

HUMAN RIGHTS COMMITTEE

McLeod v. Jamaica

Communication No 734/1997

31 March 1998

CCPR/C/62/D/734/1997

VIEWS

Submitted by: Anthony McLeod (represented by Kingsley Napley, London)

Victim: The author

State party: Jamaica

Date of communication: 16 January 1997 (initial submission)

Date of decision on admissibility and adoption of Views: 31 March 1998

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

Meeting on 31 March 1998,

Having concluded its consideration of communication No.734/1997 submitted to the Human Rights Committee by Mr. Anthony McLeod, 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 Anthony McLeod, a Jamaican national awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7, 10, paragraph 1, and 14 of the International Covenant on Civil and Political Rights. He

is represented by counsel, Mr. David Smythe of the London law firm Kigsley Napley.

The facts as presented by the author:

2.1 Mr. McLeod was arrested on 27 December 1994 and charged on 3 February 1995. He was convicted on 22 September 1995 of the murder of one Anthony Buchanan and sentenced to death. He applied for leave to appeal against conviction and sentence to the Court of Appeal of Jamaica. At the hearing on 20 March 1996, legal aid counsel informed the Court that there were no grounds he could argue. On 8 July 1996, the Court of Appeal dismissed the author's appeal. The Judicial Committee of the Privy Council denied leave to appeal on 16 January 1997.

2.2 At the trial, the case for the prosecution was that on 3 December 1994, Anthony McLeod and a group of men robbed one Alvin Green on the Rio Magno Road, parish of St. Catherine. At the same time the deceased, an off duty police officer, came along the road. In order to avoid identification, the group killed him.

2.3 The prosecution's primary evidence was the testimony of a witness, one Calvin Wright, a cousin of the accused and friend of the deceased. The witness testified at trial that the author had confessed the murder to him on Tuesday 6 December 1994. McLeod had gone to his house at 14:00 and they were taking on the verandah, when Wright brought up the subject of the death of their mutual friend Buchanan saying: " Boy what a was dem kill Anthony". The author said: "A the said thing, me hear you know". At this time the witness' brother Garnett Wright walked into the house. The author then said "Between you and me Junior (name by which the witness is also known) you know sey a mi kill him". The author then told Wright that he had gone to the country to hold up a lady, and met a man in the dark; he robbed him of a one hundred dollar bill. Then a big man had come along the road. McLeod and another man forced this man to the ground. They searched the man's bag and saw a police uniform in it. The author said he cut the man's throat because he feared identification . He used the police uniform to wrap it around the face of the deceased and set it on fire.

2.4 The brother of the witness, Garnett Wright gave evidence to the effect that when he arrived at home on Tuesday 6 December 1994, and had seen the author speaking to his brother. Calvin Wright told his aunt of the conversation and reported it to the police. The witness admitted in cross-examination that he had heard about the death of the policeman on the radio, but denied that he had made up the confession as a result of what he had heard on the radio. He denied fabricating a case against the author because of ill feeling between the families.

2.5 Alvin Green gave evidence that on 3 December 1994, at about 8 pm, he was robbed of a one hundred dollar note by several men who held him up with a gun on the Rio Magno Road. He was unable to identify the men because of the darkness.

2.6 The prosecution further relied on medical evidence indicating that the cause of death of the deceased had been multiple injuries caused by a sharp instrument like a knife. There were first and second degree burns on the whole of the right side of the body, consistent with the assumption that the deceased was first killed then burned having used what appeared to be a policeman's uniform to set the body a light.

2.7 On trial, Mr. McLeod stated that he had not been in the area at the time of the crime; he admitted having gone there, on a later day. He claimed that he was set up because of a family feud. His father testified to the effect that a family feud between his family and that of the witness indeed existed.

The complaint:

3.1 Counsel argues that the unsatisfactory aspects of the trial, in particular the misdirection by the judge to the jury on joint enterprise, the failure to give proper directions regarding evidence in general and, in particular the medical evidence and the confession, amount to a violation of article 14, paragraph 1.

3.2 It is contended that defence counsel only met with the author the day before the appeal hearing, and that he failed to take any instructions from him. At the hearing and without instructions defence counsel failed to advance and argue these trial defects before the Court of Appeal. The author by reason of the inadequate access to a lawyer was denied adequate preparation of his appeal, in violation of article 14, paragraphs, 1, 3 (d) and 5.

3.3 Counsel contends that defence counsel's failure to call the author's sister as a witness during the trial constituted a breach of article 14, paragraph 3 (e), of the Covenant.

3.4 It is further asserted that the detention regime at St. Catherine's District Prison constitutes a violation of articles 7 and 10, paragraph 1. Reference is made to reports by Human Rights Watch and Amnesty International, where it was observed, inter alia, that the prison holds more than twice the capacity for which it was constructed in the nineteenth century, and that the facilities provided by the State are deficient: no bedding or furniture in the cells; no sanitation; no artificial lighting and only small air vents through which natural light can enter; limited employment opportunities for prisoners; and no doctor permanently attached to the prison, so that medical problems are generally treated by warders who receive very limited training. It is submitted that the particular impact of these general conditions upon the author are that he remains confined in a 2 metre square cell for twenty-three hours each day. He is isolated from other prisoners for most of the day, spends most of his waking hours in enforced darkness and has little to keep him occupied. He is not permitted to work or to educate himself.

State party's comments on admissibility and the merits:

4.1 In a submission of 17 March 1997, the State party waives the right to address the admissibility of the communication and addresses the merits of the author's claims. On the alleged violation of article 14, paragraph 1, it argues that the way in which the judge directed the jury on the issue of joint enterprise, medical evidence to corroborate a confession, and the relevance of the evidence of a witness, following the Committee's jurisprudence is a matter which was properly left to the Court of Appeal to evaluate.

4.2 On the alleged violation of article 14 paragraphs, 3 (d) and 5, because of the conduct of legal aid counsel on appeal, the State party contends that it cannot be held accountable for these actions of counsel. Reference is made to the Committee's jurisprudence. With respect to the alleged violation of article 14, paragraph 3 (e), because of the failure of defence counsel to call an alibi witness, the

State party relies on the same reasoning to reject any breach of the Covenant.

Admissibility consideration and examination of merits:

5.1 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in January 1997, the author has exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has waived its right to address the issue of admissibility of the complaint and has proceeded to comment on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes.¹ The Committee further notes that counsel for the author has agreed to the examination on the merits of the case at this state.

5.2 The Committee finds that no obstacles to the admissibility of the communication exist and accordingly proceeds, without further delay, to an examination of the substance of these 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.

6.1 The author claims that he was not properly represented by his legal aid counsel on trial, as counsel did not call an alibi witness, in violation of article 14, paragraph 3 (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 nothing in the record to suggest that counsel was not using his best judgment; he did call one other alibi witness, (the author's father). The Committee considers that there is no basis for holding the State party accountable for counsel's actions, and consequently finds that there has been no violation of article 14, paragraph 3 (e), of the Covenant.

6.2 The author alleges that there were irregularities in the court proceedings, improper instructions from the judge to the jury on the issues of joint enterprise, medical evidence to corroborate a confession, and the relevance of the evidence of a witness. 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, 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 suggest that the issues raised by the author may have pointed to deficiencies in the evidence. On examination, however, it does not appear to the Committee that any of these alleged deficiencies were arbitrary or that they violated the obligation of impartiality.

6.3 With regard to the author's claim of deficient representation on appeal, he claims that although consulted before the appeal he was not aware that his legal aid representative would argue no grounds of appeal and that this was not in accordance with his instructions to counsel. The State party does not refute this claim but contends that it is not accountable for the actions of counsel. The Committee notes from the information before it that the Court of Appeal examined the case even

though counsel had conceded he could find no grounds to argue. The Committee is of the view, however, that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's rights under article 14, paragraph 3 (b) and (d), have been violated.

6.4 With regard to the author's claim that his conditions of detention at St. Catherine's District Prison, where he has been held on death row since his conviction, constitute a violation of articles 7 and 10, paragraph 1, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he is confined to a 2 metre square cell for twenty-three hours each day, and remains isolated from other men for most of the day. He spends most of his waking hours in enforced darkness and has little to keep him occupied. He is not permitted to work or to undergo education. The State party has not refuted these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person contrary to article 10, paragraph 1, of the Covenant.

6.5 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, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the author was denied an opportunity to appeal his case since his counsel did not inform him that he was not going to forward any grounds of appeal. This means that the final sentence of death in Mr. McLeod's case was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

7. 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 article 10, paragraph 1; and 14 paragraph 3(b) and (d), and consequently of article 6 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing a new appeal or should the State party not be in a position to comply with this recommendation, his release.

9. 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 it continues to be subject to the application of the Optional protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subjected 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 following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia.

1/ See Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, paragraph 7.4.

[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 Mr. Martin Scheinin

While I associate myself with the Committee's views as regards all the findings on violations of the substantive articles of the Covenant, I wish to clarify an issue related to the obligation of the State party to remedy the violations of the Covenant to the author.

The practice of the Committee in relation to the remedy has undergone a process of evolution during the twenty years of the Committee's work under the Optional Protocol. It is a legal obligation of a State party under article 2, paragraph 3, of the Covenant to ensure that any person whose rights protected by the Covenant have been violated "shall have an effective remedy". In addition to this general provision, article 9, paragraph 5, establishes a right to compensation for arrest or detention unlawful either under the Covenant or domestic law. Both of these obligations stem directly from the Covenant and not from the Committee's mandate to issue, when performing its functions under the Optional Protocol, interpretations or recommendations on what measures would in each case constitute an effective remedy. In its very first views the Committee did not specify the nature of the remedy even though the case clearly fell under article 9, paragraph 5^a. However, already in its second case the Committee specified that compensation was the appropriate form of remedy in a case where a violation of article 9 was established^b. In later years the Committee has recommended compensation as the remedy or as a part of the remedy in many cases in which a violation of only other articles than article 9 have been found. The first such recommendations of compensation were issued in the Committee's views adopted in its 15th session (1982) in the cases of Pedro Pablo Camargo v. Colombia (Communication No. 45/1979) and Mirta Cubas Simones v. Uruguay (Communication No. 70/1980), after finding a violation of article 6, and articles 10 and 14, respectively.

It is to be expected that the evolution towards more specific pronouncements on the remedy will continue. It should, for instance, be welcomed by the Committee that authors or counsel specify,

when sending submissions to the Committee, the amount of compensation they consider appropriate for the violation suffered, and that State parties present their observations on such claims when answering to communications. This would enable the Committee to take the next logical step in addressing the issue of remedies, namely, to specify the amount and currency of compensation in those cases where compensation is seen by the Committee to be an appropriate remedy. This would strengthen both the nature of the Optional Protocol procedure as an international recourse to justice and the Committee's role as the internationally authoritative interpreter of the Covenant.

In death penalty cases the Committee has after finding a violation of the Covenant often, but not always, recommended either commutation or release as an effective remedy. Both of these remedies make it clear that when a person has been sentenced to death in violation of the Covenant or treated contrary to the provisions of the Covenant while awaiting execution, the remedy should include an irreversible decision not to implement the death penalty. The Committee has been particularly clear and consistent on this point when the requirements of a fair trial under article 14 have been found to be violated. In several cases, including the present one, the Committee has explicitly stated that the imposition of the death penalty after a procedure that does not meet the requirements of article 14 entails a violation of the right to life, i.e. article 6 of the Covenant.

In cases involving a violation of articles 7 and/or 10 of the Covenant in relation to persons on death row, the Committee has not been consistent in formulating its specific recommendations as to the remedy. This cannot, of course, alter the main rule that the victim is entitled to an effective remedy under article 2, paragraph 3, of the Covenant. In the final paragraph of the views in its most important case related to the death penalty, the case of *Earl Pratt and Ivan Morgan v. Jamaica* (Communication Nos. 210/1986 and 225/1987) the Committee gave a clear and convincing answer to the question what constitutes "effective remedy" to a person awaiting execution:

"Although in this case article 6 is not directly at issue, in that capital punishment is not per se unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence." (italics added)

In the light of what has been said above the pronouncement in paragraph 8 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would mean either a new consideration of the appeal or the author's release. In the specific context of the present views being issued after Jamaica's withdrawal from the Optional Protocol procedure has taken effect in accordance with article 12 of the Optional Protocol, I would have seen it more appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new appeal or release. This would have made it more clear than the Committee's formulation of paragraph 8 of the views that an "effective remedy" in a case in which a violation of article 10, paragraph 1, article 14, paragraph 3 (b) and (d), and of article 6 is found must include, first and foremost, absolute protection of the victim against execution. As the

Committee's views in Pratt and Morgan suggest, this must in my opinion be the understanding of what constitutes an effective remedy in every case where a violation of the Covenant is established in relation to a person awaiting execution. To a person on death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.

Notes:

a/ see the views in *Moriana Hernández Valentini de Bazzano et al. v. Uruguay*, Communication No. 5/1977.

b/ see, *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 9/1977.