HUMAN RIGHTS COMMITTEE

Filpovich v. Lithuania

Communication No. 875/1999

4 August 2002

CCPR/C/78/D/875/1999

VIEWS

Submitted by: Jan Filipovich (represented by counsel Lietuvos Respublikos Advokatûra Advokato K. Stungio Kontora)

Alleged victim: The author

State party: Lithuania

Date of communication: 25 January 1997 (initial submission)

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

Meeting on 4 August2002,

Having concluded its consideration of communication No. 875/1999, submitted to the Human Rights Committee on behalf of Mr. Jan Filipovich 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 25 January 1997, is Jan Filipovich, a Lithuanian citizen convicted of premeditated murder. He claims to be a victim of a violation by Lithuania of article 14, paragraphs 1 and 3 (c), and article 15, paragraph 1, of the Covenant. He is represented by counsel. The Covenant and the Protocol entered into force for Lithuania on 20 February 1992.

The facts as submitted by the author

2.1 On 3 September 1991, the author and Mr. N. Zhuk got into a fight, following which Mr. Zhuk was found unconscious and taken to the hospital, where he was not operated on until 5 September and died that same day. According to the author, the causes of death were trauma to the abdominal cavity and peritonitis, which developed because of the delay in operating on Mr. Zhuk.

2.2 The preliminary investigation began in September 1991. The author was convicted of premeditated murder by the Vilnius District Court on 16 January 1996. **(1)** The author appealed the decision in the same Court, which dismissed the appeal on 13 March 1996. On 2 May 1996, the Criminal Division of the Lithuanian Supreme Court rejected the author's application for judicial review. Subsequently, on 1 July 1996, the Vice-President of the Supreme Court and the Attorney-General of Lithuania refused to submit an application for judicial review.

The complaint

3.1 The author alleges that he is a victim of a violation of the right to a fair trial, as provided for in article 14, paragraph 1, because neither the preliminary investigation nor the oral proceedings were unbiased, since no importance was attached to the results of an investigation conducted by a commission set up to determine the reason for the delay in the surgical operation and the diagnostic error. The author states that, if the investigation's version of events was correct, the only possible charge that could have been brought was grievous bodily harm, not premeditated murder.

3.2 The author alleges a violation of article 14, paragraph 3 (c), of the Covenant because, although the investigation began in September 1991, he was not sentenced until 16 January 1996 and the final decision was handed down only on 2 May 1996, i.e. four years and eight months after the start of the proceedings. In his view, this constitutes undue delay.

3.3 The author alleges that there was a violation of article 15, paragraph 1, because the penalty imposed was heavier than the one that should have been imposed at the time the offence was committed. He states that, in 1991, the penalty for premeditated murder imposed by article 104 of the Lithuanian Criminal Code was 3 to 12 years' deprivation of liberty. He was, however, sentenced under the new article 104 of the Criminal Code, which provides for 5 to 12 years' deprivation of liberty, and he was given a term of 6 years. He also alleges that the court never stated either in its ruling or in subsequent decisions that he was convicted under the version of article 104 of the Criminal Code in force since 10 June 1993. **(2)**

The State party's observations on admissibility and the merits

(a) Alleged violation of article 14, paragraph 1, of the Covenant

4.1 With regard to article 14, paragraph 1, the State party draws attention to the Committee's case law and, in particular, the Views of 28 September 1999 relating to communication No. 710/1996 (*Hankle v. Jamaica*) and the Views of 9 April 1981 relating to communication No. 58/1979 (*Maroufidou v. Sweden*), which stated that it is generally for the domestic courts to review the facts

and evidence in a particular case, unless it can be determined that the evaluation was clearly biased or arbitrary or amounted to a denial of justice.

4.2 The State party argues that the Lithuanian courts, i.e. both the court of first instance and the appeal court, as well as the Supreme Court, referred explicitly to the conclusions of the investigating commission. In particular, the Supreme Court held that the court of first instance had exhaustively investigated all the material circumstances of the case and had properly evaluated the evidence, according to the requirements of articles 18 and 76 of the Code of Criminal Procedure. **(3)** The Supreme Court also reviewed the characterization of the offence under domestic law and determined that it had correctly been categorized as premeditated murder within the meaning of article 104 of the Lithuanian Criminal Code.

4.3 In the light of the foregoing, the case does not reveal any irregularity on the basis of which it may be concluded that there was an improper evaluation of the evidence or a denial of justice during the author's trial. Consequently, this part of the communication must be declared inadmissible under article 3 of the Optional Protocol because it is incompatible with the provisions of the Covenant.

(b) Alleged violation of article 14, paragraph 3 (c), of the Covenant

4.4 According to the State party, the author based his allegations only on the duration of the proceedings and did not put forward any other argument in support of his complaint. The duration of the proceedings cannot itself give rise to a violation of article 14, paragraph 3 (c), since the Covenant already explicitly provides for the right to be tried without undue delay. In addition to putting forward arguments in support of his complaint, the author must not only indicate exactly how long the proceedings lasted, but must also refer to the delays attributable to the State party and provide specific evidence.

4.5 The State party also argues that the author's calculations concerning the duration of the proceedings are not correct. Specifically, the start of the relevant period was not in September 1991, but on 20 February 1992, when the Covenant and the Optional Protocol entered into force for Lithuania.

4.6 Since the author has not provided information on undue delays during the criminal proceedings, the State party holds that the author has not substantiated his complaint and that, consequently, this part of the communication should be declared inadmissible under article 2 of the Optional Protocol.

(c) Alleged violation of article 15, paragraph 1, of the Covenant

4.7 The State challenges the author's contention that the lack of any specific reference to the relevant version of article 104 of the Penal Code in the sentence of the court of first instance indicates a violation of article 15, paragraph 1, of the Covenant. It recalls that the legality of the sentence was reviewed by the Lithuanian Supreme Court, which rejected the author's arguments that the court of first instance had imposed the wrong penalty, stating that the penalty was imposed

in accordance with article 39 of the Criminal Code. **(4)** This article is in keeping with the principle that a law introducing heavier penalties is not retroactive. In recognizing the legality of the penalty imposed in accordance with article 39, the Supreme Court thus also confirmed that this penalty is in conformity with the principle of non-retroactivity provided for in article 7 of the Criminal Code. 4.8 The State party makes it clear that the Supreme Court also ascertained that there were no other reasons why the penalty imposed might have been regarded as heavier than the one which might legitimately have been imposed for this type of criminal offence in the specific circumstances of the case. In the present case, there was the aggravating circumstance that the author was drunk, but there were no mitigating circumstances. Article 104 of the Criminal Code, which was in force when the author committed the offence, provided for between 3 and 12 years' deprivation of liberty. The author was sentenced to a penalty of six years, well within the limits set in that article.

4.9 In view of the fact that the Supreme Court considered that the penalty imposed on the author was in keeping with article 39 of the Lithuanian Criminal Code and bearing in mind the Committee's case law stating that it is generally for the domestic courts to review the facts and evidence in a particular case, the State party maintains that the penalty imposed is in keeping with the prohibition on the imposition of a penalty that is heavier than the one that was applicable at the time when the offence was committed, as stated in article 15, paragraph 1, of the Covenant.

The author's comments relating to admissibility and the merits

5.1 In his comments of 20 August 2000, the author argues that, throughout the proceedings, his right to a defence and to be heard by a court were mere formalities, as clearly reflected in the court's decision.

5.2 The author's conviction by the Vilnius District Court on 16 January 1996 was based on the fact that the only reasons for Mr. Zhuk's death were the blows to his head and stomach which the author inflicted, thereby causing his death. According to the author, the court adopted these conclusions without any reliable evidence and without having examined the main evidence, **(5)** since the forensic report stated that the cause of Mr. Zhuk's death was a trauma to the stomach resulting in peritonitis. The medical report also stated that Mr. Zhuk was operated on too late, that the injuries which caused his death were not diagnosed until 30 hours after his arrival at the hospital and that the doctor, who suspected that there might be injuries to Mr. Zhuk's stomach, did not take the necessary measures to make a final diagnosis so that he might be operated on immediately.

5.3 With regard to article 14, paragraph 3 (c), the author agrees with the State party that the duration of the proceedings should be counted as from the entry into force of the Covenant, i.e. 20 February 1992, but, even then, the period would be too long because there were four years and two months between the entry into force of the Covenant and the date of 2 May 1996.

5.4 Bearing in mind that the evidence was collected during the initial stages of the investigation and that the forensic medical report was prepared on 6 September 1991 and, respectively, 1 December 1992, the only reason for such lengthy proceedings was the unjustified delay by the investigators in the case in bringing the author before the court.

5.5 Lastly, the author refers to article 15, paragraph 1, of the Covenant and states once again that he should have been tried in accordance with the law in force at the time when the offence was committed, whereas, in fact, the offences for which he was tried were not defined by the law in force when they were committed. The Vilnius District Court, which heard the case, took the view that the definition of the offence was in keeping with article 104 of the Criminal Code (premeditated murder), without taking account of the fact that article 111, paragraph 2, providing for the offence of grievous bodily harm resulting in death, existed at the time. The author also maintains that the penalty applicable for that type of offence was heavier than the penalty applicable at the time the offence was committed. He states that he disagrees with the State party's observation that, in its decision of 2 May 1996, the Supreme Court confirmed that the penalty was applied in accordance with the law in force at the time the offence was committed.

Issues and proceedings before the Committee

Consideration as to the admissibility

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 complaint 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 the purposes of article 5, paragraph 2 (a) of the Optional Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b) of the Optional Protocol. The Committee also notes that the State party has not contested the admissibility of the communication under article 5, paragraphs 2 (a) and (b) of the Optional Protocol .

6.3 With regard to the author's allegations in respect of the violation of article 14, paragraph 1, the Committee recalls that it is generally for the courts of States parties, not for the Committee, to review the facts in a particular case. The Committee takes note of the State party's allegations that all of the evidence was examined by the Supreme Court. Moreover, the information available to the Committee and the author's arguments do not show that the evaluation of the facts by the courts was clearly arbitrary or amounted to a denial of justice. The Committee therefore takes the view that the complaint is inadmissible for lack of substantiation under article 2 of the Optional Protocol.

6.4 With regard to the author's allegations concerning articles 14, paragraph 3 (c), and 15, paragraph 1, of the Covenant, the Committee considers that these complaints have been sufficiently substantiated for purposes of admissibility. Accordingly, it will consider this part of the communication on the merits in the light of the information furnished by the parties, in conformity with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration as to the merits

7.1 As to the author's allegations that the trial went on for too long, since the investigation began in

September 1991 and the court of first instance convicted him on 1 January 1996, the Committee takes note of the State party's arguments that the duration of the proceedings should be calculated as from the entry into force of the Covenant and the Protocol for Lithuania on 20 February 1992. The Committee nevertheless notes that, although the investigation began before the entry into force, the proceedings continued until 1996. The Committee also takes note of the fact that the State party has not given any explanation of the reason why four years and four months elapsed between the start of the investigation and the conviction in first instance. Considering that the investigation ended, according to the information available to the Committee, following the report by the forensic medical commission and that the case was not so complex as to justify a delay of four years and four months, or three years and 2 months after the preparation of the forensic medical report, the Committee concludes that there was a violation of article 14, paragraph 3 (c).

7.2 With regard to the author's allegations that he was sentenced to a heavier penalty than the one that should have been imposed at the time the offence was committed, the Committee takes note of the author's allegations that none of the sentences against him explained which version of article 104 of the Criminal Code had been applied in imposing six years' deprivation of liberty. However, the Committee also notes that the author's sentence of six years was well within the latitude provided by the earlier law (3 to 12 years), and that the State party has referred to the existence of certain aggravating circumstances. In the circumstances of the case, the Committee cannot, on the basis of the material before it, conclude that the author's penalty was not meted out according to the law that was in force at the time when the offence was committed. Consequently, there was no violation of article 15, paragraph 1, of the Covenant.

8. 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 as found by the Committee constitutes a violation of article 14, paragraph 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to ensure that similar violations do not occur in 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 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 when a violation has been established, the Committee wishes to receive from the State party, within 90 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 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. 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, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1. Article 104 of the Criminal Code.2. The new Lithuanian Criminal Code entered into force in June 1993.3. Article 18 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must take all of the measures provided for by law to investigate seriously and exhaustively all circumstances of a particular case and determine aggravating and mitigating circumstances, as well as incriminating and exculpatory circumstances. Article 76 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must evaluate the evidence according to their own beliefs and on the basis of a serious and exhaustive examination of all the circumstances of the case, in accordance with the law and legal ethics.4. Article 39 of this Code explicitly states that the court in question must apply the penalty within the limits set by the article, specifying responsibility for the crime committed. The court must also take account of the nature and gravity of the offence and of aggravating or mitigating circumstances.5. According to the author, a forensic medical examination is compulsory in criminal proceedings, in accordance with article 86, paragraph 1, of the Code of Criminal Procedure, and is one of the main pieces of evidence (art. 74, para. 2, and art. 85, para. 3).