HUMAN RIGHTS COMMITTEE

Gombert v. France

Communication No 987/2001

18 March 2003

CCPR/C/77/D/987/2001

ADMISSIBILITY

Submitted by: Mr. Philippe Gombert (represented by counsel, Maître Philippe Dehapiot)

Alleged victim: The author

State party: France

Date of communication: 24 September 1999 (initial submission)

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

Meeting on 18 March 2003,

Adopts the following:

Decision on admissibility

1. The author is Mr. Philippe Gombert, a French citizen, currently serving a prison sentence at the Melun detention centre in France. He claims to be the victim of a violation by France of article 15, paragraph 1, of the Covenant. His communication also raises issues relating to the right to a defence under article 14, paragraph 3 (a), of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 On 31 January 1994, the author was charged with offences under the narcotics legislation, namely the illegal import or export of narcotics and conspiracy to import or export narcotics.

2.2 In an order dated 20 April 1998, the investigating judge redefined the charges against the

author in the light of the repeal of the former Criminal Code as of 1 March 1994 and its replacement by a new Criminal Code. The author was subsequently committed for trial in the Marseille criminal court on charges of importing narcotics as part of an organized gang, obtaining, possession, supply, sale and transport of narcotics, and conspiracy to commit a crime, all of which are offences under the new Criminal Code.

2.3 In a judgement dated 3 November 1998, the Marseille criminal court found the accused guilty of the charges against him and ordered that he should continue to be held and serve a term of 15 years' imprisonment.

2.4 On 4 November 1998, the author appealed against the judgement.

2.5 By a decision dated 2 February 2000, the Aix-en-Provence appeal court upheld the criminal court judgement and sentenced the author to 13 years' imprisonment.

2.6 In a decision dated 3 May 2001, the Court of Cassation rejected an application by the author.

The complaint

3.1 The author claims that he was liable to prosecution only for the offences of illegal import or export of narcotics, which are punishable under paragraph 1 of article 222-36 of the new Criminal Code. He argues that, in accordance with the principle of retroactivity *in mitius*, his sentence should have been reduced to 10 years (the maximum penalty under art. 226-36, para. 1) instead of the 20 years laid down for the import of narcotics under the former legislation - article L 627 of the Public Health Code. The author maintains that article 338 of the Amendment Act of 16 December 1992 denies this principle in providing that offences of import or export committed before the entry into force of the new Criminal Code but tried after its entry into force shall continue to be punishable by 20 years' imprisonment if they were committed by an organized gang. The author contests the redefinition of the offences to apply, in his case, the aggravating circumstances of membership of an "organized gang" - a charge unknown in criminal law at the time of the offences - and to enable him to be sentenced to 13 years' imprisonment, thereby violating article 15, paragraph 1, of the Covenant.

3.2 The author further claims that the redefinition of the offences violates his right to a defence insofar as the aggravating circumstance of membership of an "organized gang" should have been subject to formal supplementary notification prior to committal, as recommended in the March 1994 circular from the Ministry of Justice. The author claims that, owing to the court's failure to observe that formality, he was unaware of the charges against him and unable to defend himself.

3.3 The author states that domestic remedies have been exhausted, as described above.

3.4 The author also states that, on 4 December 1997, he submitted a petition to the European Court of Human Rights claiming a violation of article 5, paragraph 3, and article 6, paragraph 1, of the European Convention on Human Rights on the grounds of the excessive length of his pre-trial detention of the criminal proceedings against him. The Court ruled on this application in a decision

dated 13 February 2001, which became final on 13 May 2001. The Court found that a violation of the provisions invoked by the author had occurred. 1/

The State party's observations on admissibility

4.1 In its comments dated 4 October 2001, the State party disputes the admissibility of the communication.

4.2 In the first place, the State party recalls applicable domestic law.

4.3 With reference to the relevant legislative texts, the State party describes the changes introduced by the reform of the Criminal Code, and notably the insertion of provisions to combat trafficking in narcotics, which had previously been part of the Public Health Code.

4.4 Under the old legislation, the import and export of narcotics had been punishable as follows:

- Illegal import or export of narcotics - 10 to 20 years' imprisonment (Public Health Code, art. L 627, para. 1);

- Conspiracy to import or export narcotics illegally - 10 to 20 years' imprisonment (Public Health Code, art. L 627, para. 2).

4.5 The new Criminal Code does not contain exactly the same definitions of offences as the Public Health Code, but now provides that (a) the illegal import or export of narcotics is punishable by 10 years' imprisonment (art. 222-36, para. 1), and (b) the illegal import or export of narcotics by an organized gang is punishable by 30 years' rigorous imprisonment (art. 222-36, para. 2).

4.6 Thus, while the offence of import or export of narcotics remains unchanged, it is now punishable by 10 years' imprisonment. The offence of conspiracy to import or export narcotics illegally no longer exists. A new offence has been created concerning import or export of narcotics as part of an organized gang, punishable by 30 years' rigorous imprisonment.

4.7 In order to overcome the difficulties of implementing the new Criminal Code arising from the differences between the definitions of offences, the legislation includes a number of transitional provisions. With regard to drug trafficking, article 338 of the Amendment Act, No. 92.1336, dated 16 December 1992, provides that offences of import or export committed before the entry into force of the new Criminal Code but tried after its entry into force shall still be punishable by 20 years' imprisonment if committed by an organized gang.

4.8 The State party explains that this provision reflects the legislator's desire to maintain, for the most serious offences of import or export of narcotics, the same penalties as under the old legislation, without contravening the principle of non-retroactivity of the more severe law. This situation made it possible to abolish the sentence of 30 years' rigorous imprisonment and introduce penalties for narcotics trafficking by organized gangs, while maintaining efforts to combat such offences - for, according to the State party, had the traditional rules governing conflicting criminal

laws been applied, the effect in some cases could, paradoxically, have been to render narcotics traffickers tried after the reform's entry into force, for offences committed before its entry into force, liable to sentences that were not only lighter than those provided for under the new Code but also lighter than those under the old legislation. That would have been the result of immediate application of the provisions of article 131-4 of the new Code, which establishes a maximum of 10 years' ordinary imprisonment, whereas article L 627 of the Public Health Code provided for up to 20 years' imprisonment.

4.9 The State party claims that adoption of the Amendment Act thus permitted the temporary extension of the penalties previously applied to the offences that were most prejudicial to public order and health.

4.10 With reference to judicial practice, the State party maintains that the principles laid down by the 1992 Act have been applied by criminal courts in a manner that fully respects the principle of retroactivity *in mitius*, which is established in the case law of the Constitutional Council (decision of 19-20 January 1981) and explicitly confirmed in the new Criminal Code. Article 112-1 of the Criminal Code provides that:

> "Only acts that constituted an offence at the time they were committed are punishable. Only sentences imposing penalties that were legally applicable at that time may be imposed. The new provisions shall apply, however, to offences committed before their entry into force and not yet subject to a final sentence, where they are less severe than the old provisions."

4.11 In a case where the only charge is import or export of narcotics, article 222-36, paragraph 1, which provides for a penalty of 10 instead of 20 years' imprisonment, shall apply immediately. According to the State party, that would be the only case in which the principle of retroactivity *in mitius* would be applicable, and indeed the Court of Cassation had not hesitated to strike down appeal court decisions sentencing anyone to a prison term longer than the maximum now laid down by article 222-36, paragraph 1 (Cass crim 19.9.1995).

4.12 With regard to offences of import or export of narcotics and of conspiracy to import or export narcotics, the Court of Cassation has emphasized that, "with the entry into force of the Criminal Code", it now finds "legal support in articles 132-71 [defining the concept of an organized gang] and 222-36 of the Code, which define the offence of illegal import of narcotics as part of an organized gang, a circumstance that encompasses the element of conspiracy" (Cass crim 22.6.1994 Beltran bull crim No. 247). This conclusion was subsequently confirmed (Cass crim 24.10.1996 Landeau: "The aggravating circumstances of membership of an organized gang encompasses the element of conspiracy").

4.13 According to the State party, the Court of Cassation, applying quite logically the principle of non-retroactivity of the more severe criminal law, has ruled that the new law is not applicable. The Court concluded that "article 222-36, being more severe than the provisions in force at the time of the offence insofar as it punishes such offences with 30 years' rigorous imprisonment, is consequently not applicable in this case". It considered that, in such cases, article 338 of the Amendment Act, providing for 20 years' ordinary imprisonment, should be applied, as the only

temporary exception to the principle laid down in article 131-4. Since this penalty corresponds exactly to the penalty previously applicable to offences of this kind, there is no need to apply the principle of retroactivity *in mitius* in this case.

4.14 In the second place, the State party describes the application of domestic law in the case of Mr. Philippe Gombert.

4.15 The State party recalls that the author was initially charged on 30 January 1994 with illegal import or export of narcotics and conspiracy to import or export narcotics (Public Health Code, art. L 627).

4.16 However, in the order dated 20 April 1998, committing the author for trial to the criminal court, the offences had been redefined. Under the 1992 Amendment Act and the above-mentioned case law of the Court of Cassation dating from 1994, the offences of "illegal import or export of narcotics" and "conspiracy to import or export narcotics illegally" were removed from the statute books and redefined as "illegal import or export of narcotics as part of an organized gang".

4.17 According to the State party, this redefinition means that the offences with which Mr. Gombert was charged are covered only by paragraph 2 of article 222-36 of the new Criminal Code, which prohibits the illegal import or export of narcotics as part of an organized gang. The State party contends that the author's claim that he is liable only under paragraph 1 of that article, which relates only to illegal import or export of narcotics, is incorrect, and that he has therefore not been wrongly denied retroactivity *in mitius*, since that principle is not applicable in the present case.

4.18 The State party also points out that, contrary to the author's assertions, the redefinition of the offences has in no way violated his right to a defence. In the first place, the State party recalls that the March 1994 circular invoked by the author did not have a direct bearing on his situation. The circular concerned persons who had been charged only with import or export of narcotics and explained how that offence was to be redefined under the new Criminal Code. It did not, in any case, cover persons who had also been charged with the offence of conspiracy to import narcotics. The State party again points out that the author had, in January 1994, already been duly charged with the offence of importing narcotics and with another offence, conspiracy to import narcotics. Moreover, the author had been questioned on both offences by the investigating magistrate in charge of the case. In the State party's view, the author's circumstances were thus not those described in the circular.

4.19 The State party further argues that the concept of "organized gang" was not a substantively new point, which was never raised during the investigation stage and of which the author became aware only at the hearing. It reflects in effect a technical amendment to the offence of "conspiracy", arising from the entry into force of the new Criminal Code. Consequently, in the view of the State party, there was no legal requirement to give notice of an additional charge relating to another offence. The State party therefore considers that the author cannot validly claim to have been ignorant of the charges against him, since these are identical offences under different names. The author thus had every opportunity to mount whatever defence he wished against the charges relating to an "organized gang", previously described as "conspiracy".

4.20 The State party further points out that the circular in question is not legally binding. It is merely a commentary on the provisions of the legislation, issued in order to explain the new rules and, if necessary, facilitate their application: it is in no way binding on the judicial authorities.

4.21 Thus, according to the State party, article 338 of the Amendment Act, far from violating the principle of retroactivity *in mitius* is intended to protect the rights of defendants charged with narcotics trafficking as part of an organized gang, since application of a more severe criminal law (Criminal Code, art. 222-36, para. 2, defining that offence) had been ruled out and a punishment identical to that previously applied remains applicable on a temporary basis.

4.22 Lastly, the State party considers that the redefinition was carried out in a context of settled law, and thus that the question of the violation of article 15 of the Covenant did not arise: as the Court of Cassation held in its decision of 3 May 2001, 2/ the article was not applicable in this case since, contrary to the author's claims, the law did not provide for a lighter sentence in his situation.

4.23 The State party therefore considers that the communication is inadmissible insofar as it falls outside the scope of article 15 of the International Covenant on Civil and Political Rights.

The author's comments on the State party's observations on admissibility

5. In his letter of 17 July 2002, the author stated that he did not intend to submit further comments in response to the State party's submissions.

Deliberations of the Committee on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) and (b), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the author has exhausted all domestic remedies.

6.3 In the light of the State party's arguments, the Committee notes that the initial definition of the offences imputed to the author would cover all the elements of the crime of which he was accused following the entry into force of the new Criminal Code. Consequently, the Committee considers that the author has not substantiated, for the purposes of admissibility, his complaint of a violation of article 14, paragraph 3 (a), of the Covenant.

6.4 With regard to the complaint of a violation of article 15, paragraph 1, of the Covenant, the Committee notes that the State party's arguments that the author has not received a sentence more severe than that which was applicable at the time of the crime to the acts constituting the offence for which the author was sentenced, and that he did not have a right to a lighter sentence under the transitional provisions of the new Criminal Code. The Committee therefore considers that the author has not substantiated this part of the complaint for the purposes of admissibility.

7. The Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

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

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1/ The issues were not those submitted in connection with the present case.

2/ The Court of Cassation stated that, "since article 338 of the Amendment Act of 16 December 1992 does not violate article 15, paragraph 1, of the International Covenant, which is not applicable in this case, the penalty provided in article 222-36, paragraph 2, of the Criminal Code, punishing the offence of illegal import of narcotics as part of an organized gang, being more severe than the penalty previously applied to the offences replaced by this offence, the appeal court's decision is justified".