HUMAN RIGHTS COMMITTEE

Gelazauskas v. Lithuania

Communication No 836/1998 *

17 March 2003

CCPR/C/77/D/836/1998

VIEWS

Submitted by: Kestutis Gelazauskas (represented by counsel Mr. K Stungys)

Alleged victim: The author

State party: Lithuania

Date of communication: 14 April 1997

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

Meeting on 17 March 2003,

Having concluded its consideration of communication No. 836/1998, submitted to the Human Rights Committee on behalf of Mr. Kestutis Gelazauskas 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, dated 14 April 1997, is Mr. Kestutis Gelazauskas, a citizen of Lithuania and currently serving a prison term of thirteen years in Pravieniskes penitentiary No. 2, Lithuania. He claims to be a victim of a violation by Lithuania of articles 14, paragraphs1, 3 (g) and 5 of the International Covenant on Civil and Political Rights (the Covenant). He is represented

by counsel.

The facts as submitted by the author

2.1 On 4 May 1994, the author was sentenced, together with a co-defendant, to thirteen years imprisonment for the murder, on 20 March 1993, of Mr. Michailas Litvinenka. According to the judgment, the victim was murdered in his home by both defendants after they had been drinking together. The victim was found hidden in his sofa and had died, in the opinion of medical experts, by a combination of blows to his body and stab to his eyes, heart and lungs. There were 27 injuries on the victim's body and an attempt to saw off his leg. Several witnesses alleged that they had been told by the defendants that both of them had killed the victim. Both defendants were found guilty as charged and were sentenced to the same period of imprisonment.

2.2 Applications for cassation motions were made on behalf of the author on four occasions but a review of his case was always denied. On 28 September 1995, the author's mother made an application for cassation motion. 1/ On the same day, the author's counsel made a similar application for cassation motion, which was rejected by the chairman of the Division of Criminal Cases of the Supreme Court on 8 December 1995. On 2 April 1996, the author's counsel made another application for cassation motion, which was also rejected by the chairman of the Supreme Court. Finally, on 15 April 1996, the author's counsel made a last application for cassation motion which was rejected on 12 June 1996.

The Complaint

1 The author first alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he had no possibility to make an appeal against the judgment of 4 May 1994. In this case, the court of first instance was the Supreme Court and, under the State party's legislation, its judgments are not subject to appeal. Such a judgment may be reviewed by an application for cassation motion to the Supreme Court but a review of the judgment is dependent on the discretion of the chairman of the Supreme Court or of the Division of Criminal Cases of the Supreme Court. All attempts to bring such an application have failed.

3.2 The author also alleges a violation of article 14, paragraph 1, of the Covenant because the prosecution allegedly failed to prove that the author had a motive and an intention to commit the offence and the Court failed to refer to this aspect of the offence in the written judgment. According to the author, it was therefore unlawful to convict him of "premeditated murder". 2/ The author also contends that the prosecution failed to prove a causal link between the blows allegedly struck by the author and the death of the victim. According to the author, the court failed to ascertain the actual cause of death. His conviction and the hearing would therefore be unfair.

3.3 Finally, the author alleges a violation of article 14, paragraph 3 (g), of the Covenant because he was forced to admit, during the preliminary investigation, that he had struck the victim twice. The author later testified that he had not struck the victim, that it was the co-defendant who stabbed him and that he had helped the co-defendant to dispose of the body. The author alleges that he was threatened, beaten and deceived into giving a confession by the investigator, Mr. Degsnys, and that his mother, who had an intimate relationship with the latter, was used as a means to secure this

confession. According to the author, the investigator deceived his mother, by persuading her to write to the author and encourage him to admit to having struck the victim so as to avoid the death penalty.

The State party's observations on the admissibility and merits of the communication

4.1 By submissions of 21 December 1998, the State party made its observations on the admissibility and merits of the communication.

Alleged violation of article 14, paragraph 5, of the Covenant

4.2 On the alleged violation of article 14, paragraph 5, of the Covenant, the State party gives an explanation on the possibilities of appeal in the domestic procedure, because the system was reformed a few months after the author was convicted.

4.3 At the time of the sentence, a two-tier court system - local courts and the Supreme Court - was in force in the State party. Both courts could function as first instance courts and, in accordance with the Code of Criminal Procedure valid at that time, there were two types of appeal possible:

- Court sentences that were not yet in force could be appealed in cassation to the Supreme Court within 7 days after the announcement of the sentence. Nevertheless, sentences of the Supreme Court taken in first instance were final and not susceptible to appeal in cassation.

- Sentences of local courts and of the Supreme Court could, after having come into force, be challenged by "supervisory protest" within one year of the coming into force. Only the Chairperson of the Supreme Court, the Prosecutor General and their deputies had a right of submission of this "supervisory protest". A sentenced person or his counsel only had the right to address these persons with a request that they submit a "supervisory protest". If such a request was made, the "Presidium" of the Supreme Court would hear the case and decide whether to dismiss the protest, dismiss the criminal case and acquit the person, return the case to the first instance, or take another decision.

4.4 This procedure was applicable until 1 January 1995. Nevertheless, in the present case, neither the author, nor his counsel made a request for the submission of a "supervisory protest" after the sentence came into force for the author.

4.5 On 1 January 1995, several new laws reforming the domestic procedure came into force:

- The law of 31 May 1994 ("the new Law on Courts"), which came into force on 1 January 1995, replaced the two-tier court system by a four-tier court system (district and county courts, Court of appeals, Supreme Court).

- The law of 15 June 1994, which came into force on 1 July 1994, provided for the order of entering into force of the new "Law on Courts" and determined the "transitional" competence of the Lithuanian Courts.

· The law of 17 November 1994 provided for new orders of appeals for sentences not yet in force and of cassation for sentences which came into force.

4.6 According to the law of 15 June 1994, the Supreme Court, as of 1 January 1995, hears cassation motions of all decisions taken by the Supreme Court in first instance. A sentenced person or his counsel have thus the right to address the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to submit cassation motions to the Supreme Court. According to article 419 of the Code of Criminal Procedure, the term for such application was one year.

4.7 In the present case, the author could have made an application for cassation motion until 4 May 1995, one year after the sentence came into force, but no such application was made.

4.8 The application for cassation motion of the author's counsel was made on 28 September 1995 when the term of one year had already expired. The Chairman of the Division of Criminal Cases of the Supreme Court therefore decided on 8 December 1995 that, in accordance with article 3, paragraph 6 of the Law of 15 June 1994, there was no ground for submission of the cassation motion. The same reasoning holds true with respect to the application made by counsel on 2 April 1996.

4.9 The State party also wishes to stress that the author had the right to ask for "restitution of the term for the cassation motion" but did not use it.

4.10 In conclusion, when the sentence was pronounced on 4 May 1994, there was, under the Code of Criminal Procedure then in force, no possibility of cassation motion. However, between the entry into force of the sentence and 1 January 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Prosecutor General or their deputies that they submit a "supervisory protest". Moreover, between 1 July 1994, the entry into force of the law of 15 June 1994, and 4 May 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts that they submit a cassation motion. None of these possibilities were used by the author. The applications of author's counsel to submit a cassation motion of 28 September 1995 and 2 April 1996 were submitted outside the time limit of one year.

4.11 With respect to article 14, paragraph 5, of the Covenant, the State party notes that the Supreme Court was the highest judicial instance of the State party at the time of the judgment in the present case but that the right of the author to request for a "supervisory protest" between 4 May 1994 and 1 January 1995 and to request an cassation motion between 1 July 1994 and 4 May 1995 should be considered as a review within the meaning of this provision.

4.12 As a result, the author did not exhaust domestic remedies and this part of the communication should be declared inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

Alleged violation of article 14, paragraph 1 of the Covenant

4.13 The State party, referring to a number of provisions of its Constitution and Code of Criminal Procedure, first stresses that, during the proceedings of the author's case, principles such as the independence of the judiciary, equality before the law, the right to legal counsel, or the publicity of the trial, were operating and in conformity with the requirements of article 14, paragraph 1, of the Covenant.

4.14 With respect to the other factual circumstances of the case, the State party states that it is neither able to evaluate the evidence of the criminal case nor to assess their weight among the complexity of evidence contained in this case, which is a discretionary right belonging to the courts.

4.15 The State party is thus of the opinion that the allegations concerning a violation of article 14, paragraph 1, of the Covenant are incompatible with the provision of the Covenant, and this part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

Alleged violation of article 14, paragraph 3 (g)

4.16 The State party draws the attention of the Committee on the provisions of its Code of Criminal Procedure according to which it is forbidden to strive to obtain testimonies of the accused or of other persons taking part in the criminal proceedings using violence, threatening or by any other illegal methods.

4.17 The State party notes that despite allegations of such illegal actions, the author has not used his right under article 52 of the Code of Criminal Procedure to appeal actions and decisions of the interrogator, investigator, prosecutor or the court. Moreover, the author could have submitted these facts to the prosecutor who had then a duty to investigate officially.

4.18 The State party also notes that the testimony given by the author during the trial was not followed by a concrete request addressed to the Court pursuant to article 267 of the Code of Criminal Procedure. The court did not, therefore, take a decision in this regard. Moreover, all testimonies of the accused during the trial have the value of evidence and are assessed by the court when taking its decision.

4.19 The State party is thus of the opinion that the author did not exhaust domestic remedies in this respect and that this part of the communication should be declared inadmissible.

Comments of the author

5.1 By submission of 30 June 1999, the author made his comments on the State party's submission.

5.2 With regard to the alleged violation of article 14, paragraph 5, the author considers that the

right to address the Chairperson of the Supreme Court, the Prosecutor General or their deputies with a request to submit a "supervisory protest" or a cassation motion does not constitute a review within the meaning of article 14, paragraph 5, of the Covenant because the submission of a "supervisory protest" or cassation motion is an exceptional right, depending on the discretion of those authorities and is not a duty.

5.3 The possibility to submit a cassation motion in accordance with the requirement of article 14, paragraph 5 of the Covenant exists only since 1 January 1995.

5.4 With regard to the term of one year to submit a cassation motion, that was allegedly overlapped in the present case, the author claims that the one-year time limit of article 419 of the Code of Criminal Procedure could only be applicable to cassation motions which aim is to worsen the situation of a convicted person. According to this provision, "*it is permitted to lodge a cassation complaint about a sentence for applying the law that provides for more major crime* [……] *or for other aims, which worsen the situation of a convicted person* [……]". 3/ The applications for cassation motion of 28 September 1995 and 2 April 1996 were made with the purpose to acquit the author, thus to improve his situation. The requests were thus regular and the time limit of one year could not apply.

5.5 The author, pointing to an apparent contradiction between the State party's argumentation and the content of the letters rejecting the cassation moion, further explains that the decision of 8 December 1995 rejecting the application for a cassation motion was not based on the fact that it exceeded the one-year time limit, but because "*the motives of your cassation complaint* [……] *are denied by evidence, which were examined in court and considered in the sentence*".

5.6 On the second application for a cassation motion of 2 April 1996, the Chairman of the Supreme Court wrote on 5 April 1996 that the law does not provide that the Supreme Court "*is a cassation instance for* [sentences that have] *been adopted by itself*". It added that sentences of the Supreme Court "*are final and* [cannot be appealed, so that retrying] *the case is impossible*". The Chairman of the Supreme Court did not refer to the one year time limit. The claim under article 14, paragraph 5, is thus sufficiently substantiated.

5.7 With regard to the alleged violation of article 14, paragraph 1, the author reiterates that the principles of criminal procedure were not complied with and that the conclusions of the Court do not therefore follow the merits of the case.

5.8 With regard to the violation of article 14, paragraph 3 (g), the author reiterates that he confessed during the preliminary investigation because he was misled by the investigator and because he had been the victim of violence during investigation. In support of this claim, the author refers to a letter written by the co-defendant to the author's parents, testimonies of Mr. Saulius Peldzius who was in custody with the author, and audio-records of conversation between the author and the investigator. Moreover, the author states that he made a complaint against the investigator to the General Prosecutor of Lithuania on 15 and 30 May 1996 and that the General Prosecutor decided on 12 June 1996 not to investigate.

5.9 The State party has not made further observations on the author's last submission.

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 the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With regard to the alleged violation of article 14, paragraph 1 and 3 (g), the Committee notes the author's claims that the judgment of the Supreme Court of 4 May 1994 does not reflect the merits of the case and that, during the investigation, he was forced to confess to the murder for which he was later convicted. In this respect, the Committee has taken note of the undated statement made by the author's co-defendant as well as the testimony given on 15 June 1995 by a cellmate, Saulius Peldzius.

6.4 Recalling that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case, the Committee notes that these allegations were raised during the trial and addressed by the Supreme Court in its judgment. Moreover, the information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The Committee is thus of the opinion that the author has not substantiated his claim under article 14, paragraph 1 and 3 (g) of the Covenant and that this claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes the State party's contention that this part of the communication should be declared inadmissible for failure to exhaust domestic remedies. The Committee also notes that the author has four times attempted to obtain a cassation motion on the decision of the Supreme Court but that his requests were either rejected or unanswered. Considering that the parties concede that no domestic remedies are still available, and that the author's claim is based on the alleged absence of a possibility of review of the judgment of 4 May 1994, the Committee is of the opinion that the admissibility of this claim should be considered together with its merits.

On the merits

7.1 Regarding the submission of a "supervisory protest", the Committee notes the State party's contention that the author had, between 4 May 1994 and 1 January 1995, a "right to address the Chairperson of the Supreme Court of Lithuania, the Prosecutor General and their deputies with a request to submit a supervisory protest", that this possibility constitutes a right to review in the sense of article 14, paragraph 5 of the Covenant, and that the author did not use this right. The Committee also notes the author's contention that the decision to submit a "supervisory protest" is an exceptional right depending on the discretion of the authority who receives the request and does

therefore not constitute an obligation to review a case decided by the Supreme Court in first instance.

7.2 In the present case, the Committee notes that, according to the wording of the last sentence of the judgment of 4 May 1994, "[t]he verdict is final and could not be protested or cassation appealed". It also notes that it is not contested by the State party that the submission of a "supervisory protest" constitutes an extraordinary remedy depending on the discretionary powers of the Chairperson of the Supreme Court, the Prosecutor General or their deputies. The Committee is therefore of the opinion that, in the circumstances, such a possibility is not a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b) of the Covenant. Moreover, recalling its decision in case No. 701/1996, 4/ the Committee observes that article 14, paragraph 5 implies the right to a review of law and facts by a higher tribunal. The Committee considers that the request for the submission of a "supervisory protest" does not constitute a right to have one's sentence and conviction reviewed by a higher tribunal under article 14, paragraph 5 of the Covenant.

7.3 Regarding the submission of a cassation motion, the Committee notes the State party's contention that, between 1 July 1994 and 4 May 1995, it was possible for the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to entertain a cassation motion at the request of the author, that this possibility constitutes a right to review in the sense of article 14, paragraph 5 of the Covenant, and that the author did not use this right within the time limit of one year from the date the judgment entered into force, that is before 4 May 1995, in accordance with article 419 of the State party's Code of Criminal Procedure. The Committee on the other hand also notes the author's contention that the decision to submit a cassation motion, similarly to that of submitting a "supervisory protest", is an extraordinary right at the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court at first instance. The Committee further notes the author's contention that the delay of one year referred to by the State party only concerns cassation motions aiming at worsening the situation of the accused.

7.4 The Committee notes that the State party has not provided any comment on the author's arguments related to the prerogatives of the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts on the submission of a cassation motion and the time limit to submit an application for a cassation motion. In this regard, the Committee refers to two letters, transmitted by the author, dated 28 December 1998 (from the Chairman of the Division of the Criminal Cases of the Supreme Court) and 5 April 1996 (from the Chairman of the Supreme Court), both rejecting the application for a cassation motion on the grounds, respectively, that "the motives of [the] cassation complaint [……] are denied by evidence, [which] were examined in court and considered in the verdict" and that "[the State party's legislation] does not provide [that the Supreme Court] is a cassation instance for verdicts [……] adopted by itself. Verdicts of [the Supreme Court] are final and are not appealable." The Committee notes that these letters do not refer to a time limit.

7.5 The Committee, taking into account the author's observations with regard to the extraordinary character and the discretionary nature of the submission of a cassation motion, the absence of

response from the State party thereupon, and the form and content of the letters rejecting the applications for a cassation motion, considers that the material before it sufficiently demonstrates that, in the circumstances of the case, the applications made by the author for a cassation motion, even if they had been made before 4 May 1995 as argued by the State party, do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b) of the Covenant.

7.6 Moreover, the Committee, recalling its reasoning under paragraph 7.2 above, is of the opinion that this remedy does not constitute a right of review in the sense of article 14, paragraph 5 of the Covenant because the cassation motion cannot be submitted to a higher tribunal as it is required under the said provision.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author(s) with an effective remedy, including the opportunity to lodge a new appeal, or should this no longer be possible, to give due consideration of granting him release. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 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.

[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.]

* 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, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir 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 author claims that he has not received any answer on this application.

2/ According to the judgment of the Supreme Court of 4 May 1994, the "injuries [inflicted on the

victim caused intense] pain and the defendants could understand it. The defendants [inflicted] the injuries deliberately and they wanted to do it. They did the crime of malice prepense and thus their actions are qualified justly pursuant to Lithuanian Republic [Criminal Code] article 105 (5) — cruel premeditated murder".

3/ As translated by the author.

4/ *Cesario Gómez Vásquez v. Spain*, Case No. 701/1996, Views adopted on 20 July 2000.