Appeal of Jamaica dismissed his appeal on 11 July 1988. A further application for special leave to appeal to the Judicial Committee of the Privy Council has not been filed, for reasons set out below.

2.2 Since his conviction on 18 November 1987 the author was held at St. Catherine's District Prison on death row. On 8 December 1992, the author's case was reviewed and classified by decision of a single judge of the Court of Appeal as non-capital murder pursuant to the Offences Against the Persons (Amendment) Act 1992. The author's sentence was therefore commuted to life imprisonment.

2.3 As to the issue of exhaustion of domestic remedies, counsel explains that Mr. Gallimore has not petitioned the Judicial Committee of the Privy Council for special leave to appeal against the judgment of the Court of Appeal, because the substance of his appeal does not come within the restrictive jurisdiction of the Privy Council, as it has established that it will not act as a Court of Criminal Appeal. Furthermore, London counsel reportedly advised that such a petition would have little prospect of success. Thus, it is submitted, in the author's case an appeal to the Judicial Committee of the Privy Council is neither an effective nor an available remedy.

2.4 In the same manner, the author did not apply to the Supreme (Constitutional) Court of Jamaica for redress, because it is considered that such a constitutional motion would inevitably fail in the light of the precedent set by the decisions of the Judicial Committee of the Privy Council in DPP v. Nasralla (1967) 2 ll ER 161 and Riley v. Attorney General of Jamaica, (1982) 2 All ER 469, where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. It is stated that since the author alleges unfair treatment under the law and not that post constitutional laws are unconstitutional, the constitutional remedy is not available to him. It is further submitted that, even if it is considered that the author does have a constitutional remedy in theory, in practice it is not available to him because of his lack of funds and the unavailability of legal aid. In this connection, reference is made to the Committee's jurisprudence in relation to the communications of Raphael Henry (communication No. 230/1987) and Lynden Champagnie, Delroy Palmer and Oswald Chisholm (communication No. 445/1991).

2.5 The case for the prosecution was that, on 8 May 1987, at 9.30 p.m., Angela Bess, after talking with the author in the street, was killed by one stab with an ice-pick by the author.

2.6 The prosecution's case was mainly based on the evidence of one Phillip Robinson. He testified that, sitting in the front of a minibus, he witnessed the author with his back turned

towards the road talking with the deceased near the bus station, when suddenly the author pulled something out from the vicinity of his waist and made a hostile motion towards her. He saw the author move off quickly, he got out of the bus, the woman fell into his arms and told him, that the man had stabbed her. The witness put her down on the ground and got back onto the bus which was driving in the same direction as that in which the author was attempting to escape. The author got on the bus, and when he got off, the witness followed him, and, pretending to be a police officer, challenged the author to stop. He searched the author's pockets and found an ice-pick. Having removed this, the witness took the author to the police station.

2.7 The body of Angela Bess, bearing a stab wound in the region of the heart, was found by the police at the place of the incident later in the evening, and identified on 15 May 1987 by Aneita Taylor, the mother of the deceased.

2.8 The author's defence was based on mistaken identity. The author made a sworn statement alleging that he was in a bar having drinks, after which, while he was waiting for a bus, the witness and another man came towards him, called him George Campbell and forced him at gun point to follow them first to the place of the incident and then to the police station. He stated that the deceased was entirely unknown to him.

2.9 The appeal of the author was based on the grounds of unfair trial and insufficient evidence to warrant a conviction. The author himself was not present at the appeal and was represented by a different legal aid lawyer than the one who had represented him at the trial. The author's appeal lawyer did not argue any grounds of appeal on his behalf, and stated that he could not find any arguable grounds in favour of the author.

The complaint:

3.1 The author claims that he is a victim of a violation of article 10, paragraph 1, of the Covenant. In this connection, counsel states that, between 8 and 9 May 1987 while the author was in custody, he was twice beaten by the police with cable brake wire all over his body and police officers stood on his stomach. [1] Counsel further states that the author has been badly beaten several times by prison warders with no cause when he was detained in St. Catherine District Prison on death row, and that as a result of one beating he was unable to use his right hand for 17 days. Counsel adds that, despite several complaints to the prison officers, the author has not been treated for the resulting injuries, nor has he been seen by a doctor.

3.2 It is further stated that the author wrote to the Parliamentary Ombudsman after he had been beaten up by police officers while in custody on 8 and 9 May 1987, but received no response. [2] Reference is made to the Amnesty International Report of December 1993 in which it is stated that the Office of the Ombudsman does not have sufficient funding to be effective, and it is stated that the last report of the Ombudsman was dated December 1988. It is therefore submitted that the Office of the Parliamentary Ombudsman does not provide an effective domestic remedy in the circumstances.

3.3 As to his claim under article 14 of the Covenant, counsel refers to passages of the judge's summing-up to the jury. It is submitted that the trial judge failed to properly direct the jury, according to the legal rules required in identification cases as they are laid down in the decision R. v. Turnbull [1977] QB 244. In particular, it is said that the identification warning given to the jury by the judge was inadequate, and that the indication of the weakness in the evidence was unclear and unsatisfactory.

3.4 As to article 14, paragraph 3 (b), counsel states that the author did not have adequate time for the preparation of his defence and to communicate with counsel of his own choosing. In this connection, counsel points out that the legal aid lawyer in the first court hearing was assigned by the judge and was not chosen by the author. Counsel alleges that the author met with his attorney for the first time only four weeks after his arrest, that the interview lasted 10 minutes and no written statement was taken by the attorney. He points out that the author had only two subsequent meetings, after the Preliminary Hearing and immediately before the trial, which also lasted only ten minutes, and that this was not enough time to go through his case with his lawyer. No witnesses were called on the author's behalf.

3.5 Counsel further points out that, as regards his appeal, the author was assigned another legal aid lawyer, whom he did not meet prior to the appeal, and who failed to argue any grounds of appeal on the author's behalf. The author did not attend the appeal himself. It is stated that this constitutes at the same time a violation of article 14, paragraph 5, of the Covenant.

3.6 With respect to article 14, paragraph 5, of the Covenant, counsel further states that the author did not have access to the trial transcript and a duly reasoned summing up of the judge before the appeal. He argues that this effectively denied him the right to have his conviction reviewed by a higher tribunal. [3] In this connection, reference is made to the Committee's jurisprudence in relation to the communications of Raphael Henry (communications No. 230/1987) and Leaford Smith (communication No. 282/1988), where the Committee held that in order to enjoy the effective use of his right to have conviction and sentence reviewed by a higher tribunal, the convicted person is entitled to have, within a reasonable time, access to written judgements, duly reasoned, for all incidents of appeal.

3.7 Counsel submits that, at the review of the author's classification, the non-parole period of his sentence was set at twenty years [4] and stated to commence on the date of his classification as a non-capital offender, thereby failing to take into account the five years during which he was held on death row at St. Catherine District Prison. In this connection it is submitted that the retrospective nature of Section 7 of the Offences Against the Persons (Amendment) Act 1992, which reclassifies prisoners already on death row, is contrary to both article 14 of the Covenant and the Jamaican Constitution. Counsel argues that under Section 7 of the Act the author was in fact convicted of a new offence, and should therefore have been afforded the rights of a full trial hearing. He was, however, not provided with any reasons for his classification as a non-capital offender or for the length of the sentence imposed on him, and was not given any opportunity to make any presentation concerning the classification by the single judge or to appeal against the sentence imposed on him by

that judge.

3.8 Counsel states that if the non-parole period of the author's sentence does not take into account the five years he spent on death row, it would be contrary to article 7 of the Covenant since he was held for such a substantial period as a condemned man. It is therefore requested that the Committee provides an appropriate remedy in relation to such a violation which in this case should be a recommendation that his sentence be reduced to take account of the time which the author spent in prison prior to his reclassification.

The State party's submission and counsel's comments thereon:

4.1 In its submission of 21 June 1996, the State party states that it will respond to the merits despite considering that the communication should be declared inadmissible for failure to exhaust domestic remedies since the author has not sought review of his case by the Privy Council.

4.2 With respect to the alleged violation of article 7 because the period of time which the author was required to serve, following the reclassification of his offence, did not take into account the five years spent on death row, the State party holds that the question of parole is dealt with in section 7 of the Offences Against the Persons (Amendment) Act 1992. It provides that a judge may specify the time which a person has to serve before he is eligible for parole. Where no such period is specified, a minimum of 7 years must be served before a person can be eligible for parole. The Act does not specify the criteria which should be looked at in determining the period to be served. Rather the judge, in the exercise of his discretion, would look at all the relevant circumstances before making a recommendation. There is no requirement to take the period already served into account. Further unless it can be shown that, in exercising his discretion, the judge acted unreasonably or exceeded his authority in law, it cannot be argued that there was any breach of article 7.

4.3 With respect to the allegation of a breach of article 10 due to the ill-treatment the author received while on death row, the State party contends that it needs additional information as to the actual dates or approximate dates of the incident, the names of the warders and any other information available in respect of the incident in order to investigate it.

4.4 With regard to the violation of article 14, paragraph 3 (b), since the author who was represented by a legal aid lawyer both on trial and on appeal, did not have adequate time to meet with them, the State party submits that it is its duty to provide competent legal aid counsel. However, the manner in which counsel chooses to represent his client and any failings therein cannot be attributed to the State party.

4.5 The State party rejects the allegation that there has been a breach of article 14, paragraph 5, because the author did not have access to his trial transcript and the duly reasoned summing up of the trial judge. The fact remains that legal aid counsel did represent the author before the Court of Appeal where his case was examined. Consequently, the State party rejects the view that any violation has occurred.

4.6 With respect to the purported breach of article 14, because of the retrospective nature of section 7 of the Offences Against the Persons (Amendment) Act 1992, in terms of the reclassification of offences, the State party notes that the author has alleged that this further constitutes a breach of the Jamaican Constitution. Having identified a constitutional breach it is incumbent upon the author to pursue a domestic remedy for that breach, before applying to the Committee. Consequently, this part of the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.1 In his submission of 16 August 1996, counsel rejects the State party's affirmations that an appeal to the Privy Council is still open to the author. He points out that the author has not sought to have his case reviewed by the Judicial Committee of the Privy Council because the grounds on which the Privy Council will entertain an appeal from foreign countries in criminal matters are very limited. It has been established that it will rarely act as a court of criminal appeal as it limits appeals in criminal cases to those where in its opinion some matter of constitutional importance has arisen or where a substantial injustice has occurred. Given that the Privy Council's jurisdiction is therefore extremely narrow (and far more limited than the powers of the United Nations Human Rights Committee), the Applicant has not petitioned the Privy Council for special leave to appeal against judgement of the Court of Appeal of Jamaica as this is neither an available nor an effective remedy. In accordance with the advice given in writing by leading counsel, the author has not petitioned the Privy Council.

5.2 Counsel reiterates the original claim that a violation of article 7 of the Covenant has occurred as the time the author had already served on death row when he was reclassified under the Offences Against the Persons Amendment Act was not taken into account when establishing the non parole period he would have to serve. Counsel states that since the Act does not specify the criteria which should be looked at to determine the period to be served, it seems only reasonable that a judge would at least consider the period already served, when exercising his discretion.

5.3 With respect to the allegations of beatings by warders, counsel reiterates his claim and emphasizes that the State party has been provided with all the information available to him, which should be more than enough if there was a serious wish to investigate.

5.4 With regard to the allegation that the author did not have adequate representation due to the lack of time with defence counsel in order to prepare his defence, counsel reiterates that a breach of article 14, paragraph 3 (b), has occurred even if the State party refuses to accept responsibility for it.

5.5 Counsel accepts that the author's case was reviewed by the Court of Appeal but reiterates that the author did not have access to the trial transcript and duly reasoned summing up of the judge before the appeal on 11 July 1988, and consequently, there has been a violation article 14, paragraph 5, of the covenant. [5]

Issues and proceedings before the Committee:

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

6.2 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, since he met with him only for a short time prior to the trial and failed to follow his instructions in visiting the scene of the crime and did not call a defence witness in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his professional judgment. The Committee finds that in this respect, the author has no claim under article 2, of the Optional Protocol.

6.3 With regard to the author's allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of identification evidence, in particular that the identification warning given to the jury by the judge was inadequate and that the indication of the weakness in the evidence was unclear and unsatisfactory, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. Gallimore's trial suffered from such defects. In particular, it is not apparent that the judge's instructions on how to interpret identification evidence, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible, as non substantiated, pursuant to article 2 of the Optional Protocol.

6.4 With respect to the requirement of exhaustion of domestic remedies, the Committee has noted the State party's contention that the author has failed to petition the Judicial Committee of the Privy Council for special leave to appeal. The author's failure to petition this body cannot, however, be attributed to him, as in order to petition the Judicial Committee, as a poor person, the petition must be accompanied by an affidavit in support of the petition as well as the certificate of counsel that the petitioner has reasonable grounds of appeal. The author has not petitioned the Privy Council on the advice he was given in writing by leading counsel. In this respect, the Committee wishes to recall its constant jurisprudence[6] and finds, in the circumstances of this case, that the application to the Privy Council cannot be considered an effective remedy and does not constitute a remedy which must be exhausted by the author for the purposes of the Optional Protocol. The Committee therefore considers that it is not precluded by article 5, paragraph 2 (b), from considering the communication.

6.5 With regard to the State party's contention that the communication is inadmissible for failure to exhaust domestic remedies with respect to the possibility of filing a constitutional motion for an alleged breach of the Constitution in respect of Section 7 of the Offences

Against the Persons, (Ammendment) Act 1992, the Committee recalls its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. It notes the State party's argument that a constitutional remedy was still open to the author, and observes that the Supreme Court of Jamaica has, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. The Committee, however, recalls that the State party has indicated on several occasions that no legal aid was made available for constitutional motions. It considers that, in the absence of legal aid, a constitutional motion does not constitute an available remedy which needs to be exhausted for purposes of the Optional Protocol.

6.6 The Committee declares the rest of the claims admissible and proceeds, without further delay, to an examination of the substance of these, 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 With respect to the author's claims of ill-treatment, the Committee notes that he has alleged beatings while in police custody, which the State party has failed to address altogether. Consequently, the Committee finds that due weight must be given to the allegations. With respect to the author's claim that he was beaten while in detention at St. Catherine District Prison and did not receive medical treatment for a hand injury, as a result of which he was unable to use his hand for 17 days, the Committee notes the State party's claim that it required additional information as to the events. It also notes that Counsel has stated that the author raised the issue with the prison warders. In return the State party merely requests additional information and does not seem to have investigated the matter. It also notes that the letter from counsel informing the Committee of his inability to provide more information than that already submitted was transmitted to the State party in December 1996. In the absence of further information from the State party, the Committee considers that due weight must be given to the author's complaint and accordingly finds that the treatment he received at the hands of the authorities both while in police custody and later in detention are in violation of articles 7 and 10, paragraph 1, of the Covenant.

7.2 The author further claims that his rights under article 14, paragraph 1, were violated in the reclassification procedure in which the author's offense was classified as non-capital under Section 7 of the Offenses Against the Persons (Amendment) Act 1992 and the non-parole period was set to 15 years. It is submitted that the author was not provided with any reasons for the length of the non parole-period and was not given the opportunity either to make any contribution to the procedure or to appeal against the sentence imposed on him by the single judge. Even though a life sentence is prescribed by law for offenses reclassified as non-capital, the Committee notes that the judge when fixing the non-parole period exercises discretionary power conferred on him by the Amendment Act 1992 and makes a decision which is separate from the decision on pardon and forms an essential part of the determination of a criminal charge. The Committee notes that the State party has not contested that the author was not afforded the opportunity to make any submissions prior to the decision of the judge or the opportunity to seek review of that decision. In the circumstances, the Committee finds that article 14, paragraphs 1 and 3 (d) were violated.

7.3 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground that the time the author spent on death row (5 years) and the non-parole period of 15 yearsSee fotnote 7. set by the judge together amount to cruel and inhuman punishment, the Committee recalls its constant jurisprudence that the period of time spent on death row does not per se constitute a violation of article 7. As to whether the combined effect of the five years on death row and the non-parole period of 15 years amounts to cruel and inhuman punishment, bearing in mind the nature of the offence, the Committee finds that there has been no violation of articles 7 and 10 in this regard.

7.4 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 [7] 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 interest of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in any criminal proceedings and in particular in a 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. Gallimore 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 5, in respect to the author's appeal.

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, 10, paragraph 1 and article 14, paragraphs 1, 3(d) and 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Gallimore with an effective remedy, including either reducing the non-parole period to the Ammendment Act's minimum of seven years, or reevaluating the non-parole period in a procedure that guarantees the enjoyment of the author's rights under article 14, or some other appropriate procedure. 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 ninety days, information about the measures taken to give effect to the Committee's Views. The State

party is also requested to publish the Committee's Views.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mrs. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

**An individual opinion signed by Committee member Hipólito Solari Yrigoyen is appended to the present document.

1/ The matter was not raised during the trial.

2/ No copy of the author's letter is provided.

3/ No information is provided whether the author ever asked for a copy of the trial transcript and the summing up, and the author's counsel appears to have possessed a copy.

4/ From the file it appears that in the notice to prisoner of a single judge's decision, the author was sentenced to 15 years before becoming elegible for parol.

5/ From the file it appears that the Court of Appeal examined the case and counsel for the defence said that: "having gone through the record as carefully as possible, he could find no arguable ground on behalf of the applicant".

6/ Communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

7/ 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 Kelly v. Jamaica), adopted on 17 July 1996, paragraph 9.5.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Committee member Hipólito Solari Yrigoyen (partly dissenting)

I hold a dissenting opinion on paragraph 7.1. The author has made specific allegations of ill-treatment while detained in police custody and later in St. Catherine's Prison, where he suffered an injury to his hand which rendered it unusable for 17 days; according to his counsel, the prison authorities were apprised of the fact. The State party has provided no information on these claims, merely asking the Committee for further details: this is not proper in view of its obligation under article 4, paragraph 2, of the Optional Protocol. Nor has the Committee been informed whether any investigation into the matter was mounted. In the light of the foregoing, the Committee considers that account must be taken of the author's accusations, and that the treatment the author suffered, both in police custody and in prison, violates articles 7 and 10, paragraph 1, of the Covenant.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]