

HUMAN RIGHTS COMMITTEE

Leehong v. Jamaica

Communication N° 613/1995

13 July 1999

CCPR/C/66/D/613/1995*

VIEWS

Submitted by: Anthony Lee Hong (Represented by Ronald McHugh of Clifford Chance, London)

Alleged victim: The author

State party: Jamaica

Date of communication: 5 January 1995 (initial submission)

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

Meeting on 13 July 1999,

Having concluded its consideration of communication No. 613/1995 submitted to the Human Rights Committee by Anthony Lee Hong, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts, the following:

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

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

McHugh of the London law firm of Clifford Chance. The author's death sentence has been commuted.

The facts as submitted by the author:

2.1 A warrant for the author's arrest was issued on 5 December 1988.¹ 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 to 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 jurisprudence², 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 to 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.³

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 to 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 judgement 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 was received. 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.

6.1 During the 58th session, the Human Rights Committee considered the admissibility of the communication.

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

6.3 The Committee noted with concern the absence of cooperation from the State party on the matter under consideration. In particular it observed that the State party had failed to provide information on the question of admissibility of the communication. On the basis of the information before it the Committee found that it was not precluded by article 5, paragraph 2(b) of the Optional Protocol from considering the communication.

6.4 The Committee considered that, in the absence of information provided by the State party, the author had sufficiently substantiated for the purposes of admissibility, his claim that he was shot before his arrest and the ill-treatment he had been subjected to while at St. Catherine District Prison. This part of the communication might raise issues under articles 7, 9, paragraph 1 and 10 paragraph 1, of the Covenant which need to be examined on the merits. Counsel had 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 referred to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.⁴

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 considered that a delay of 14 months could not be construed as being unreasonable. Consequently, the Committee found that in this respect the author had no claim under article 2 of the Optional Protocol.

6.7 With regard to the author's claim that he was not tried without 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 considered that the author's counsel had not substantiated this claim for purposes of admissibility. Consequently, this part of the communication was 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 considered that in the absence of information from the State party, the author and his counsel had sufficiently substantiated this claim for purposes of admissibility. Accordingly, the Committee considered that this part of the communication should be examined on the merits. It invited 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 invited the State party to provide it with a detailed chronology of the events in the author's case.

6.9 The author had 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 found that in the absence of a reply, in this respect, from the State party, the author and his counsel had 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 considered that the State party could not 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 was no reason to believe that counsel was not using other than his best judgement 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 noted 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 considered that it was not for the Committee to question counsel's professional judgement 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 recalled that article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge. The Committee found therefore that, in this respect, the author has no claim under article 2 of the Optional Protocol.

6.12 The author's remaining allegations concerned claims about irregularities in the court proceedings and improper instructions from the judge to the jury on the issue of identification. The Committee reiterated 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

judgement expressly stated that the trial judge's instructions had been: "clear, fair and adequate". Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.13 Consequently on 16 October 1996 the Human Rights Committee declared that the communication was admissible inasmuch as it appeared 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.

States party's merits observations and the counsel's comments

7.1 In a submission dated 17 December 1997, the State party informed the Committee it would investigate the author's allegations of ill-treatment in prison.

7.2 With regard to the alleged breach of article 9, paragraph 1, due to the circumstances under which the author was arrested, shot by police from behind, the State party has promised to have the allegation investigated. However, it requested that counsel provide additional information in respect of the incident: whether the author had been detained during a joint police operation? whether there was an exchange of gun-fire between the police and the other parties?. It further states that these questions do not in anyway constitute an acknowledgement that there was any breach of this article.

7.3 With respect to the claims under articles 9, paragraph 2, and 14, paragraph 3 (a), in that the author was not promptly informed of the charges against him, the State party contends that the allegations are confusing: "In paragraph 7 of the [original] communication it is stated that a warrant for his arrest was executed on the author on December 22 1988. In paragraph 31 the author states that he was not aware of the warrant being executed on him. In the same breath, the applicant admits that he was told that he had been arrested and the nature of the offence. This was confirmed by the author's mother. Therefore, the author cannot honestly say that he was unaware of the charges against him until he came to trial."

7.4 The State party further denies any breach of the Covenant in respect of article 9, paragraph 3 of the Covenant since the author was brought before a magistrate prior to the holding of the preliminary enquiry.

8.1 By submission dated 8 April 1998, counsel provided a memorandum with a chronology of events as known to the defence, where the claims, that the author had been shot from behind when arrested and that he was not aware of the charges against him are reiterated.

8.2 In a further submission dated 29 June 1998, counsel looks forward to receiving the State party's information in respect of the circumstances of the author's arrest, his ill-treatment at St. Catherine's District Prison and the chronology of events leading to the author's arrest as requested by Committee in its admissibility decision. He refers the State party to his submission of April 1998 in order to respond to the State party's questions in the note verbale of 17 December 1997.

8.3 With regard to the State party's challenge of a violation of articles 9 paragraph 2 and 14 paragraph 3 (a) in that the author was not promptly informed of the charges against him counsel reiterates that the author was not aware at the time of his arrest on 22 December 1988, of the charges against him. In particular, he claims that the Jamaican police did not inform the author of the fact of, or the reasons for his arrest but merely notified him that he would have to take part in an identification parade. The author was finally made aware of the charges against him only on 31 March 1989, over three months after his violent apprehension. Counsel points out that the State party has not addressed the fact that the charges made against the author on 22 December were dropped and that it was not until 31 March 1989 that he was told that he was being charged with the murder (of Mr. Wiggan) for which he was later tried.

8.4 As regards the violation of article 9, paragraph 3, counsel reiterates his original claim. He notes that the author was arrested on 22 December 1988, for the murder of a policeman, brought before a magistrate on 31 March, and charged at that time with the murder of Mr. Wiggan. The charges against him for the policeman's murder were dropped for lack of evidence. The preliminary hearing for the murder of Carlos Wiggan was held on 20 June 1989. Counsel holds that the author was brought before a judge in connection with the crime for which he was finally convicted of, only after a 6-month delay.

Examination of the merits:

9.1 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 for in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's complaints of ill-treatment while in detention at St. Catherine's District Prison, the Committee notes that author has made very precise allegations, relating to the incidents referred to in paragraph 3.11 supra. These allegations have not been contested by the State party, except to say that it would investigate. There is no information from the State party as to whether an investigation has been carried out and if so, what its result has been, contrary to its obligation to cooperate with the Committee as required by article 4, paragraph 2 of the Optional Protocol. In the Committee's opinion, the ill-treatment and conditions described are such as to violate the author's right to be treated with humanity and with respect for the inherent dignity of the human person and the right not to be subjected to cruel, inhuman or degrading treatment, and are therefore contrary to articles 7, and 10, paragraph 1.

9.3 With respect to the author's claim that he was shot by the police from behind before being arrested, the Committee reiterates its jurisprudence where it has held that it is insufficient for the State party to simply say that there has been no breach of the Covenant. Consequently, the Committee finds that in the circumstances the State party not having provided any evidence in respect of the investigation it alleges to have carried out the shooting remains uncontested and due weight must be given to the author's allegations. Accordingly, the Committee finds that there has been a violation of article 9, paragraph 1, with respect to the author's right to security of the person.

9.4 The author has claimed a violation of articles 9, paragraph 2, and 14, paragraph 3(a), since he was not informed of the charges against him at the time of his arrest. After a police officer was killed, the author was charged and arrested. Later after an investigation, the original charge was dropped for lack of evidence, but it appears that the author was the suspect of another murder and was kept in detention before being charged and sentenced for the second crime. In the circumstance of the case and on the basis of the information before it, the Committee finds that there has been no violation of the articles 9, paragraph 2, and 14, paragraph 3, of the Covenant.

9.5 The author has claimed a violation of article 9, paragraph 3, in as much as he was not brought before a magistrate after his arrest on 22 December 1988. It was only on 31 March 1989 that he was brought before the Magistrates Division of the Gun Court. There was thus a delay of more than three months before he was produced before a judicial authority. The Committee notes that the State party has admitted the delay of more than 3 months between the date of arrest and the date he was brought before a judicial authority, but has offered no explanation for this delay and merely contended that there has been no violation of the Covenant. The Committee is of the view that mere assertion that the delay does not constitute a violation is not sufficient explanation. The Committee therefore finds that 3 months to bring an accused before a magistrate does not comply with the minimum guarantees required by the Covenant. Consequently, and in the circumstance of the case the Committee finds that there has been a violation of article 9, paragraph 3 of the Covenant.

10. 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, 9, paragraphs 1, and 3, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Leehong with an effective remedy, entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. 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 continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with 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 ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

* The following members of the Committee participated in the examination of the present

communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fauto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

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/ See communications Nos. 250/1987 (Paul Kelly v. Jamaica and 248/1987 (Glenford Campbell v. Jamaica)

3/ 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).

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]