

## HUMAN RIGHTS COMMITTEE

### Lubuto v. Zambia

Communication No. 390/1990

31 October 1995

CCPR/C/55/D/390/1990/Rev.1

### VIEWS

*Submitted by: Bernard Lubuto*

*Victim: The author*

*State party: Zambia*

*Date of communication: 1 January 1990 (initial submission)*

*Date of decision on admissibility: 30 June 1994*

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

Meeting on 31 October 1995,

Having concluded its consideration of communication No. 390/1990, submitted to the Human Rights Committee by Mr. Bernard Lubuto 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 and the State party,

Adopts its

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

1. The author of the communication is Bernard Lubuto, a Zambian citizen, currently awaiting execution at the Maximum Security Prison in Kabwe, Zambia.

### The facts as presented by the author:

2.1 The author was sentenced to death on 4 August 1983 for aggravated robbery, committed on 5 February 1980. On 10 February 1988, the Supreme Court of Zambia dismissed his appeal.

2.2 The evidence led by the prosecution during the trial was that, on 5 February 1980, the author and two co-accused robbed a certain Marcel Joseph Mortier of a motor vehicle (a Datsun vanette). One of the co-accused held Mr. Mortier at gun-point, while stepping into his car. The author and the other co-accused were standing nearby in the bushes. The man with the gun fired shots at one of Mr. Mortier's labourers, who had been in the car and tried to run away from the spot. The man then drove off with the car, with Mr. Mortier still in it. Mr. Mortier then threw himself out of the vehicle and fell on the ground. Gunshots were fired at him, but did not hit him. The author was later identified at an identification parade and the prosecution produced a statement signed by the author, in which he admits his involvement in the robbery.

2.3 The author testified during the trial that he had been arrested by the police in the evening of 4 February 1980, after a fight in a tavern. He was kept in the police station overnight; in the morning of 5 February, when he was about to be released, he was told that a robbery had taken place. He was taken to an office, where one of Mr. Mortier's labourers said that he answered the description of the robber. The author was then returned to the cells, but kept denying any involvement in the robbery. On 7 February 1980, he participated in an identification parade and was identified as one of the robbers by the labourer whom he had met earlier at the police station.

2.4 The author's testimony was rejected by the Court on the basis of the entries in the police register, which showed inter alia that the author was arrested late in the evening of 5 February 1980.

### The complaint:

3.1 The author claims that the trial against him was unfair, since the judge accepted all evidence against him, although a careful examination would have shown discrepancies in the statements made by the witnesses. He further claims that his legal aid lawyer advised him to plead guilty and that, when he refused, the lawyer failed to cross-examine the witnesses. The author claims that the death sentence imposed on him is disproportionate, since no one was killed or wounded during the robbery.

3.2 The author claims that he was tortured by the police to force him to give a statement. He alleges that he was beaten with a hose pipe and cable wires, that sticks were put between his fingers and that his fingers were then hit on the table, and that a gun was tied with a string to his penis and that he was then forced to stand up and walk. The allegations were produced at the trial, but the judge considered, on the basis of the evidence, that the author's statement to the police was given freely and voluntarily.

3.3 Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 6, 7 and 14 of the Covenant.

The Committee's admissibility decision:

4.1 During its 51st session, the Committee considered the admissibility of the communication. It noted with concern the lack of cooperation from the State party, which had not submitted any observations on admissibility.

4.2 The Committee considered inadmissible the author's claims concerning the conduct of the trial. It recalled that it is, in principle, not for the Committee to evaluate facts and evidence in a particular case and it found that the trial transcript did not support the author's claims. In particular, it appeared from the trial transcript that author's counsel did in fact cross-examine the witnesses against the author.

4.3 The Committee considered that the length of the proceedings against the author might raise issues under article 14, paragraph 3(c), and, as regards the appeal, article 14, paragraph 5, of the Covenant. The Committee further considered that the author's claim that the imposition of the death sentence was disproportionate, since no one was killed or wounded during the robbery, might raise issues under article 6, paragraph 2, of the Covenant, and that his claim that he was tortured by the police to force him to give a statement might raise issues under article 7 of the Covenant which should be examined on the merits.

4.4 Consequently, on 30 June 1994, the Human Rights Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7 and 14, paragraphs 3(c) and 5, of the Covenant. The State party was requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

The State party's submission on the merits and author's comments thereon:

5.1 By submission of 29 December 1994, the State party acknowledges that the proceedings in Mr. Lubuto's case took rather long. The State party requests the Committee to take into consideration its situation as a developing country and the problems it encounters in the administration of justice. It is explained that the instant case is not an isolated one and that appeals in both civil and criminal cases take considerable time before they are disposed of by the courts. According to the State party, this is due to the lack of administrative support available to the judiciary. Judges have to write out every word verbatim during the hearings, because of the absence of transcribers. These records are later typed out and have to be proofread by the judges, causing inordinate delays. The State party also refers to the costs involved in preparing the court documents.

5.2 The State party further points out that crime has increased and the number of cases to be decided by the courts have multiplied. Due to the bad economic situation in the country, it has not been possible to ensure equipment and services in order to expedite the disposal of

cases. The State party submits that it is trying to improve the situation, and that it has recently acquired nine computers and that it expects to get 40 more.

5.3 The State party concludes that the delays suffered by the author in the determination of his case are inevitable due to the situation as explained above. The State party further submits that there has been no violation of article 14, paragraph 5, in the instant case, since the author's appeal was heard by the Supreme Court, be it with delay.

5.4 As regards the author's claim that the imposition of the death sentence was disproportionate since no one was killed or wounded during the robbery, the State party submits that the author's conviction was in accordance with Zambian law. The State party explains that armed robberies are prevalent in Zambia and that victims go through a traumatic experience. For this reason, the State party sees aggravated robbery involving the use of a fire arm as a serious offence, whether or not a person is injured or killed. Finally, the State party submits that the author's sentence was pronounced by the competent courts.

5.5 Furthermore, the State party points out that under articles 59 and 60 of the Constitution, the President of the Republic of Zambia can exercise the prerogative of mercy. The author's case has been submitted and a decision is awaited. The State party further states that the delay in the hearing of the appeal and the fact that no one was injured in the attack are taken into account by the Advisory Committee on the exercise of the Prerogative of Mercy.

5.6 With regard to the author's claim that he was tortured by the police in order to force him to give a statement, the State party submits that torture is prohibited under Zambian law. Any victim of torture by the police can seek redress under both the criminal and civil legal systems. In this case, the author did not make use of any of these possibilities, and the State party suggests that, had the author's allegations been true, his counsel at the trial would have certainly advised him to do so.

5.7 The State party further explains that, if an accused raises during trial that he was tortured by the police in order to extract a confession, the Court is obliged to conduct a "trial within a trial" to determine whether the confession was given voluntarily or not. In the author's case, such a trial within a trial was held, but it appeared from the testimonies given that the accused claimed that they were merely ordered to sign a statement without having made a confession. The Court then continued with the main trial, and the question of whether the author made a statement or not was decided upon the basis of all the evidence at the end of the trial. It appears from the trial transcript that the judge concluded that the author had not been assaulted. He based his conclusion on the fact that the investigating magistrate, before whom the author and his co-accused appeared on 8 February 1980, had not recorded any injuries or marks of beating nor had the author complained to him about maltreatment; he further took into account discrepancies in the author's testimony as well as evidence led by the police officers that the accused had been cooperative. There was no record of the author having been medically treated for injuries which might have been caused by maltreatment.

5.8 Finally, the State party confirms that, pursuant to the Committee's request, the appropriate authorities have been instructed not to carry out the death sentence against the

author while his case is before the Committee.

6. In his comments on the State party's submission, the author explains that he first appeared before a judge on 4 July 1981, and that the trial was then adjourned several times because the prosecution was not ready. At the end of July 1981, the case was transferred to another judge, who did not proceed with it, and then only on 22 September 1982, again before a different judge, the trial actually started.

#### Issues and proceedings before the Committee:

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author was convicted and sentenced to death under a law that provides for the imposition of the death penalty for aggravated robbery in which firearms are used. The issue that must accordingly be decided is whether the sentence in the instant case is compatible with article 6, paragraph 2, of the Covenant, which allows for the imposition of the death penalty only "for the most serious crimes". Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the Covenant.

7.3 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3(c).

7.4 As regards the author's claim that he was heavily beaten and tortured upon arrest, the Committee notes that this allegation was before the judge who rejected it on the basis of the evidence. The Committee considers that the information before it is not sufficient to establish a violation of article 7 in the author's case.

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 a violation of articles 6, paragraph 2, and 14, paragraph 3(c), of the International Covenant on Civil and Political Rights.

9. The Committee is of the view that Mr. Lubuto is entitled, under article 2, paragraph 3(a), of the Covenant to an appropriate and effective remedy, entailing a commutation of

sentence. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, 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.

## **Appendix**

### **Individual opinion by Mr. Nisuke Ando, member of the Human Rights Committee, with respect to the Committee's Views adopted on 31 October 1995**

I do not oppose the Committee's Views in the present case. However, with respect to the statement in the Views that "use of firearms did not produce the death or wounding of any person", I would like to add the following:

Certain categories of acts are classified as "crimes" because they create a grave danger which may result in death or irreparable harm to many and unspecified persons. Such crimes include bombing of busy quarters, destruction of reservoirs, poisoning of drinking water, gassing in subway stations and probably espionage in war-time. In my view, the imposition of the severest punishment, including death penalty where applicable, could be justified against these crimes, even if they do not result for one reason or another in the death of or injury to any person.

Nisuke Ando

[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.]