HUMAN RIGHTS COMMITTEE

Perera v. Australia

Communication No. 536/1993

28 March 1995

CCPR/C/53/D/536/1993

ADMISSIBILITY

Submitted by: Francis Peter Perera

Alleged victim: The author

State party: Australia

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

Meeting on 28 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Francis Peter Perera, a merchant seaman and Australian citizen by naturalization, born in Sri Lanka and currently living at Kangaroo Point, Queensland, Australia. He claims to be the victim of a violation by Australia of articles 14, paragraphs 1, 3(e) and 5, and 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author was arrested on 11 July 1984, together with one Fred Jensen. He was charged with drug-related offences and later released on bail. On 17 May 1985, he was found guilty on two charges of supplying heroin and one charge of possession of a sum of money obtained by way of commission of a drug offence. He was sentenced to nine years' imprisonment by the Supreme Court of Queensland. On 21 August 1985, the Court of Criminal Appeal quashed the judgement and ordered a retrial. Upon conclusion of the retrial

the author, on 3 March 1986, was found guilty of having possessed and having sold more than 9 grams of heroin to Jensen on 11 July 1984; he was sentenced to eight years' imprisonment. He appealed the judgement on the grounds of misdirection by the judge to the jury, and bias by the judge in the summing-up. The Court of Criminal Appeal dismissed his appeal on 17 June 1986. On 8 May 1987, the High Court of Australia refused the author leave to appeal. On 18 November 1989, the author was released from prison to "home detention" for health reasons; since 17 March 1990 he has been on parole. His parole ended on 18 March 1994.

2.2 At the trial, the prosecution submitted that, early in the morning of 11 July 1984, the author had driven with Jensen in the latter's car; the car had parked next to another car; the author stayed in the car while Jensen went to the other car to sell $11,000 worth of heroin to an undercover police officer. While the sale was proceeding, police arrived and arrested both the author and Jensen. According to the prosecution, the author, when arrested by the police, immediately voluntarily admitted having handed over heroin to Jensen to sell. The author's house was searched by the police and an amount of money was seized; no drugs were found. The prosecution claimed that $3,000 found in the house was marked money used for the buying of heroin from Jensen on 1 July 1984.

2.3 On 15 October 1985, in a separate trial, Jensen was found guilty of four charges of supplying a dangerous drug, two charges of selling a dangerous drug, and one charge of being in possession of money from the sale of a dangerous drug. On each charge, he was sentenced to six years' imprisonment, to run concurrently.

2.4 The author claims to know nothing of the offence he was charged with and stresses that no drugs were found in his possession. He submits that he did not know about Jensen's involvement with drugs. During the trial, he gave sworn evidence to the effect that Jensen used to work as a handyman around his house, and that, on the morning of 11 July 1984, they were travelling in Jensen's car to a piece of land to build a shack for the author. He further stated that he and his wife, at the end of 1983, had given Jensen $4,000 to fix things in the house. They then left for Sri Lanka in November 1983 and returned in February 1984, only to discover that Jensen had not done the work for which he was commissioned. In July 1984, Jensen then paid them back $3,000.

2.5 The author states that the only non-circumstantial evidence against him, on the basis of which he was sentenced, was the evidence given by two policemen that he made admissions regarding his involvement in the sale of heroin on 11 July 1984, first at the roadside, immediately upon his arrest, and later the same morning in the police station. One of the policemen made notes, reflecting the admissions, in his notebook; these notes were not signed by the author.

Complaint

3.1 The author alleges that he did not have a fair trial. He claims that he never made a statement to the police and that the notes which were admitted as evidence during the trial were a fraud. He also claims that the police threatened and hit him and that he was in

considerable distress during the interrogations. The author submits that these issues were raised at the trial, but that the judge, after a voir dire, admitted the policemen's evidence regarding the statement given by the author.

3.2 The author further claims that, during the trial, he had repeatedly asked his lawyer to call Jensen as a witness, but that he was advised that there was no need for the defence to call him; nor did the prosecution call Jensen as a witness. The author submits that his lawyer did not raise as a ground of appeal the failure to call Jensen as a witness, although the fact that he was not heard allegedly gave rise to a miscarriage of justice. The author claims that the failure to call Jensen as a witness, despite his numerous requests, constitutes a violation of article 14, paragraph 3(e), of the Covenant. In this context, the author also claims that he later discovered that his privately retained lawyer had been in possession of a statement, made by Jensen on 1 March 1986, which exculpated the author. However, this statement was not brought to the attention of the Court. In the statement Jensen admits having difficulty remembering the events of two years previously, as a result of his then drug addiction; he states, however, that at the time he was doing some work for the author around the house and that the author was not aware that he was selling heroin.

3.3 The author further claims that his right to have his conviction and sentence reviewed by a higher tribunal according to law has been violated, since an appeal under Queensland law can be argued only on points of law and allows no rehearing of facts. This is said to constitute a violation of article 14, paragraph 5.

3.4 The author further claims that he was discriminated against by the police because of his racial and national origin. He claims that he was called racist names by the police officers who arrested him and that their decision to fabricate evidence against him was motivated by reasons of racial discrimination.

State party's observations and the author's comments thereon

4.1 The State party, by submission of December 1993, argues that the communication is inadmissible.

4.2 As regards the author's general claim that he did not have a fair trial, the State party argues that this claim has not been sufficiently substantiated. In this connection, the State party contends that the claim lacks precision. The State party points out that the independence of the judiciary and the conditions for a fair trial are guaranteed by the constitution of Queensland and satisfy the criteria set out in article 14 of the Covenant. The State party recalls that the author's first conviction was quashed by the Court of Criminal Appeal, because the Court considered that the judge's instructions to the jury had been unbalanced. The State party argues that the author's retrial was fair and that it is not the Human Rights Committee's function to provide a judicial appeal from or review of decisions of national authorities.

4.3 As regards the author's claim that his right under article 14, paragraph 3(e), was violated because his lawyer failed to call Jensen as a witness, the State party argues that the author

was at no stage hindered by the State party in obtaining the attendance of the witness, but that it was his counsel's decision not to do so. In this context, the State party submits that the police had a signed interview with Mr. Jensen in which he stated that he paid the author in exchange for drugs. Furthermore, the State party submits that the matter was never raised on appeal, and that therefore domestic remedies have not been exhausted. The State party adds that it is not the Government's responsibility to organize the defence of a person accused of having committed a crime.

4.4 As regards the author's claim that his right to review of conviction and sentence was violated, the State party argues that he has failed to substantiate this claim and that, moreover, his claim is incompatible with the provision of article 14, paragraph 5. The State party explains that the primary ground upon which a conviction may be set aside under the Queensland Criminal Code is "miscarriage of justice". It is stated that arbitrary or unfair instructions to the jury and partiality on the part of the trial judge would give rise to a miscarriage of justice. In this context, reference is made to the author's appeal against his first conviction, which was quashed by the Court. The author's appeal against his second conviction, after the retrial, was dismissed. The State party argues that the appellate courts in the author's case did evaluate the facts and evidence placed before the trial courts and reviewed the interpretation of domestic law by those courts, in compliance with article 14, paragraph 5. Finally, the State party refers to the Committee's jurisprudence that "it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before the courts and to review the interpretation of domestic law by those courts. Similarly, it is for appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality."[1] The State party submits that the Australian appeal processes comply with the interpretation of article 14, paragraph 5, as expressed by the Committee.

4.5 The State party argues that the author's claim that he was subjected to racial discrimination and beatings by members of the Queensland Police Force is inadmissible. In this context, the State party also notes that the incidents complained of occurred in July 1984. The State party submits that there is no evidence that the police actually engaged in racist behaviour. At the trial, the police denied all allegations to that effect. As regards the author's claim that the police fabricated the evidence against him, the State party notes that this allegation was brought before the courts and that it was rejected; there is no suggestion that this rejection was based on racial discrimination. The State party concludes therefore that the claim that the evidence against the author was fabricated for reasons of racial discrimination is unsubstantiated. The author's complaints about police violence and racist abuse were brought to the attention of the Criminal Justice Commission in 1989, which, on 15 March 1991, decided not to conduct any further investigation. The State party argues, however, that another remedy was available to the author under the federal Racial Discrimination Act 1975. Under the Act, complaints can be made to the Human Rights and Equal Opportunity Commission within 12 months of the alleged unlawful conduct. Since the author failed to avail himself of this remedy, the State party argues that his claim under article 26 is inadmissible for failure to exhaust domestic remedies.

5.1 In his comments on the State party's submission, the author reiterates that he had made explicit requests to his solicitors to have Jensen called as a witness, but that they failed to call him, informing him that Jensen's evidence was not relevant to the defence and that it was up to the prosecution to call him. The author states that, being an immigrant and lacking knowledge of the law, he depended on his lawyer's advice, which proved to be detrimental to his defence. In this context, he submits that, under Australian law, he can enforce his right to call witnesses only through his solicitor, not independently. According to the author, his solicitor was accredited to the Supreme Court of Queensland. He argues that the State party should take responsibility for the supervision of solicitors accredited to the courts, to see whether they comply with their obligations under the law. The author further contends that the signed interview with Jensen, referred to by the State party, was obtained under the influence of drugs, and that this would have been revealed if he would have been called as a witness, especially because the evidence that the author was not involved in any drug deal was corroborated by other witnesses.

5.2 The author reiterates that the racist attitude of the police, resulting in violence and in fabrication of the evidence against him, led to his conviction for an offence of which he had no knowledge. He submits that the evidence against him was wholly circumstantial, except for the alleged admissions to the police, which were fabricated. He claims that the failure of the judge to rule the admissions inadmissible as evidence constitutes a denial of justice, in violation of article 14, paragraph 1; in this context, he submits that the judge did not admit evidence on behalf of the defence from a solicitor who had visited the author at the police station and who had seen that the author was upset and crying, allegedly as a result of the treatment he received from the policemen. The author also contends that there were inconsistencies in the evidence against him, that some of the prosecution witnesses were not reliable, and that the evidence was insufficient to warrant a conviction. In this context, the author points out that he was acquitted on two other charges, where the evidence was purely circumstantial, and that his conviction on the one charge apparently was based on the evidence that he had admitted his involvement to the policemen upon arrest.

5.3 The author further submits that it is apparent from the trial transcript that he had difficulties understanding the English that was used in court. He claims that, as a result, he misunderstood some of the questions put to him. He claims that his solicitor never informed him that he had the right to have an interpreter and that, moreover, it was the trial judge's duty to ensure that the trial was conducted fairly and, consequently, to call an interpreter as soon as he noticed that the author's English was insufficient.

5.4 The author further notes that one of the appeal judges who heard his appeal after the first trial also participated in the consideration of his appeal after the retrial. He claims that this shows that the Court of Criminal Appeal was not impartial, in violation of article 14, paragraph 1.

5.5 The author maintains that article 14, paragraph 5, was violated in his case, because the Court of Criminal Appeal reviews the conviction and sentence only on the basis of the legal arguments presented by the defendant's counsel and does not undertake a full rehearing of the facts. According to the author, article 14, paragraph 5, requires a full rehearing of the

facts. In this context, the author also states that no possibility of direct appeal to the High Court exists, but that one has to request leave to appeal, which was refused by the Court in his case.

5.6 As regards the State party's claim that he has not exhausted domestic remedies with regard to his complaint about police treatment, the author submits that, in fact, he has addressed complaints to the Police Complaints Tribunal, the Human Rights and Equal Opportunity Commission and the Parliamentary Ombudsman, all to no avail.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the author's allegations relate partly to the evaluation of evidence by the court. It recalls that it is generally for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it is clear that a denial of justice has occurred or that the court violated its obligation of impartiality. The author's allegations and submissions do not show that the trial against him suffered from such defects. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.3 As regards the author's complaint that Jensen was not called as a witness during the trial, the Committee notes that the author's defence lawyer, who was privately retained, was free to call him but, in the exercise of his professional judgement, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the author's complaint about the review of his conviction, the Committee notes from the judgement of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.5 With regard to the author's claim that the appeal against his retrial was unfair, because one of the judges had participated in his prior appeal against the first conviction, the Committee notes that the judge's participation on appeal was not challenged by the defence

and that domestic remedies with respect to this matter have thus not been exhausted. This part of the communication is therefore inadmissible.

6.6 As regards the author's claim about the failure to provide him with the services of an interpreter, the Committee notes that this issue was never brought to the attention of the courts, neither during the trial, nor at appeal. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

6.7 In so far as the author complains that the police used violence against him and discriminated against him on the basis of his race, the Committee notes that, to the extent that these allegations do not form part of the author's claim of unfair trial, they cannot be examined because the purported events occurred in July 1986, that is, before the entry into force of the Optional Protocol for Australia on 25 December 1991 and do not have continuing effects which in themselves constitute a violation of the Covenant. This part of the communication is therefore inadmissible ratione temporis.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) The present decision shall be communicated to the State party and to the author.

1/ Communication No. 331/1988, para. 5.2 (G.J. v. Trinidad and Tobago, declared inadmissible on 5 November 1991).

[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.]