

## HUMAN RIGHTS COMMITTEE

### Smith and Stewart v. Jamaica

Communication N° 668/1995

8 April 1999

CCPR/C/65/D/668/1995\*

### VIEWS

*Submitted by: Errol Smith and Oval Stewart (represented by Ms. Natalia Schiffrin of Interights)*

*Alleged victim: The author*

*State party: Jamaica*

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

Meeting on 8 April 1999

Having concluded its consideration of communication No.668/1995 submitted to the Human Rights Committee by Messrs. Errol Smith and Oval Stewart 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 the following:

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

1. The authors of the communication are Errol Smith and Oval Stewart, two Jamaican citizens currently detained at South Rehabilitation Centre, Kingston, Jamaica. They claim to be victims of violations by Jamaica of article 14, paragraphs 1, 3(c), 3(d), 3(e) and 5, of the International Covenant on Civil and Political Rights. In addition, Oval Stewart claims to be a victim of violations of articles 7 and 10, paragraph 1. They are represented by Natalia Schiffrin of Interights.

## The facts as submitted by the authors

2.1 The authors were convicted for murder and sentenced to death on 8 November 1982 by the Home Circuit Court of Jamaica. The authors' appeals were dismissed by the Jamaican Court of Criminal Appeal on 14 December 1984. On 17 July 1986, the Judicial Committee of the Privy Council dismissed their appeals. The authors have not sought a constitutional motion to the Jamaican Supreme Court because they were denied legal aid for such motions. On 15 February 1991, Oval Stewart's death sentence was commuted to life imprisonment. Following the enactment of Offences Against the Person (Amendment) Act 1992, Errol Smith's death sentence was also commuted.

2.2 The case for the prosecution was that on 30 June 1980 in the evening, two men, Owen Bailey and Rohan Francis, were moving a bed. A group of men were present nearby, including the two authors, and started to fire shots at Bailey and Francis, who immediately fled. Owen Bailey ran back into his house, where his father was, and where he was shot shortly after, while Francis hid at the back of the house. It is stated that Rohan Francis made a statement to the police on the night of the murder, but that the statement was subsequently lost and a second statement was only taken three months later. In this statement, Francis allegedly gave about six names, including those of Smith and Stewart.

2.3 At the trial, Rohan Francis identified the authors as members of the group which had approached him on the day of Owen Bailey's murder. Rohan Francis testified that Errol Smith had a gun and that he had heard him say that Owen Bailey had to be killed. Mr Herman Bailey, the deceased's father, testified that he could not see the man with the gun who shot his son because he was standing behind a door, and could therefore not identify the authors.

## The complaint

3.1 The authors claim that they are victims of a violation of article 14, paragraphs 1 and 3(e), of the Covenant on two grounds. Firstly, the authors state that the testimony of the prosecution's main witness, Rohan Francis, was inaudible and incomprehensible, and thus imply that the conviction was wrongful.

3.2 Secondly, the authors state that the prosecution failed to produce the first statement given by the prosecution's main witness, thereby prejudicing the authors' ability to impeach his testimony. It is stated that Mr Francis testified that in his first statement given on the night of Owen Bailey's death, he did not give the police the names of who killed Owen Bailey, and that he thereafter did not identify the authors until three months later. The authors argue that the first statement was essential, as it would have thrown serious doubts on Mr Francis' trial identification of, inter alia, Mr. Smith as the man carrying the gun. Furthermore, counsel argues that without knowing what Mr. Francis said to the police when events were freshest in his memory, it is impossible to say what other opportunities for cross-examination the authors were deprived of.

3.3 The authors claim to be victims of a violation of article 14, paragraph 3(d), on the ground

of inadequate legal assistance. It is submitted that the authors' legal aid lawyers failed to subject the prosecution's case to meaningful adversarial testing as they failed both to call any witnesses and to move for a mistrial or otherwise object to the inaudibility of the prosecution's main witness, Rohan Francis. In this regard, Mr. Stewart also claims to be a victim of a violation of article 14, paragraph 3(b), as he was not afforded adequate opportunity to prepare his defence together with his legal aid lawyer. It is submitted that their first meeting was on the day of the preliminary hearing, and that the lawyer subsequently only visited him once before the trial.

3.4 Mr. Smith claims to be a victim of article 14, paragraphs 3(d) and 5, as his lawyer failed to argue his case before the Court of Appeal. It is submitted that the lawyer failed to show up in court personally and that he merely asked the co-defendant's lawyer to convey to the court that he had "considered the notes of evidence and the summing up in so far as it affected Smith, and that having done so he found nothing on which he could properly base an application for leave to appeal". Reference is made to the jurisprudence of the Committee.

3.5 The authors also claim that they are victims of a violation of article 14, paragraphs 3(c) and 5, on the ground that, although they appealed to the Court of Appeal immediately after their conviction and sentence in November 1982, the Court of Appeal did not deliver its judgement in the matter for two full years, until December 1984. It is submitted that this delay was entirely attributable to the State party.

3.6 Mr. Stewart claims that he was subjected to inhuman and degrading conditions on death row at St Catherine's District Prison in violation of articles 7 and 10, paragraph 1, of the Covenant. It is submitted that the sanitary conditions are dreadful, that the nutritional quality and quantity of the food is grossly inadequate and that the author was denied access to non-legal correspondence. It is further stated that the author was subjected to inadequate medical care, causing him to lose the sight in one of his eyes. The author has not sought a remedy through the Ombudsman because he does not believe that such a complaint would have any effect.

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

4.1 In its submission of 15 January 1996, the State party, "in order to expedite the examination of the communication", offers its comments also on the merits.

4.2 With regard to the alleged violations of article 14 on the ground of the alleged inaudibility of the main prosecution's witness and on the ground that the prosecution misplaced the first police statement of this witness, the State party submits that these matters relate to facts and evidence and that they therefore fall outside the scope of issues to be dealt with by the Committee.

4.3 With regard to the alleged violation of article 14, paragraph 3(d), on the ground of inadequate legal assistance for both authors before the Home Circuit Court and for Mr. Smith also before the Court of Appeal, the State party notes that these complaints concern the manner in which the legal aid lawyers chose to conduct their case, and submits that this

is not a matter for which the State party can be held responsible. It is argued that the State party's obligation under the Covenant is to appoint competent legal aid counsel, but that the manner in which they conduct their case thereafter cannot be attributed to the State party.

4.4 With regard to the alleged violation of article 14, paragraphs 3(c) and 5, on the ground of delay between the conviction of the authors and the dismissal of their appeal, the State party states that it does not regard the period of two years which lapsed as undue delay, and submits that there has been no breach of the Covenant.

4.5 As to Mr. Stewart's claim that article 10, paragraph 1, was breached because he was denied medical attention and thereby lost vision in one eye, the State party states that this allegation will be investigated, and that the results of the investigation will be sent to the Committee as soon as they are ready.

5.1 In her submission of 1 March 1996, counsel states that the authors agree to a joint examination of the admissibility and the merits of the communication.

5.2 With regard to the authors' claim of a violation of article 14, paragraphs 1 and 3(e), because the prosecution's main witness was inaudible, counsel notes the State party's assertion that this relates to the facts of the criminal case and that the claim therefore should not be dealt with by the Committee. Counsel argues that these allegations in the present case go to the very basis of the right to a fair trial and should be properly considered by the Committee. Counsel notes that the State party does not dispute that a vast amount of the testimony of the witness could not be understood by the jury, and submits that the facts amount to a violation of the fair trial guarantees of article 14.

5.3 In relation to the missing statement from the main prosecution witness, counsel reiterates that the witness failed to name the authors as those responsible for the murder in the statement, even though it was given on the same night. It is submitted that, in the view of the influence this missing statement could have had on the court proceedings, the failure to produce it constitutes a violation of article 14, paragraph 3(e). Reference is made to the jurisprudence of the Committee<sup>1</sup>.

5.4 Counsel notes the State party's response to the alleged violations of article 14, paragraph 3(b) and (d), where it held that the manner in which legal aid counsel conduct their cases cannot be attributed to the State party. Counsel submits that this assertion is wrong in law and argues that while it is well settled that the Committee will not second-guess the professional judgement of assigned counsel, the Committee has made it clear that the State party can and will be held liable for the ineffective conduct of counsel. With regard to the present case, counsel submits that the complete lack of preparation and strategy and the total apathy on counsel's part in calling witnesses as well as in making objections creates a presumption of inequality of arms. Reference is made to the jurisprudence<sup>2</sup> of the Committee.

5.5 Specifically to Mr. Smith's claim under these provisions, counsel reiterates that his lawyer failed to argue his case before the Court of Appeal, and submits that this decision

taken by counsel brings this case in line with a number of cases<sup>3</sup> where the Committee has held abandoned appeals to be violations of article 14, paragraph 3(d).

5.6 With regard to Mr. Stewart's claim under article 14, paragraph 3(b), that he only met with his lawyer once for a few minutes prior to the trial, counsel reiterates that this amounts to a violation of this provision. Reference is made to the jurisprudence of the Committee<sup>4</sup>.

#### 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 notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the alleged violation of article 14 on the ground of deficiencies in the testimony of the main prosecution witness, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case, as in this case was done both by the trial court and the Court of Appeal. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 The Committee declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 In regard to the alleged violation of article 14, paragraph 3(b), it transpires that the witness Rohan Francis conceded in his evidence that in his original police statement he had not named the alleged murderers of Mr. Bailey and that he was examined by the judge on this point. In the summing up to the jury, the judge made mention of this point too. In these circumstances, the Committee cannot find that the failure to produce to the defence Francis' original police statement, which was apparently mislaid and was not part of the prosecution's case, constituted a violation of article 14, paragraph 3(b).

7.2 The authors claim to be victims of a violation of article 14, paragraph 3(d), on the ground that their legal assistance before the Home Circuit Court was inadequate. The author Stewart

also alleges a violation of article 14, paragraph 3(b), as he was not afforded sufficient time with his legal aid lawyer to prepare for his trial. With regard to the quality of defence, it is submitted that the legal aid lawyers failed to challenge the prosecution's case in an appropriate manner as they failed both to call any witnesses and to move for a mistrial or otherwise object to the inaudibility of the prosecution's main witness. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time be granted to the accused and their counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. The Committee notes that neither of the authors nor their counsel requested an adjournment and finds that there is nothing in the file which suggests that it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

7.3 Mr. Smith has also claimed to be a victim of article 14, paragraphs 3(d) and 5, on the ground that his lawyer failed to argue his case before the Court of Appeal, and instead asked the co-defendant's lawyer to convey to the court that he had found nothing on which he could base an application for leave to appeal. On the basis of this message, the Court of Appeal refused Mr. Smith's application without further consideration. The State party does not dispute these facts, but contends that it is not responsible for counsel's conduct of the case. The Committee recalls its jurisprudence<sup>5</sup> that the right to representation under article 14, paragraph 3(d), entails that 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 judgment, 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 informed the accused. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. In the present case, it does not appear that the Court of Appeal ascertained that the author was duly informed, and the Committee concludes that there has been a violation of article 14, paragraphs 3(d) and 5, on this ground.

7.4 The authors have claimed that the period of 25 months which lapsed from their conviction to the dismissal of their appeal in the Court of Appeal constitutes a violation of article 14, paragraphs 3(c) and 5. The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, particularly in capital cases, and notes that the State party has merely argued that such a period does not amount to a violation of the Covenant, without offering any explanation for the delay. In the absence of any circumstances justifying the delay, the Committee finds that there has been a violation of article 14, paragraph 3(c), in conjunction with paragraph 5.

7.5 As to Mr. Stewart's claim of a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that Mr. Stewart has made specific allegations. He states that

the sanitary conditions of the prison are dreadful, that the quality and quantity of the food is grossly inadequate and that he has been denied access to non-legal mail. Furthermore, he states that he has been subjected to inadequate medical attention, which has caused the loss of his sight in one eye. The State party has not refuted these specific allegations, and has not, in spite of its explicit promise and the principle in article 4, paragraph 2, of the Optional Protocol, forwarded results of the investigation announced in 1996 into the author's allegations that he was denied medical attention. The Committee finds that these circumstances disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

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 article 14, paragraphs 3(c), 3(d) and 5, of the International Covenant on Civil and Political Rights in the case of Mr. Smith, and articles 7, 10, paragraph 1, and 14, paragraph 3(c), in conjunction with paragraph 5, of the International Covenant on Civil and Political Rights in the case of Mr. Stewart.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Smith and Mr. Stewart with effective remedies, including compensation for both of them and the release of Mr. Smith.

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.

---

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, and Mr. Roman Wieruszewski.

1/ Communication Nos. 464/1991 & 482/1991, Garfield Peart and Andrew Peart v. Jamaica, Views adopted on 19 July 1995.

2/ Communication No. 338/1988, Leroy Simmonds v. Jamaica, Views adopted on 23 October 1992; Communication No. 353/1988, Lloyd Grant v. Jamaica, Views adopted on

31 March 1994; Communication No. 596/1994, Dennie Chaplin v. Jamaica, Views adopted on 2 November 1995.

3/ Communication No. 250/1987, Carlton Reid v. Jamaica, Views adopted on 20 July 1990; Communication No. 253/1987, Paul Kelly v. Jamaica, Views adopted on 8 April 1991; Communication No. 353/1988, Lloyd Grant v. Jamaica, Views adopted on 31 March 1994; Communication No. 356/1989, Trevor Collins v. Jamaica, Views adopted on 25 March 1993.

4/ Communication No. 282/1988, Leaford Smith v. Jamaica, Views adopted on 31 March 1992; Communication No. 283/1988, Aston Little v. Jamaica, Views adopted on 1 November 1991; Communication No. 355/1989, George W. Reid v. Jamaica, Views adopted on 8 July 1994.

5/ See, inter alia, the Committee's Views in Communications No. 537/1993, Paul Anthony Nelly v. Jamaica, adopted on 17 July 1996, para. 9.5; 734/1997, Anthony McLeod v. Jamaica, adopted on 31 March 1998, para. 6.3; 750/1997, Silbert Daley v. Jamaica, adopted on 31 July 1998, para 7.5.

[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.]