

## HUMAN RIGHTS COMMITTEE

### Grant v. Jamaica

Communication No. 353/1988

31 March 1994

CCPR/C/50/D/353/1988\*

### VIEWS

*Submitted by: Lloyd Grant (represented by counsel)*

*Victim: The author*

*State party: Jamaica*

*Date of communication: 24 November 1988 (initial submission)*

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

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 353/1988, submitted to the Human Rights Committee by Mr. Lloyd Grant 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 its

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

The facts as submitted by the author

1. The author of the communication is Lloyd Grant, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. An earlier communication submitted by him to the Human Rights Committee was registered as communication No. 285/1988; on 26 July 1988,

the Committee declared it inadmissible on the grounds of nonexhaustion of domestic remedies, since the author had not yet petitioned the Judicial Committee of the Privy Council for special leave to appeal. The decision provided for the possibility of review, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure, after exhaustion of domestic remedies. On 21 November 1988, the Judicial Committee dismissed the author's petition for special leave to appeal. The author thereupon resubmitted his case. He claims to be a victim of violations by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author and his brother, Vincent Grant, were tried in the Hanover Circuit Court between 4 and 7 November 1986 for the murder, on 2 October 1985, of one T.M. Both were convicted and sentenced to death. On 5 October 1987, the Court of Appeal of Jamaica dismissed the author's appeal, but acquitted his brother. The author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 21 November 1988. With this, it is submitted, all available domestic remedies have been exhausted.

2.2 The author was interrogated by the police on 7 October 1985 in connection with the murder of T.M., who had been killed during a robbery at his home in the parish of Hanover, over 150 miles away from the author's home. The author explained that, while he knew the deceased from the time when he lived in Hanover, he had not visited that town since June 1985 and knew nothing about the crime. He was none the less arrested and placed in custody. On 25 October 1985, the author was placed on an identification parade, where he was identified by the deceased's wife, E.M., whom he also knew. He and Vincent Grant, who was then living in Hanover, were subsequently charged with the murder of T.M.

2.3 The prosecution's case was that the author acted in common design with his brother and a third, unidentified, man. It relied upon identification evidence of E.M. and of one D.S., and upon statements allegedly made by both defendants under caution.

2.4 E.M. testified that, in the afternoon of 1 October 1985, Vincent Grant, whom she had known all her life, entered the shop. Although she spoke to him he remained silent, staring at her house which was opposite the shop. He then left. Subsequently D.S. entered the shop and told her that he had seen Vincent Grant holding a sharp machete and leaning against the gate to her house, watching her banana field, and that two masked men, both carrying machetes, had been in the field. D.S. further told her that, despite the mask, he had recognized Lloyd Grant, who, when asked what they were doing on the M.'s premises, ran away. E.M. further testified that, after having locked the doors and windows of their house, she and her husband retired to bed; a kerosene lamp was left burning in the living room. At approximately 1 a.m., she was woken up by a noise and she went to the living room where she saw two men who immediately assaulted her. At their request, she gave them all the money kept in the house. She was then forced to lie face down on the floor, and one of the men, whom she identified as Lloyd Grant, bent over her, asking her whether she knew him. When she replied in the negative, he stood up and attacked her husband, who had entered the room. A scuffle ensued and her husband fell to the floor. Lloyd Grant, she stated, then proceeded to humiliate and assault her, during which time she had ample opportunity to see

his face. E.M. finally testified that, before both men left the premises, they exchanged words with a third man, who was apparently waiting for them outside in the yard.

2.5 The post-mortem examination revealed that T.M.'s death was due to haemorrhage and excessive bleeding as a result of his throat being cut, and that his neck had been broken.

2.6 In court D.S. further testified that, on 2 October 1985, between 2 a.m. and 3 a.m., he was returning home when he saw Vincent and Lloyd Grant and an unidentified third man run away from the locus in quo.

2.7 Statements allegedly made by both defendants to the police on 7 and 11 October 1985 were admitted in evidence by the judge after a challenge on the voire dire. Vincent Grant allegedly told the police that he had been forced by his brother to accompany him and another man to T.M.'s house, but that, after both men had entered the premises, he had run away. In his statement, the author identified Vincent Grant as the mastermind behind the robbery and gave details of the burglary and of his entry into T.M.'s house in the company of his brother and a third person. The author further allegedly stated that while he was outside, holding E.M., the third person came out of the house and told him that he had "chopped up" T.M.

2.8 The author put forward an alibi defence. He made an unsworn statement from the dock, claiming that he had been at his home in Kingston with his girlfriend when the crime occurred. He further claimed that he had been forced by the police to sign, on 11 October 1985, a drawn-up statement. Vincent Grant also made an unsworn statement from the dock, stating only that, on 2 October 1985, he was at home with his girlfriend, that he went to bed at 5 o'clock and that he knew nothing about the murder.

2.9 With respect to the identification of Vincent Grant (who had not been identified by E.M.), the testimony of D.S. revealed that his sight had been impaired by the darkness. Before the Court of Appeal, Vincent Grant's counsel argued, inter alia, that the trial judge had failed to give the jury adequate warning about the dangers of identification evidence and, in addition, failed to relate such direction as he gave on identification to the evidence presented by D.S. The Court of Appeal agreed with counsel that the trial judge overlooked the fact that the identification evidence offered in respect of the two defendants was materially different and that each case required appropriate and specific treatment. The Court of Appeal subsequently acquitted Vincent Grant.

2.10 Author's counsel before the Court of Appeal admitted that "there was overwhelming evidence against his client, especially in the light of E.M.'s testimony", and that, "although he was of the opinion that the trial judge's directions on identification in relation to the author could have been more helpful, he did not believe that any reasonable argument could be mounted in law as to what the trial judge actually said". He further admitted that "the trial judge gave proper directions on common design" and that "overall he could find no arguable ground to urge on behalf of his client". The Court of Appeal agreed with counsel, stating that, in the case of the author, it found no defects in the instructions to the jury by the judge, and that the evidence against him was "overwhelming".

2.11 Throughout his trial and appeal, the author was represented by legal aid lawyers. A London law firm represented him pro bono before the Judicial Committee of the Privy Council.

2.12 The offence for which the author has been convicted was classified, on 18 December 1992, as a capital offence under the Offences against the Person (Amendment) Act 1992. On 6 January 1993, the author applied to the Court of Appeal for review of the classification in his case. The review process under the Act is currently stayed pending the outcome of a constitutional motion in another case, which challenges the constitutionality of the classification procedure established by the Act.

### The complaint

3.1 With regard to articles 7 and 10 of the Covenant, the author claims that, on 8 October 1985, he was beaten by police, hit on the head with a gun and threatened with death and that another policeman fired his gun to frighten him. On 11 October 1985, he allegedly was again beaten by the police; he claims that he was whipped with an electric cable and administered electric shocks. The author further claims that, on death row, visiting facilities are inadequate and that conditions in the prison are unsanitary and extremely overcrowded.

3.2 In respect of the allegation of unfair trial under article 14 of the Covenant, it is submitted that:

(a) The author did not receive legal advice during the preliminary hearing. It was not until one month prior to the trial that he was assigned a legal aid attorney, who did not consult with him, despite an earlier adjournment for that purpose, until the day before the start of the trial and then only for 40 minutes;

(b) The circumstances of the case were not investigated before the trial began. The attorney did not attempt to secure the testimony of the author's girlfriend, P.D., or of her mother. Although instructed by the author to do so, the attorney failed to contact P.D., whose evidence would have provided an alibi for the author;

(c) The attorney did not argue the issue of reliability of the identification by E.M. If E.M. had been asked when she had last seen the author, it would have been revealed that she had not seen him for about 10 years, when he was fourteen or fifteen years old;

(d) The attorney did not go through the prosecution statements with the author;

(e) Counsel for the appeal effectively abandoned the appeal or failed to pursue it properly. This is said to have prejudiced the author's case before the Judicial Committee of the Privy Council, which acknowledged that there might have been points of law for the Court of Appeal to look into;

(f) Counsel for the appeal also declined to call P.D. It is contended that the author's legal representation was inadequate and in violation of article 14, paragraph 3 (d), in respect of

the proceedings before both the Circuit Court and the Court of Appeal.

#### The State party's information and observations

4. By submissions of 8 May 1990 and 18 April 1991, the State party argued that the communication was inadmissible on the grounds of failure to exhaust all available domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol, since the author had failed to avail himself of constitutional remedies in the Supreme (Constitutional) Court of Jamaica. The State party further submitted that the communication did not disclose a violation of any of the rights set forth in the Covenant.

#### The Committee's admissibility decision

5.1 During its forty-fourth session, the Committee considered the admissibility of the communication. With regard to the author's claims concerning the conditions of detention on death row, the Committee noted that he had not indicated what steps, if any, he had taken to submit his grievances to the competent prison authorities, and what investigations, if any, had been carried out. Accordingly, the Committee found that in this respect domestic remedies had not been exhausted.

5.2 With regard to the allegation of ill-treatment by the police, the Committee noted that this issue was raised before the trial court, and that the State party had not provided specific information in respect of this allegation in spite of the Committee's request that it do so. The Committee observed, taking into account that the author is a poor person depending on assignment of legal aid and that legal aid is not made available for the purpose of constitutional motions, that there were no further remedies available to the author in respect of this claim.

5.3 With regard to the allegations of unfair trial, the Committee noted that the author's claims related primarily to the inadequacy of the preparation of his defence and of his representation before the Jamaican courts. It considered that these claims might raise issues under article 14, paragraphs 3 (b), (d) and (e) of the Covenant, which should be examined on the merits.

5.4 On 20 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10 and 14, paragraphs 3 (b), (d) and (e) of the Covenant.

#### The State party's request for review of admissibility and counsel's comments

6.1 The State party, in a submission dated 1 October 1992, maintains that the communication is inadmissible because of nonexhaustion of domestic remedies. It explains that the rights under the Covenant which allegedly were violated in the author's case are similar to the rights contained in sections 17 (1) and 20 (6) (c) and (d) of the Jamaican Constitution. Accordingly, having exhausted the criminal appellate process, it would be open to the author, under section 25 of the Constitution, to seek redress for the alleged violations of his constitutional rights before the Supreme (Constitutional) Court of Jamaica.

6.2 With regard to a violation of article 7, the State party submits that the author did not substantiate his claim; no medical evidence was produced in support of the alleged ill-treatment, nor is there any evidence that he made a complaint to the competent local authorities. It further submits that the appropriate remedy for the author for the alleged violations of his rights under articles 7 and 10 of the Covenant would be a civil action for damages for assault.

6.3 With regard to the alleged violations of article 14, paragraphs 3 (b), (d) and (e), the State party refers to an individual opinion appended to the Committee's views in communication No. 253/1987,<sup>1</sup> and submits that the State party's obligation to provide an accused with legal representation cannot extend beyond the duty to act in good faith in assigning counsel to the accused, and that errors of judgement made by court-appointed lawyers cannot be attributed to the State party any more than errors by privately retained lawyers can be. It concludes that the Committee would be applying a double standard if it were to hold court-appointed lawyers accountable to a higher degree of responsibility than their counterparts, and thus hold the State party responsible for their errors of judgement.

7.1 With regard to the State party's request for review of the admissibility decision, London counsel points out that the State party has failed to show that a constitutional motion would be an effective and available remedy for the author. In this context, it is submitted that a constitutional motion is not a remedy available to the author, as he does not have the means to pursue such a course of action and legal aid is not made available for this purpose. Furthermore, the author has been unable to secure legal representation in Jamaica to argue such a motion on a pro bono basis. It is submitted that, for these reasons, a constitutional motion is not an available remedy which the author is required to exhaust for purposes of article 5, paragraph 2 (b) of the Optional Protocol. In addition, the application of such remedy, and the subsequent appellate process, would entail an unreasonable prolongation of the pursuit of remedies.

7.2 As to the alleged ill-treatment in violation of articles 7 and 10 of the Covenant, counsel submits that, on 8 October 1985, the author was taken from his cell (at the Central Police Station in Kingston) to an office, where four policemen proceeded to question him without caution or charge. In the course of the interrogation, the four policemen allegedly beat the author to force him to confess to the crime. The following evening, three policemen took him to the Montego Bay Police Station. On the way to Montego Bay, the policemen turned off the highway and took the author to a "lonely road", where they again questioned and beat the author, with his hands cuffed behind his back. One of the police officers hit the author on his left ear with his gun, causing it to bleed, while another police officer fired his gun close to the author's head. On 11 October 1985, two policemen took the author out of his cell to an upstairs room, where the Superintendent was waiting. In the presence of the Superintendent, the two policemen beat the author on his back with electric wire, until it began to bleed. One of the men plugged in pieces of the wire and gave the author two electric shocks to his side.

7.3 As to the inadequacy of the preparation of the author's defence and of his representation before the Jamaican courts, it is submitted that the author was not represented during police

interrogation and during the preliminary hearing. In September 1986, he saw the attorney assigned to him for the trial for the first time. She reportedly requested the judge to adjourn the trial, as she needed more time to prepare the defence. The hearing was rescheduled for 3 November 1986. Although upon requesting the adjournment, the attorney promised the author that she would discuss the case with him that evening, she never came to see him. On 3 November 1986, she visited him in the court lockup. During the interview, which lasted for only 40 minutes, she took the first statement from the author; the attorney did not investigate the circumstances of the case prior to the trial nor did she consider the author's alibi defence. The author affirms that during the course of the trial he again met with his attorney, but that she did not carry out his instructions.

7.4 With regard to the attorney's failure to pursue the evidence of the author's girlfriend, counsel forwards an affidavit, dated 4 December 1989, from P.D. and a questionnaire, dated 22 March 1990; P.D. contends that the author was with her during the whole night of 1 to 2 October 1985, and that her mother and one P.M. could have corroborated this evidence. It further appears from her affidavit that, on one of the days of the court hearing, she was informed by the police that her presence was needed, but that she failed to go because she had no money to travel and the police allegedly told her that it had no car available to transport her to the Circuit Court. According to London counsel, the main reason why witnesses were not traced and called was that the legal aid rates were so inadequate that the attorney was not able to make the necessary inquiries and initiate the necessary steps to prepare the author's defence properly.

7.5 As to the conduct of the trial defence itself, it is submitted that the attorney failed properly to challenge the testimony of E.M. and D.S., in particular with regard to their identification of the author, and that she did not make any interventions when counsel for the prosecution put leading questions to the prosecution witnesses.

7.6 With regard to the preparation of the author's defence on appeal, reference is made to the transcript of an annex to the "Privy Council questionnaire for inmate appealing" where the author claims that: "On one occasion D.C. (counsel assigned to him for the purpose of the appeal) came inside the prison and saw about 10 inmates (including myself) and I spoke with him for approximately 20 minutes. During those 20 minutes he asked me if I had any knowledge of the crime and if I have any witness. I also asked him to get my girlfriend in court and he don't". It is submitted that, since D.C. had not represented him at the trial, it was essential for the author to have adequate time to consult with D.C. prior to the hearing of the appeal, and that the amount of time granted for that purpose was wholly inadequate. The above is said to indicate that the author's rights under article 14, paragraph 3 (d) were not respected, since counsel was not of his own choosing.

7.7 With regard to the claim that D.C. abandoned or failed properly to pursue the appeal, reference is made to the written judgement of the Court of Appeal and to a letter, dated 8 February 1988, from D.C. to the Jamaica Council for Human Rights. In his letter, D.C. states that: "I daresay however that the judge's instructions on identification was certainly not the best but the usual safeguards were complied with and on any legal merit I cannot recommend the case for further consideration". According to London counsel, there were

several grounds in the case which could have been argued on appeal, such as P.D.'s evidence (had she been called), and the reliability of the identification evidence of E.M. and D.S., especially in light of the fact that the weakness in the latter's identification concerned both defendants.<sup>2</sup>

7.8 Further to the above comments, which relate to the claims which were before the Committee when the communication was declared admissible on 20 March 1992, counsel's comments, dated 12 March 1993, contain several new allegations relating to articles 6, 9, paragraphs 1, 2 and 3, 14, paragraphs 1, 2, 3 (c) and 5, and 15 of the Covenant. For the purpose of the present communication, these further claims have been made too late.

### Examination of the merits

8.1 The Committee has taken note of the State party's request that it review its admissibility decision. It reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author should still exhaust.<sup>3</sup> There is therefore no reason to revise the Committee's earlier decision on admissibility.

8.2 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.3 As to the author's allegation of ill-treatment by the police on 8 and 11 October 1985, the Committee notes from the trial transcript that the police officers allegedly responsible were extensively cross-examined on this issue by the author's attorney both during and after the voire dire proceedings. In the absence of supporting medical evidence, the Committee is unable to find violations of articles 7 and 10 of the Covenant in the case.

8.4 Concerning the author's claims relating to the preparation of his defence and his legal representation on trial, the Committee recalls that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. The determination of what constitutes "adequate time" requires an assessment of the circumstances of each case. The Committee notes that the material before it does not disclose whether either the author or his attorney complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. Nor is there any indication that the author's attorney acted negligently in the conduct of the defence. In this context, the Committee notes that the trial transcript discloses that E.M. and D.S. were thoroughly cross-examined on the issue of identification by the defence. The Committee therefore finds no violations of article 14, paragraphs 3 (b) and (d), in respect of the author's trial.

8.5 The author also contends that he was unable to secure the attendance of witnesses on his



behalf, in particular the attendance of his girlfriend, P.D. The Committee notes from the trial transcript that the author's attorney did contact the girlfriend, and, on the second day of the trial, made a request to the judge to have P.D. called to court. The judge then instructed the police to contact this witness, who, as indicated in paragraph 7.4 above, had no means to attend. The Committee is of the opinion that, in the circumstances, and bearing in mind that this is a case involving the death penalty, the judge should have adjourned the trial and issued a subpoena to secure the attendance of P.D. in court. Furthermore, the Committee considers that the police should have made transportation available to her. To the extent that P.D.'s failure to appear in court was attributable to the State party's authorities, the Committee finds that the criminal proceedings against the author were in violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

8.6 The author also claims that the preparation of his defence and his representation before the Court of Appeal were inadequate, and that counsel assigned to him for this purpose was not of his own choosing. The Committee recalls that, while article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appellate instance that the appeal has no merit.<sup>4</sup> While it is not for the Committee to question counsel's professional judgement that there was no merit in the appeal, it is of the opinion that he should have informed Mr. Grant of his intention not to raise any grounds of appeal, so that Mr. Grant could have considered any other remaining options open to him. In the circumstances, the Committee finds that the author's rights under article 14, paragraphs 3 (b) and (d) were violated in respect of his appeal.

8.7 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of judicial proceedings in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. In the instant case, while a constitutional motion to the Supreme (Constitutional) Court might in theory still be available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, for the reasons indicated in paragraph 8.1 above. As the Committee observed 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 by a higher tribunal".<sup>5</sup> In the present case, it may be concluded that the final sentence of death was passed without the proceedings having met the requirements of article 14, and that, as a result, the right to life protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose violations of articles 6 and 14, paragraphs 1, 3 (b), (d) and (e) of the Covenant.

10. The Committee is of the view that Mr. Lloyd Grant is entitled to a remedy entailing his release. It requests the State party to provide information, within ninety days, on any relevant measures taken by the State party in compliance with 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.]

#### Notes

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

1/ Communication No. 253/1987 (Paul Kelly v. Jamaica), Views adopted on 8 April 1991.

2/ It appears from the transcript of the Privy Council hearing that author's counsel before the Judicial Committee of the Privy Council argued, inter alia, that the trial judge's direction as to the evidence of E.M. was inadequate, as he had not mentioned to the jury whether any sense of fear on her part could have had an effect upon her ability to identify the assailant. Counsel further argued that the defects found by the Court of Appeal in the trial judge's direction as to the evidence of D.S. affected the author's case as much as it did his brother's, and that the jury might have come to a different conclusion in the author's case if they had been adequately directed on the evidence of D.S. Lord Keith of Kinkel replied that: "It may be so and maybe you have a Court of Appeal point on that, but that is not quite the way we approach the matter when considering whether to grant special leave. The jury might have come to a different conclusion if they had been directed about the evidence of D.S. rather more effectively than they were, that may well be, but the fact remains that you have got a very clear and positive identification by E.M."

3/ See also the Committee's views in communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica), adopted on 1 November 1991, paras. 7.1 et seq.

4/ Communication No. 356/1989 (Trevor Collins v. Jamaica), Views adopted on 25 March 1993, para. 8.2.

5/ CCPR/C/21/Rev.1 (19 May 1989), p. 6, para. 7.