

## HUMAN RIGHTS COMMITTEE

### Leehong v. Jamaica

Communication No. 613/1995

16 October 1996

CCPR/C/58/D/613/1995\*

### ADMISSIBILITY

*Submitted by: Anthony Leehong (represented by counsel)*

*Alleged victim: The author*

*State party: Jamaica*

*Date of communication: 5 September 1994 (initial submission)*

*Documentation references: Prior decisions - Special Rapporteur's rule 86/91 decision, transmitted to the State party on 11 January 1994 (not issued in document form)*

*Date of present decision: 16 October 1996*

### Decision on admissibility

1. The author of the communication is Anthony Leehong, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 9; 10; 14; 15, and 17 of the International Covenant on Civil and Political Rights. He is represented by counsel.

#### The facts as submitted by the author

2.1 A warrant for the author's arrest was issued on 5 December 1988 <sup>1</sup>/ On 20 December 1988, while walking down a street, the author was shot from behind by the police, without any warning. The author was brought to Kingston Public Hospital by two passers-by. On 22 December 1988, while in hospital, the author was allegedly told by the police that he was under arrest for the murder of a police man which had taken place in early December 1988. He remained in hospital, under police guard, until 29 December 1988; he was then taken to the Central Lock-up in Kingston, allegedly still in connection with the murder of the policeman and to stand an identification parade in this respect. On 31 March 1989, the author and another person were brought before the

Magistrates Division of the Gun Court in connection with the murder of the policeman; this charge was dropped. The author states that the investigating officer did not recognize him. In this respect, he points out that the officer asked the co-accused whether he was Anthony Leehong; after receiving a negative reply, the officer told the author and the examining magistrate that he had obtained a warrant for the author's arrest and that in the hospital he had charged the author with the murder of one Carlos Wiggan. The author states that only then did he learn that he had been arrested and charged for the murder of Carlos Wiggan.

2.2 On 21 February 1990, after 13 minutes of deliberation, the jury returned a verdict of guilty. The author was sentenced to death. On 28 January 1991, the Court of Appeal dismissed his application for leave to appeal. A further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 7 February 1994. With this, it is submitted, all domestic remedies have been exhausted. On 13 November 1994, the author's offence was reclassified as non-capital under the Jamaican Offences Against the Person (Amendment) Act 1992. His death sentence has been commuted to life imprisonment, serving a minimum of 20 years before being eligible for parole.

2.3 The preliminary enquiry before the Gun Court relating to the murder of Carlos Wiggan started on 20 June 1989. The author was represented by a legal aid attorney. This attorney, however, did not attend the second hearing held on 11 July 1989, when the arresting officer gave his deposition; the author was unrepresented during this hearing. The attorney was present at the third hearing held on 13 September 1989. During these hearings, eye-witnesses identified the author as the assailant of Carlos Wiggan; no prior identification parade had been held.

2.4 Subsequently, the author's mother succeeded in obtaining the services of another lawyer. The trial was scheduled to start on 19 February 1990, but was adjourned until 21 February 1990, in order for the author's lawyer to prepare the case. The author met his lawyer on two occasions for a period of between two and four hours in all.

2.5 The case for the prosecution was that, in the morning of 4 December 1988, in the Parish of St. Andrew, the author killed Carlos Wiggan with two gunshots. The author claims to be innocent and that he was at home during the time of the crime.

2.6 At the trial, the prosecution relied on the testimony of the deceased's stepfather, his mother and his sister. The stepfather of the deceased testified that on 4 December 1988, at about 9:30 a.m., he heard an explosion. When he looked out of the window, he saw a person whom he knew by the name of Peter, and whom he identified as being the author, running after Carlos Wiggan, and shooting him twice. Firing further shots, the author ran away, together with another person.

2.7 The mother of the deceased testified that, on the morning of the incident, she looked down from the balcony and saw her son standing against a wall with the author holding a gun in front of him. She also noticed two other men standing nearby. She then saw the author shooting at her son, who tried to escape. As the persons moved, she could not observe what happened; she could only hear shots. When she came out of the house, she saw her son lying on the ground. She stated that she had the author in sight for two to three minutes and that she had never seen him before.

2.8 The deceased's sister testified, that she saw the author, whom she had known for two years, shooting at her brother, and then chasing him. She then heard other gunshots and saw the author leaving the premises, without a gun.

2.9 The author's defence claimed that the three witnesses for the prosecution had mistakenly identified the author. The author himself, in an unsworn statement, denied that he was called Peter or that he had killed the deceased. No witnesses were called on behalf of the defence.

### The complaint

3.1 Counsel submits that the manner in which the police apprehended the author, by shooting him from behind without giving an order to stop or a warning, was in breach of article 9, paragraph 1. In this context, he submits that the author was unarmed and that he did not pose any threat to the police or to the public.

3.2 The author claims violations of articles 9, paragraph 2, and 14, paragraph 3(a), since he only learned that he had been arrested and charged for the murder of Carlos Wiggan on 31 March 1989, when he was taken before the examining magistrate. He claims that on 22 December 1988, in the hospital, he was not aware of having been arrested and charged with the murder of which he was convicted, and that he was not given a copy of the warrant or the charge sheet. Furthermore, the author does not recall whether he was cautioned. Counsel argues that, if the author was informed at all, it was done in circumstances in which he could not understand what was going on. Counsel adds that he, as well as the Jamaica Council for Human Rights have requested information from the Kingston Public Hospital about the author's physical condition at the time of his arrest, but that no reply has been received to date.

3.3 The author points out that he was not brought before a judge until three months after his arrest, and then it was in relation to the murder of a policeman, the author was not charged for that murder. However he was then charged and remanded into custody for the murder of Wiggan. It was another 3 months before he was brought before a judge with respect this second murder of which he was subsequently convicted. He submits that this constitutes a violation of article 9, paragraph 3, of the Covenant. In this context, reference is made to the Committee's jurisprudence in communications Nos. 250/1987 (Paul Kelly v. Jamaica) and 248/1987 (Glenford Campbell v. Jamaica), where it was held that a delay of 6 weeks from arrest to appearance before a judge amounted to a violation of article 9.

3.4 The author further points out that the trial against him did not start until 21 February 1990. He claims that a delay of 14 months between arrest and trial amounts to a violation of article 9, paragraph 3. Moreover, it is submitted that the author should have been released from detention, while awaiting trial.

3.5 The author claims that he was not given adequate time and facilities for the preparation of his defence, in violation of article 14, paragraph 3 (b). As to the preliminary examination, he claims that he saw his legal aid attorney for the first time at the first hearing, that no witnesses were called on his behalf, and that the attorney did not attend the second hearing, as a result of which no cross-examination of the arresting officer took place. As to the trial, the author claims that his privately

retained lawyer failed to properly cross-examine the witnesses against him, due to lack of preparation. In this context, it is submitted that there were serious discrepancies between the testimonies of the prosecution's witnesses. This is said to constitute a violation of article 14, paragraph 3 (e), of the Covenant.

3.6 As to a violation of the author's rights under article 14, paragraph 1, counsel refers to passages of the judge's summing-up to the jury. It is submitted that the trial judge failed to properly direct the jury, according to the legal rules required in identification cases (Turnball guidelines), and that this amounted to a denial of justice. In particular, it is said that the judge did not properly point out the danger of relying on visual identification evidence, nor to the weaknesses in the evidence. It is further submitted that the judge's instructions reversed the burden of proof. This is said to amount to a violation of article 14, paragraph 2.

3.7 It is further contended that the author's right to a review of his conviction and sentence by the Court of Appeal was not in accordance with article 14, paragraphs 3(d) and 5. Counsel explains that the author's lawyer (who had also represented him at trial) indicated before the Court of Appeal that there was no merit in the appeal, without having consulted the author. From the notice of appeal, it transpires that the author did not wish to be present in Court when his appeal was considered. Furthermore, counsel claims the author was not informed that his appeal was being heard, and consequently did not have the opportunity to instruct his lawyer. It is stated that, had the author been aware that his lawyer saw no merits in the case and was not going to argue any grounds on his behalf, thereby effectively withdrawing the appeal, he would have changed his legal representation.

2/

3.8 It is further submitted that the delays in the various stages of the judicial proceedings against the author, and in particular the delay in obtaining the court documents necessary for the preparation of a petition for special leave to appeal to the Judicial Committee of the Privy Council, amounted a violation of article 14, paragraph 3(c). In this context, counsel states that he first requested copies of the court documents on 27 June 1991; the trial transcript and the Court of Appeal's judgment were only received in February 1992, after numerous requests to the Jamaican judicial authorities by counsel and the Jamaica Council for Human Rights. The depositions made during the preliminary hearings in the author's case were finally received on 24 August 1992.

3.9 The author gives a detailed description of acts of ill-treatment to which he has been allegedly subjected to at St. Catherine District Prison. Reportedly, on 17 November 1991, he was denied food and water. The day after, he was struck with batons; he received death threats from warders on several occasions. He states that he is denied medical treatment and visitors. The author's counsel wrote several times to the Parliamentary Ombudsman on behalf of his client. On 8 February and 6 April 1994, the Office of the Parliamentary Ombudsman replied mistakenly that the author had been discharged from prison. According to counsel, this demonstrates the superficial nature of the Ombudsman's investigations. After counsel had pointed out that the author was still incarcerated and remained the subject of ill-treatment, the Ombudsman replied that the warder responsible in the case had been transferred. Nevertheless, it is submitted that the threats and violence against the author continue. Furthermore, on five occasions counsel wrote letters to the Commissioner of Corrections, who, on 27 October 1994, merely informed him that a new superintendent had been appointed to the prison, without addressing any of the specific complaints raised on behalf of the

author. On 7 October 1994, counsel was informed by the Ombudsman that its recent representations on behalf of the author had been referred for investigation to the Director of Investigations and that a report would be received soon. No such report has been received to date.

3.10 Reference is made to documentary evidence of the inhuman conditions of detention at St. Catherine District Prison, in particular as to the hygienic and sanitary conditions.

3.11 The author concludes that the maltreatment he has been - and is being - subjected to at St. Catherine District Prison, and his present conditions of incarceration amount to violations of articles 7, 10, paragraph 1, and 17 of the Covenant. He emphasizes that the conditions of imprisonment are seriously undermining his health. While on death row, he has only been allowed to see a doctor once, despite having sustained beatings by warders and having requested medical attention.

3.12 With reference to recent decisions of various judicial instances dealing with the death row phenomenon, it is submitted that to execute the author after the prolonged period of time he has been detained on death row would amount to cruel, inhuman or degrading treatment, in violation of article 7 of the Covenant.

#### The State party's information and observations on admissibility and the author's comments thereon

4. On 10 January 1995, the communication was transmitted to the State party, requesting it to submit to the Committee information and observations in respect of the question of admissibility of the communication no reply has been received to date 30 September 1996, in this respect. On 31 January 1995, the State party informed the Committee that the offence for which the author had been convicted had been classified as non-capital and that the author was no longer on death row.

5. On 24 January 1995, counsel informed the Committee that the author's death sentence had been commuted.

#### Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 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 The Committee notes with concern the absence of co-operation from the State party on the matter under consideration. In particular it observes that the State party has failed to provide information on the question of admissibility of the communication. On the basis of the information before it the Committee finds that it is not precluded by article 5, paragraph 2 (b) of the Optional Protocol from considering the communication.

6.4 The Committee considers that, in the absence of information provided by the State party, the

author has sufficiently substantiated for the purposes of admissibility, his claim that he was shot before his arrest and the ill-treatment he has been subjected to while at St. Catherine District Prison. This part of the communication may raise issues under articles 7, 9, paragraph 1 and 10 paragraph 1, of the Covenant which need to be examined on the merits. Counsel has alleged a violation of article 17 of the Covenant with no further substantiation.

6.5 With regard to the author's claim that the length of his detention on death row amounts to a violation of article 7 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant, in the absence of some further compelling circumstances. 3/

6.6 With regard to the author's claim that he was not tried without undue delay in violation of articles 9, paragraph 3 and 14, paragraph 3 (c), the Committee considers that a delay of 14 months cannot be construed as being unreasonable. Consequently, the Committee finds that in this respect the author has not claim under article 2 of the Optional Protocol.

6.7 With regard to the author's claim that he was not tried with undue delay in violation of article 14, paragraph 3 (c), because of the delay in obtaining the court documents, by counsel in London. The records show that the trial transcript was available to the author (or his counsel) when the appeal was heard, it also transpires from the trial transcript that the preliminary depositions made by the witnesses were also available to the author (or his counsel) during the trial, as evidenced by the cross examination which took place. The Committee considers that the author's counsel has not substantiated this claim for purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.8 As to the author's claims under article 9, paragraphs 1 and 2 and 14, paragraph 3 (a) of the Covenant, in that the author was not informed of the reasons for his arrest, the Committee considers that in the absence of information from the State party, the author and his counsel have sufficiently substantiated this claim for purposes of admissibility. Accordingly, the Committee considers that this part of the communication should be examined on the merits. It invites counsel to provide the Committee with more precise information regarding the original crime, i.e. the murder of the policeman, and its outcome; the incident, of 20 December 1988, in which the author was shot and subsequently arrested. The Committee invites the State party to provide it with a detailed chronology of the events in the author's case.

6.9 The author has alleged that he was not brought before a judge until three months after his arrest and it was 6 months before he was brought before a judge in connection with the crime for which he was finally convicted. The Committee finds that in the absence of a reply, in this respect, from the State party, the author and his counsel have sufficiently substantiated this allegation for purposes of admissibility, and it should be examined on the merits.

6.10 As regards the author's complaint that he was not properly represented during his trial in violation of article 14 paragraph 3 (b), and (e), the Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interest of justice. In the instant case, there is no reason to believe that counsel was not using his best judgment and this part of the

communication is therefore inadmissible under article 2 of the Optional Protocol.

6.11 As regards the author's claim that he was not properly represented by his counsel on appeal in violation of article 14, paragraph 3 (d), the Committee notes from the information before it that counsel did in fact consult with the author prior to the hearing, and that at the hearing the court of appeal examined the case. The Committee considers that it is not for the Committee to question counsel's professional judgment as to how to argue or not the appeal, unless it is manifest that his behaviour was incompatible with the interests of justice. The Committee recalls that article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge. The Committee finds therefore that, in this respect, the author has no claim under article 2 of the Optional Protocol.

6.12 The author's remaining allegations concern claims about irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of identification. The Committee reiterates that, while article 14 guarantees the right to a fair trial, it is not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee does not show that the judge's instructions suffered from such defects, but rather to the contrary, the Court of Appeal judgment expressly states that the trial judge's instructions had been: "clear, fair and adequate". Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible in as much as it appears to raise issues under articles 7 and 10, paragraph 1 in respect of the ill-treatment and articles 9, paragraphs 1, 2, and 3; and 14, paragraph 3 (a), of the Covenant;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it. In particular, the State party is requested to furnish the Committee with a copy of the author's medical records, from Kingston Public Hospital, for the period of the author's hospitalization between 20 and 29 December 1988.

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office in Geneva, within six weeks of the date of transmittal;

(d) that this decision shall be communicated to the State party and to the author and to his counsel.

---

\*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ During the trial the investigating officer corporal Blanford David, stated that on 5 December 1988 he had obtained a warrant of arrest for the accused Anthony Leehong also known as Peter or Powder-Puff, in connection with the murder of C. Wiggan.

2/ In this context, reference is made to the Committee's Views in communications Nos. 356/1989 (Trevor Collins v. Jamaica), 353/1989 (Lloyd Grant v. Jamaica), and 250/1987 (Carlton Reid v. Jamaica).

3/ See Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paragraphs 8.2 to 8.5.