HUMAN RIGHTS COMMITTEE

Henry v. Jamaica

Communication Nº 610/1995

20 October 1998

CCPR/C/64/D/610/1995*

VIEWS

Submitted by: Nicholas Henry (represented by Mr.S. Lehrfreund from Simons, Muirhead & Burton)

Victim: The author

State party: Jamaica

Date of communication: 14 November 1994 (initial submission)

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

Meeting on 20 October 1998

Having concluded its consideration of communication No.610/1995 submitted to the Human Rights Committee by Mr. Nicholas Henry, 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

1.1 The author of the communication is Mr. Nicholas Henry, a Jamaican citizen, at the time of submission awaiting execution in St. Catherine District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of Simons Muirhead

& Burton, a law firm in London.

1.2 The author's offence was classified as non-capital following the Offences against the Person (Amendment) Act 1992. He is to serve 20 years' imprisonment before becoming eligible for parole.

The facts as submitted by the author

2.1 On 2 March 1988, at the Circuit Court Division of the Gun Court, the author, together with a co-accused, was convicted for the murder of three policemen and sentenced to death. The Court of Appeal, on 2 March 1989, refused his application for leave to appeal. On 10 November 1993, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. It is submitted that herewith all domestic remedies have been exhausted. In this context, it is argued that the constitutional remedy, which exists in theory, is not available to the author in practice, because of his lack of funds and the unavailability of legal aid. Reference is made to the Committee's jurisprudence in this matter.

2.2 At the trial, the case for the prosecution was that, on 19 November 1986, a number of armed men attacked Olympic Police Station and killed three of the five policemen present. The author was accused of being an accessory to the murder in that he had assisted the members of the group in making molotov cocktails, had lied to a constable about their intention, had learned from the others that they intended to attack the police station, had received the members of the group at his house, and had assisted in hiding a large number of weapons after the event. The evidence against the author was based on a statement he had given to the police after having been cautioned and on testimony from a police officer who had spoken with the author the night before the raid. The author's statement to the police was admitted into evidence by the judge after a voir dire.

2.3 The author's defense was one of duress. He gave an unsworn statement from the dock, in which he stated that he had assisted the group of men out of fear for repercussions, that he had not been present during the attack on the police station, and that he had signed the statement to the police because he was told that it could do no harm.

The complaint

3.1 The author claims that he is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, since he was beaten and maltreated by the police upon his arrest at his home on 20 November 1986. In particular, he claims that he was forced to eat hot dumplings from the cooking pot, which caused burns and bleeding in his mouth. The author submits that he signed the statement at the police station because he hoped to receive medical treatment. Although he was given some ice, he received no medical treatment and he states that he could not eat anything for months. He claims that he can still not eat any hot food. He also claims that he still suffers from neck pains as a consequence of the beatings.

3.2 The author also claims that he has a medical problem with his testicles since 1988. Despite requests, prison authorities refuse to take him to the hospital. In the beginning of

1992, he saw a doctor, who stated that surgery was necessary and who gave an approximate date of April 1992 for the operation. Despite this, and despite several requests made by the author and his representatives (copies of correspondence are enclosed), the author was never hospitalised and still has not received any medical treatment for his condition. The lack of medical treatment is said to amount to a violation of articles 7 and 10, paragraph 1, of the Covenant. In this context, reference is made to the UN Standard Minimum Rules for the Treatment of Prisoners and to the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment.

3.3 It is further alleged that the author was subjected to ill-treatment on 4 May 1993. On that date, a search was carried out by warders and soldiers during which the author was assaulted by a soldier with a metal detector on his testicles. The author complained to the prison authorities and the Jamaica Council for Human Rights took a statement from him. The author's London counsel requested, on 3 September 1993, the Parliamentary Ombudsman to conduct an urgent investigation into the allegation of ill-treatment. The Ombudsman sent an investigator to the prison, and submitted a report to the Superintendent, who promised to make arrangements for medical treatment. The author claims that no such treatment was ever received.

3.4 It is submitted that the author has made all reasonable efforts to seek redress in respect of the ill-treatment suffered in detention, that, due to the author's lack of funds and the unavailability of legal aid, constitutional redress is not an available remedy, and that therefore the author fulfils the requirements of article 5, paragraph 2(b), of the Optional Protocol. In this context, it is stated that the author has been subjected to threats ever since his complaint against his ill-treatment, and that he fears reprisals.

3.5 The author further submits that he has been held on death row since his conviction in March 1988, that is for over six years. It is submitted that the 'agony of suspense' resulting from such a long wait and expected death, amounts to cruel, inhuman and degrading treatment. In this context, the author refers to the Privy Council's judgment of 2 November 1993 in the case of Pratt & Morgan.

3.6 The author further alleges that he is a victim of a violation of article 14, paragraphs 1 and 2, of the Covenant. He refers to the Committee's prior jurisprudence and submits that the judge's summing-up at his trial did not meet the requirements of impartiality and in effect amounted to a denial of justice. In this connection, the author contends that the language used by the judge in directing the jury was so emotive [1] that it excited sympathy for the victims and prejudice for the accused, weakened the judge's warnings to the jury to be impartial and undermined the directions to the jury on the burden and standard of proof.

3.7 The author also alleges that his legal aid lawyer did not properly defend him. In this context, the author claims that the police sent a little boy to take out guns from the cellar under the house next to him. He submits that no guns were found in his yard. He states that he told the lawyer to take a statement from the boy, but that he never did. He also indicates that the lawyer did not use the statements which the police had taken from his mother and common-law wife. The author argues that article 14, paragraph 3(d), entitles an accused to

effective legal assistance. In this context, it is also submitted that no witnesses were called on the author's behalf. The author claims therefore that his lawyer did not act diligently nor provided effective representation, in violation of article 14, paragraph 3(d).

3.8 It is further submitted that a different lawyer represented the author at the preliminary hearings and that he met the lawyer who represented him at the trial only on the first day of the trial. Upon request, the judge granted an adjournment of the trial until the next day. The lawyer then came to visit the author in prison that evening and the trial started the following day. It is argued that one day to prepare the defence in a capital murder case is highly insufficient and constitutes a violation of article 14, paragraph 3(b). In this context, it is argued that, if the lawyer would have been given more time to prepare the defence, he would have been able to call witnesses on the author's behalf or to take statements from them.

State party's observations and author's comments

4.1 By note of 15 March 1995, the State party submits its observations on the merits of the communication, in order to expedite its examination.

4.2 With regard to the author's allegations that he was denied medical attention and that he was ill treated in prison on 4 May 1993, the State party promises to investigate his allegations and to inform the Committee of the outcome of the investigations.

4.3 Concerning the author's claims under article 14(1) and 14(2), in relation to the summing-up by the judge, the State party argues that these are matters outside the Committee's jurisdiction and refers to the Committee's jurisprudence in this respect. The State party points out that the appellate courts already examined the judge's summing-up.

4.4 The State party does not accept that there were breaches of article 14 (3) (b) and (d) for which it is responsible. In respect of the claim that the author did not have adequate time to prepare his defence, the State party notes that counsel applied for and received an adjournment. If he would have required more time it was open to him to apply for it. With regard to the conduct of the defence, the State party submits that it is its duty to provide competent legal aid counsel and not to interfere with the conduct of the defence. The State party argues that it is not responsible for the manner in which counsel conducts his case and for any errors of judgement which he may or may not have made.

5.1 In his comments, counsel agrees to an examination of the merits of the communication.

5.2 With regard to the judge's summing-up, counsel submits that if it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated her obligation of impartiality, the matter can be brought within the jurisdiction of the Committee. In this context, counsel refers to the Committee's jurisprudence [2]. Counsel argues that the judge's summing up did not meet the standards of impartiality and amounted to a denial of justice.

5.3 With regard to the conduct of the trial, counsel concedes that the shortcomings of

privately retained lawyers cannot be attributed to the State party, but argues that this does not apply to legal aid lawyers, who once assigned must provide effective representation.

5.4 In a further submission, counsel refers to an incident in prison following a protest by inmates concerning the perceived reduction of their visits on 28 February 1995. A day later, on 1 March 1995, the warders allegedly came to the death row section and started beating up inmates. The author was told to come out of his cell, and was beaten by the warders. He was also thrown down the stairs. As a result, his head got busted in two places, as well as his elbow. His ears were cut up, and he suffered a ringing in his ears. His hands were hurting and his fingers were swollen. He passed blood in his urine and his ribs on one side hurt so much that he could not touch them. The author states that his wounds were dressed at the surgery, and that he was given a pain killer which he did not take. He states that he was in a lot of pain. After he and other inmates began a hunger strike, the Commissioner of Prisons told the warders to take the author to the hospital. Instead, a doctor came to see the author in prison and told him that his ribs were not fractured, but that his lung was damaged. He was prescribed medication. After three days, the warders allegedly changed this to another pill, which the author did not take. It is submitted that the ill-treatment and the subsequent denial of proper medical attention are in violation of articles 7 and 10 of the Covenant.

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 has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the author's claim concerning the summing-up by the trial judge, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to review the instructions to the jury by the trial judge, unless it can be ascertained that they were manifestly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the summing-up suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee notes that the State party has forwarded comments on the merits of the communication and that counsel has agreed to an examination of the merits at this stage. The Committee considers the remaining claims of the communication admissible and proceeds, without further delay, to an examination of their substance 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 alleged violation of articles 7 and 10, paragraph 1, of the Covenant,

because the author was maltreated by the police upon his arrest, the Committee notes that the issue was subject of a voir dire and that it was before the jury during the trial, that the jury rejected the author's allegations, and that the matter was not raised on appeal. The Committee finds that the information before it does not justify the finding of a violation of articles 7 and 10, paragraph 1, of the Covenant in this respect.

7.2 The author has claimed that his detention on death row in itself constitutes a violation of article 7 of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case for over seven years - does not violate the Covenant in the absence of further compelling circumstances. [3]

7.3 Mr. Henry also alleges that he has suffered lack of medical treatment despite a recommendation from a doctor that he be operated. The author has further submitted detailed claims that he was beaten by soldiers and warders on 4 May 1993 and again on 1 March 1995. The author's claims have not been refuted by the State party, which has promised to investigate but has not communicated the results of its investigation, even though more than three years have passed since. The Committee recalls that a State party is under the obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol. In the absence of any explanation by the State party, due weight must be given to the author's allegations. The Committee considers that the lack of medical treatment is in violation of article 10 of the Covenant, and that the beatings which the author suffered constitute violations of article 7 of the Covenant.

7.4 The author has claimed that the bad quality of the defence put forward by his counsel at trial resulted in depriving him of a fair trial. Reference has been made in particular to counsel's alleged failure to call witnesses for the defence. The Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraph 3 (d) and (e), in this respect.

7.5 The author has also claimed that he did not have enough time to prepare his defence, since he met his lawyer only on the first day of the trial. In this context, the Committee reiterates its jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the defence. The determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case. The Committee notes from the information before it that the author's lawyer requested an adjournment of one day at the beginning of the trial and that this request was granted. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. If counsel or the author felt inadequately prepared, it was incumbent upon them to request an adjournment. In the circumstances, there is no basis for finding a violation of article 14, paragraph 3(b).

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 and 10, paragraph 1, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Nicholas Henry with an effective remedy, including immediate medical examination and treatment if necessary, compensation, and consideration of early release. The State party is under an obligation to take measures that similar violations not occur.

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 it 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 or 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. 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. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia.

1/ Reference is made inter alia to the following passage: "Death is always a very sad thing, but I think death becomes worse when one dies in circumstances such as these. I think no one of you there in all honesty can say that you did not have prior knowledge of this incident because, indeed, it was a horrible incident, an incident unprecedented in Jamaica, an incident which not only got to our local news media but the news media abroad, and an incident in which I think no one in Jamaica did not recoil in horror that our own Jamaicans could do such a dastardly act. Time has passed and maybe some of the anger that you had then has passed with it. What I ask you today is not to confuse or not to mix such anger and such resentment as you felt with the trial you have before you."

2/ Communication 237/1987, Denroy Gordon v. Jamaica, Views adopted on 5 November 1992, and communication No. 232/1987, Daniel Pinto v. Trinidad & Tobago, Views adopted on 20 July 1990.

3/ See inter-alia the Committee's Views in respect of communication No. 558/1994 (Errol Johnson v. Jamaica), Views adopted on 22 March 1996.

[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.]