

HUMAN RIGHTS COMMITTEE

Peart and Peart v. Jamaica

Communications Nos. 464/1991 & 482/1991

19 July 1995

CCPR/C/54/D/464/1991 & 482/1991*

DEAL JOINTLY AND VIEWS

Submitted by: Garfield Peart and Andrew Peart [represented by counsel]

Victims: The authors

State party: Jamaica

Date of communications: 17 July 1991 and 12 November 1991 (initial submissions)

Decision on admissibility: 17 March 1994 and 19 March 1993

On 19 July 1995, the Human Rights Committee joined the consideration of communications Nos. 464/1991 and 482/1991 and adopted its Views thereon under article 5, paragraph 4, of the Optional Protocol.

A. Decision to deal jointly with two communications

The Human Rights Committee,

Considering that communications Nos. 464/1991 and 482/1991 refer to closely related events affecting the authors,

Considering further that the two communications can appropriately be dealt with together,

1. Decides, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these communications;
2. Further decides that this decision shall be communicated to the State party and the authors of the communications.

B. Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

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

Meeting on 19 July 1995,

Having concluded its **consideration** of communications Nos. 464/1991 and 482/1991, submitted to the Human Rights Committee by Messrs. Garfield Peart and Andrew Peart 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 authors of the communications, their counsel and the State party,

Adopts its

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

1. The authors of the communications are Garfield and Andrew Peart, Jamaican citizens, at the time of submission of the communications awaiting execution at St. Catherine District Prison, Jamaica¹. They claim to be victims of a violation by Jamaica of articles 2, 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors:

2.1 Andrew Peart was arrested on 14 July 1986 and charged with the murder, on 24 June 1986, of one Derrick Griffiths. Garfield Peart was arrested on 5 March 1987, in connection with the same murder. On 26 January 1988, after a trial lasting six days, the two brothers were convicted and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal dismissed their appeal on 18 October 1988. On 6 June 1991, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences Against the Person (Amendment) Act 1992.

2.2 During the trial, the principal witness for the prosecution, Lowell Walsh, who at the time of the trial was 15 years old, testified that he had been watching a bingo game, around 9 p.m. on 24 June 1986. Among those present was the deceased. According to Walsh, Andrew came up to the group and called Griffiths. Griffiths, Walsh and another person, Horace Walker, together with Andrew then went to the latter's house. On arrival there, Walsh testified that he saw Garfield, whom he had known since childhood, sitting outside in the yard. It was night, and there was no lighting. He then witnessed what appeared to be an ambush; an

armed man told Griffiths not to move, Andrew wrestled Griffiths to the ground, while Garfield threatened him with a gun. Walsh and Horace ran indoors to hide. Walsh testified that he heard gunshots and a voice saying "make sure he is dead". Walsh was then discovered by Andrew, who tied him up and threatened him. During a further incident between the two brothers and a newcomer, Walsh managed to escape.

2.3 The authors' defence was based on alibi. Upon his arrest, Garfield had immediately denied involvement and said that he had been at the cinema with friends when the incident took place. At the trial, he made an unsworn statement from the dock, repeating what he had told the arresting officer. He added that, while at the cinema, he had received a message from his child's mother that a shooting had taken place at his house. His alibi was supported by the sworn evidence of Claudette Brown, who said that she had been with the author at the cinema, and by Pamela Walker, who confirmed having given the message to the author at the cinema. In an unsworn statement from the dock, Andrew contended that, on the night of the murder, he was in the company of his girlfriend until 11 p.m., and that he had been framed.

The complaint:

3.1 The authors claim that the trial against them was unfair. They point out that they were convicted upon the uncorroborated evidence given by Walsh. They submit that the trial transcript contains a suggestion that the other eyewitness, Walker, was not called because his evidence would not have supported that of Walsh. It is submitted that Walsh made a written statement to the police on the night of the incident which contained material discrepancies from the evidence which he gave at the trial. This statement was not released to the defence, even though under Jamaican law the prosecutor is obliged to provide the defence with a copy of any such statement. During the trial, the authors' lawyer applied to see the original statement, but the judge refused the application. A copy of the statement first came into the possession of the authors' counsel in February 1991. In the statement, Walsh does not identify Garfield as one of the attackers, and mentions another person as the one who shot Griffiths. It is submitted that without hearing evidence as to the contents of the statement the jury was not in a position to give a fair and proper verdict.

3.2 The authors further claim that they were not put on an identification parade, although they had asked for one, and that the judge should therefore have disallowed the dock identification made by Walsh. It is stated that Walsh may have been mistaken in his identification of Garfield as being present because he knew that he lived at the premises.

3.3 The authors further claim that the judge was not impartial, but biased in favour of the prosecution. In this context, it is said that the judge allowed the jury to remain in Court during a submission by Garfield's lawyer of "no case to answer", and the judge then dismissed that submission in the presence of the jury. It is submitted that the jury thereby heard weaknesses and inconsistencies in the arguments which should have been heard by the judge alone, thus prejudicing the jury against the authors.

3.4 The authors also claim that the judge's instructions to the jury were inadequate. In

particular, it is alleged that the judge did not give proper instructions with regard to the evaluation of the identification evidence. It is stated that the judge failed to draw the jury's attention to the evidence, given during the trial by the investigating policeman, that it was dark that night, that he needed a lamp to see at the premises, and that, in order to make out a man holding a gun in his hand, he would have had to have been very close. In this connection, it is stated that the jury could at first not agree upon a verdict in respect of Garfield and asked for a further direction from the judge as to whether, if they believed that Garfield was present at the premises, they were obliged to come back with a guilty verdict. The judge then simply reminded them of the evidence given by Walsh, without pointing out its weaknesses.

3.5 The authors further claim that they did not have adequate time and facilities for the preparation of their defence and that they did not have the opportunity to examine or have examined the witnesses against them. It is further contended that the failure to obtain the attendance of an expert witness from the Meteorological Office to give evidence rendered the trial unfair. It is submitted that evidence as to the state of the moon on the night of the incident would have assisted the court in deciding how clearly Walsh could have seen the incident.

3.6 Andrew Peart complains that prison officers were present during an interview with his lawyer. This is said to be a breach of the right to unimpeded access to a lawyer.

3.7 Garfield Peart claims that he has been arbitrarily deprived of his liberty, in violation of article 9 of the Covenant, because he was not given a fair trial and has been kept in custody without release on bail.

3.8 Andrew Peart alleges violations of articles 9 and 14, paragraph 3(c), of the Covenant, on account of the delays in the judicial proceedings in his case. Thus, he was arrested on 14 July 1986, was not brought before an examining magistrate until 5 March 1987, and was not tried until the end of January 1988. It is submitted that a delay of 18 months between arrest and trial is unreasonable. It is submitted that similar delays occurred between the dismissal of the authors' appeal and the refusal of leave to appeal by the Judicial Committee, which is mainly attributable to the Jamaican judicial authorities; counsel explains that it was difficult to obtain copies of the deposition and the original statement of Walsh.

3.9 The authors also claim that they are victims of a violation of article 6 of the Covenant, since they have been sentenced to death following a trial which was not in accordance with the provisions of the Covenant. In this connection, reference is made to the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty contained in the annex to Economic and Social Council resolution 1984/50.

3.10 Garfield Peart further claims that his prolonged detention on death row, under degrading conditions, is in violation of articles 7 and 10 of the Covenant. Both authors submit that the conditions in St. Catherine District Prison are hard and inhuman and that they are not being offered treatment aimed at reformation and rehabilitation. It appears from a report prepared by a non-governmental organization that Andrew was injured by prison

warders during the riots of May 1990. Garfield refers to an incident on 4 May 1993 when he was badly beaten during the course of an extensive search of the prison, allegedly because his brother Andrew was a witness in a murder case involving some senior warders. All his personal belongings were destroyed. Upon indication of a prison warder, a soldier beat him with a metal detector on his testicle. Later he was taken to the sick bay and given pain killers, but no doctor came to see him. He reported the incident to the acting Superintendent, who, however, disclaimed responsibility. His counsel, in September 1993, wrote to the Jamaican Commissioner of Police, also to no avail. The author states that he has exhausted all domestic remedies in this respect and claims that the remedies of filing a complaint with the Superintendent, the Ombudsman or the Prison Visiting Committee are not effective.

The State party's observations on admissibility and authors' comments thereon:

4.1 The State party argued that the communications were inadmissible on the grounds of failure to exhaust domestic remedies. The State party argued that it was open to the authors to seek redress for the alleged violations of their rights by way of a constitutional motion.

4.2 As regards the authors' claims under article 10 of the Covenant, the State party noted that the authors had not given any explanation for their contention that the available remedies are not effective and it submitted that the authors had not shown that they had attempted to exhaust domestic remedies in this respect. In addition, the State party argued that the authors also could bring a civil action in order to obtain damages for assault and battery and destruction of property. Moreover, the State party indicated that it was in the process of investigating the incident during which Andrew Peart was injured.

5.1 In their comments on the State party's submission, the authors further stated that they had no means to retain counsel and that legal aid is not made available either for constitutional motions or for civil actions, and that for this reason said remedies were not available to them. As regards the constitutional motion, the authors further referred to the Committee's jurisprudence that a constitutional motion is not an effective remedy.² Moreover, the authors claimed that, even if the constitutional motion were an available remedy, it would entail an unreasonable prolongation of the application of domestic remedies.

5.2 Garfield Peart explained that in May 1993, he filed a further petition for leave to appeal on the grounds that his continued detention on death row, where he had already been for over five years, constituted cruel and inhuman treatment, and that therefore the death sentence against him should not be executed.

The Committee's admissibility decisions:

6.1 During its 47th and 50th sessions, the Committee considered the admissibility of the communications.

6.2 As regards the State party's argument that a constitutional remedy was still open to the authors, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. The

Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant cases, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

6.3 The Committee considered inadmissible the part of the authors' claims which related to the instructions given by the judge to the jury with regard to the evaluation of the identification evidence. The Committee reiterated that it was, in principle, for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the judge, unless it was clear that the instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee further considered that the authors had failed to substantiate, for purposes of admissibility, their claim that the judge was not impartial and their claim that they did not have adequate time and facilities for the preparation of the defence and no opportunity to cross-examine the witnesses against him. In this context, the Committee noted from the trial transcript that the authors' counsel who represented them during the trial and at the appeal, had at no time raised objections and had in fact extensively cross-examined the main prosecution witness.

6.5 The Committee considered that Garfield Peart had not exhausted domestic remedies with regard to his claim that his prolonged detention on death row violated articles 7 and 10 of the Covenant. That part of the communication was therefore inadmissible under article 5, paragraph 2(b), of the Covenant.

6.6 With regard to Garfield Peart's claim that his continued detention was arbitrary and in violation of article 9 of the Covenant, the Committee noted that he was arrested and charged with the offence of murder, and subsequently was brought to trial, convicted and sentenced. It considered that the author could not claim that he was a victim of a violation of article 9 of the Covenant, and this part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the failure to make available to the defence the content of Walsh's original statement, as well as the unavailability of a material defence witness at the trial might raise issues under article 14, paragraphs 1 and 3(e), and that the circumstances of detention might raise issues under articles 7 and 10, which should be examined on the merits. The Committee further considered that Andrew Peart's communication might raise issues under article 9, paragraph 3, and that his claim that he did not have unimpeded access to his lawyer should be examined on the merits.

7. Consequently, the Human Rights Committee decided that the communications were admissible in as much as they appeared to raise issues under articles 7, 10 and 14, paragraphs 1 and 3(e), of the Covenant, in relation to both authors, and under article 9, paragraph 3, in relation to Andrew Peart.

Post admissibility submissions from the parties:

8. By submission of 20 January 1994, counsel for Andrew Peart states that warders had beaten Andrew with a metal detector on 4 May 1993. Afterwards he was passing blood in his urine and suffering from shoulder injuries, but he did not receive medical treatment. He further states that he was locked in his cell without water until Friday 7 May 1993. Counsel also submits that Andrew has been receiving death threats from warders, allegedly because he testified against one of them before the Court after the death of an inmate in 1989. Counsel provides copies of letters sent to the Parliamentary Ombudsman, the Solicitor General, the Director of Correctional Services and the Minister of Justice and National Security. In reply, counsel received information that the complaint was being investigated by the Inspectorate General of the Ministry of National Security and Justice.

9.1 By submission of 11 November 1994 concerning Garfield Peart's communication, the State party reiterates its opinion that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author complained about his ill-treatment in prison to the Commissioner of Police, who would have little or no jurisdiction in a matter of this kind. It is submitted that the author should have sought the assistance of the Office of the Ombudsman or should have made a formal complaint to the prison authorities. The State party further states that it has asked the Inspectorate General to investigate the allegations.

9.2 With regard to the claim that article 14, paragraph 1, has been violated because counsel was not allowed to see the original statement of Walsh, the State party submits that there is a duty on the part of Crown Counsel under Jamaican law to inform the defence if there is a material discrepancy between the content of a statement given by a witness to the police and the evidence given by a witness to the defence. The duty to show the statement to the defence depends on the circumstances. The State party submits that under article 17 of the Evidence Act, defence counsel may invite a trial judge to exercise his discretion to require the production of the statement.

9.3 In the present case, the trial judge declined to exercise his discretion. In the opinion of the State party this does not involve a breach of article 14 of the Covenant. Furthermore, the State party submits that the appropriate body for reviewing the exercise of the judge's discretion is the Court of Appeal, which in the present case did not take the view that the judge's discretion was wrongly exercised, and neither did the Privy Council.

9.4 With regard to the alleged breach of article 14, paragraph 3(e), the State party argues that, unless the State by act or omission was responsible for the witness not being available, the State cannot be held accountable for the non-availability of a defence witness.

10.1 In his comments, dated 20 February 1995, counsel for Garfield Peart argues that the Office of the Ombudsman is not a competent authority within the terms of article 2, paragraph 3(b), of the Covenant. Furthermore, counsel points out that in reply to the complaint made by the author about his treatment in prison, the Commissioner of Police acknowledged receipt of the complaints and advised him that the matter was being referred

to the Commissioner of Correctional Services for appropriate action. On 27 June 1994, counsel sent a further letter to the Commissioner of Corrections, but no response has been received to date.

10.2 Counsel maintains that there was a material discrepancy between the original statement of Walsh and his evidence in court of which the defence was not advised and that the failure to produce the original statement resulted in a miscarriage of justice.

Issues and proceedings before the Committee:

11.1 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.

11.2 The Committee has noted the State party's argument that the claim with regard to the treatment suffered by Garfield Peart in prison is inadmissible because of failure to exhaust domestic remedies. The Committee has also noted that the author had complained to the acting Superintendent, and that his counsel had made a complaint to the Commissioner of Police and was subsequently informed that the complaint was referred to the Commissioner of Correctional Services for appropriate action. In the circumstances, the Committee considers that the author and his counsel have shown due diligence in the pursuit of domestic remedies and that there is no reason to review the Committee's decision on admissibility.

11.3 With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, the Committee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the

only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

11.6 With regard to the authors' allegations about maltreatment on death row, the Committee notes that the State party has indicated that it would investigate the allegations, but that the results of the investigations have not been transmitted to the Committee. Due weight must therefore be given to the authors' allegations, to the extent that they are substantiated. The Committee notes that the authors have mentioned specific incidents, in May 1990 and May 1993, during which they were assaulted by prison warders or soldiers and, moreover, that Andrew Peart has been receiving death threats. In the Committee's view this amounts to cruel treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

11.7 Andrew Peart has further alleged that he did not have unimpeded access to his lawyer because prison officials were present during an interview. The Committee considers that the author has not substantiated in what way the mere presence of the officers hindered him in preparing his defence and notes in this context that no such claim was advanced before the local courts. The Committee concludes therefore that the facts before it do not disclose a violation of article 14 of the Covenant in this respect. The Committee further considers that the facts of the case do not disclose a violation of article 9.

11.8 The Committee is of the opinion 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. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal."³ In the present case, since the final sentence of death was passed without due respect for the requirement of fair trial, there has consequently also been a violation of article 6 of the Covenant.

12. 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 7, 10, paragraph 1, and 14, paragraph 3(e), and consequently article 6, of the International Covenant on Civil and Political Rights.

13. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to make the prosecution witness' police statement available to the defence obstructed the defence in its cross-examination of the witness, in violation of article 14, paragraph 3(e),

of the Covenant; thus, Garfield and Andrew Peart did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The Committee has taken note of the commutation of the authors' death sentence, but it is of the view that in the circumstances of the case, the remedy should be the authors' release. The State party is under an obligation to ensure that similar violations do not occur in the future.

14. 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.

[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.]

Footnotes

*/ Made public by decision of the Human Rights Committee.

1/ On 18 April 1995, the authors' death sentences were commuted.

2/ Reference is made to the Committee's decisions in communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, and No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.

3/ See CCPR/C/21/Rev.1, page 7, paragraph 7.