

HUMAN RIGHTS COMMITTEE

Wright and Harvey v. Jamaica

Communication No. 459/1991

17 March 1994

CCPR/C/50/D/459/1991*

ADMISSIBILITY

Submitted by: Osbourne Wright and Eric Harvey (represented by counsel)

Alleged victims: The authors

State party: Jamaica

Date of communication: 27 February 1991 (initial submission)

Documentation references: Prior decision - Special Rapporteur's combined rule 86/rule 91 decision, dated 7 August 1991 (not issued in document form)

Date of present decision: 17 March 1994

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following on admissibility.

Decision on admissibility

1. The authors of the communication are Osbourne Wright and Eric Harvey, two Jamaican citizens currently awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of a violation by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted

2.1 According to the court file, the authors and one or two other men, on 2 November 1980, after having robbed a butcher, Mr. Roy Francis, of 20,000 Jamaican dollars, stopped a vehicle in the district of Pepper, parish of St. Elizabeth, under the pretext of needing help. They shot and wounded

the driver, Stanville Beckford, and then shot and killed one Timothy Clarke, a car passenger who was trying to escape. Mr. Beckford testified that, before losing consciousness, he saw Mr. Wright shooting Mr. Clarke. Kenneth White, who had been talking with the butcher prior to the robbery, identified Mr. Harvey as one of the participants. The butcher, Mr. Francis, made dock identifications of both Mr. Wright and Mr. Harvey as participants in the robbery. According to the testimony given by Detective Sergeant Ashman during the preliminary hearing, Mr. Wright, after his arrest on 2 November 1980, admitted the crime, indicated the hiding place of the murder weapon and directed the police to the addresses of his accomplices, Mr. Harvey and one Mr. Campbell. Money was found on both Mr. Wright and Mr. Harvey, in bundles of J\$200. The butcher's watch was found on Mr. Harvey. At the time of the retrial, Detective Ashman had died, and his deposition was admitted as evidence.

2.2 The defence was based on alibi. Mr. Wright states that he was at his girlfriend's house all morning and that he only left her place in the afternoon to buy some vegetables and to deposit J\$500 in his mother's saving account. It was then that he was arrested. He denies having admitted his participation in the killing to the police. Mr. Harvey states that he is a fisherman and that he was at Old Harbour Bay, mending his fishing nets, on 2 November 1980 and that he did not know Mr. Wright or Mr. Campbell. He was arrested on 4 November 1980, when he was just about to go to sea. He denies having been in possession of the butcher's watch or of any watch similar to it.

2.3 The authors were charged with the murder of Timothy Clarke in December 1980 and committed for trial in October 1981. In July 1983, at the conclusion of their trial, the jury did not return a unanimous verdict and a retrial was ordered. The retrial took place in the Home Circuit Court of Kingston. On 29 April 1988, the authors were found guilty and sentenced to death. The Court of Appeal of Jamaica dismissed their appeals on 10 October 1988 and produced a written judgment on 15 November 1988. In February 1991, the Judicial Committee of the Privy Council dismissed the authors' petition for special leave to appeal. With this, it is submitted, domestic remedies have been exhausted.

2.4 In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences against the Person (Amendment) Act 1992. The review process under the Act is currently stayed pending the outcome of a constitutional motion in another case, which challenges the constitutionality of the classification procedure established by the Act.

Complaint

3.1 The authors claim that they did not have a fair trial. More particularly, they allege that the Judge's summing up was biased in favour of the prosecution. The Judge allegedly did not give proper guidance to the jury on how to assess the evidential value of Ashman's deposition, and failed to warn the jury of the dangers of the admissibility of the evidence contained in the deposition, particularly in the light of the inability of the defendants to subject the evidence to cross-examination. Detective Ashman gave his deposition at the preliminary hearing before the Gun Court in 1981. Although Mr. Harvey was represented by a lawyer, no lawyer was present for Mr. Wright and no effective cross-examination of Mr. Ashman's evidence took place during the preliminary hearing. The Judge, in his summing up, conveyed the impression that the authors' failure to cross-examine Mr. Ashman during the preliminary inquiry justified conclusions adverse to them, without

taking into account the absence of a lawyer for Mr. Wright and the possible lack of instructions for Mr. Harvey's counsel. The Judge further did not sufficiently explain the danger of dock identifications and did not properly draw the attention of the jury to irregularities during the identification parade held for Mr. Harvey. Mr. Harvey claims that he was identified by Mr. White only at a second identification parade, which was unfairly conducted since the witness was given an opportunity to see him before the parade was held. Mr. Harvey was further only identified by Mr. Beckford and Mr. Francis in dock identifications that took place more than seven years after the event; both witnesses had failed to identify him at the identification parade. Mr. Wright claims furthermore that Mr. Beckford's dock identification of him was fraught with dangers, since Mr. Beckford had employed Mr. Wright five years before, and the employment had ended in disagreement. The failure of the Judge to give proper instructions to the jury with regard to these issues is said to amount to a violation of article 14, paragraph 1.

3.2 It is also alleged that the Judge refused to allow the defence to call a witness to prove the contents of the police station diary, which contained important references that would test the credibility of Mr. Ashman's uncorroborated statement. It is submitted that the defence learned the identity of the police officer who made the entry in the diary only during the course of the trial, despite earlier efforts to obtain information at the police station. The defence therefore had no opportunity to have said officer ready before the commencement of the trial. The witness arrived after the defence had completed its case, but before the Judge had started his summing up. The authors claim that there was therefore no reason for the Judge to refuse to have the witness heard and to have the contents of the police diary put to the jury. It is stated that the Judge's refusal to allow the witness violates article 14, paragraphs 1 and 3 (e), of the Covenant.

3.3 The authors further claim that article 14, paragraph 3 (c), has been violated in their case, since they were convicted some eight years after the incident. They contend that no reasonable excuse for this delay exists. The authors attach a schedule of the case history, which shows that a trial date was set on numerous occasions, but was then postponed to a later date because of the absence of either accused, defence lawyers or witnesses. In this context, the authors note that Mr. Wright was released from custody on 23 February 1984, after having been acquitted on another charge. He did not volunteer to appear and was re-arrested in the summer of 1986. However, this was said not to constitute a reason not to proceed with the trial immediately in 1986. The delay is said to be detrimental to the defence in view of the prosecution's reliance of dock identifications of the accused, made eight years after the incident took place. Also, in Mr. Wright's case, his main alibi witness, his then girlfriend, who gave evidence at the first trial, could no longer be found. Mr. Ashman died between the two trials, and the evidence from his deposition could not, therefore, be subjected to cross-examination. In this context, counsel notes that, at the hearing before the Judicial Committee of the Privy Council, their Lordships stated that they were not in a position to comment on the inefficiency of the judicial machinery in Jamaica.

3.4 The authors also claim that their rights under article 14, paragraphs 3 (b) and (d), have been violated. They claim that they suffered from a lack of adequate legal representation throughout the entire judicial process in Jamaica. Mr. Harvey submits that he was represented by a privately retained lawyer during the first trial, but that he depended on legal aid for the retrial. He claims that the legal aid attorney who represented him did not take a statement from him and that he met him for the first time in April 1988, at the beginning of the trial. Mr. Wright depended on legal aid for

the entire process; he was not represented at the preliminary hearing. It is submitted that the lack of preparation of the defence led to a failure to properly cross-examine the prosecution witnesses, to lack of communication between the authors and their lawyers and lack of attendance of witnesses for the defence. This is said to reflect the fundamental inadequacy of the Jamaican legal-aid system. In this context, the authors note that during the retrial the Judge criticized the defence on several occasions for not doing their work properly.

3.5 As regards the appeal, it is submitted that Mr. Wright was not informed about the date of the appeal hearing, that his lawyer did not consult him before the hearing, and that he only learned about the appeal when his lawyer informed him that it had failed. Mr. Harvey states that he was informed by his lawyer, on 17 August 1988, that he was not able to represent him before the Court of Appeal. A second letter, dated 18 October 1988, informed him that his appeal was dismissed. It appeared that his lawyer had represented him at the hearing, despite his earlier statement that he would not, and had conceded that he could not support the appeal. It is argued that this left the authors without effective representation at the appeal, thereby violating their right to a fair trial.

3.6 The authors also claim that the length of their detention in deplorable circumstances constitutes a violation of the Covenant, notably of article 10, paragraph 1. Reference is made to a report prepared by a non-governmental organization describing the conditions prevailing on death row in Jamaica. It is stated that the authors are given insufficient food of low nutritional value, that there is lack of access to recreational and sporting facilities and that the authors spend excessive time locked up in the cell. Mr. Wright submits that he fell ill and had to be taken to Spanish Town Hospital in March 1991.

State party's submission and authors' comments thereon

4. By its submission of 18 November 1991, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. It concedes that the authors have exhausted their criminal appeal possibilities, but argues that they have failed to pursue the remedy provided by the Jamaican Constitution. In this connection, the State party submits that articles 6, 7 and 14 of the Covenant are coterminous with sections 14, 17 and 20 of the Constitution. Section 25 of the Constitution provides that any person who alleges that any of his basic rights have been violated may apply to the Supreme Court for redress.

5. In his comments on the State party's submission, counsel refers to the Committee's jurisprudence that, in the absence of legal aid, the constitutional motion is not a remedy that needs to be exhausted for purposes of admissibility of a communication under the Optional Protocol.

Issues and proceeding 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 has taken note of the State party's claim that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The Committee recalls its constant

jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee notes that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, the Committee also recalls that the State party has indicated on several occasions ^{1/} that no legal aid is made available for constitutional motions. The Committee considers that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy which needs to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore finds that it is not precluded by article 5, paragraph 2 (b), from considering the communication.

6.3 The Committee notes that part of the authors' claim relates to the instructions given by the Judge to the jury with regard to the evaluation of the evidence and the value of the identifications. The Committee reiterates that it is in principle for the appellate courts of State parties, and not for the Committee, to review specific instructions to the jury by the Judge, unless it is clear that the instructions were arbitrary or amounted to a denial of justice, or that the Judge manifestly violated his obligations of impartiality. The material before the Committee does not show that the Judge's instructions to the jury in the instant case suffered from such defects. That part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.4 The Committee considers that the alleged lack of legal representation for Mr. Wright at the preliminary hearing, the claim that counsel in fact abandoned the appeal without prior consultation with the authors, as well as the delay of almost five years between the first trial and the retrial, may raise issues under article 14, paragraphs 3 (b), (c) and (d), of the Covenant, which should be examined on the merits.

6.5 The Committee considers, with regard to the authors' claim that their lengthy stay on death row, under allegedly deplorable circumstances, violates the Covenant, that the authors have failed to show what steps they have taken to bring this complaint to the attention of the authorities in Jamaica. That part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is admissible in so far as it may raise issues under article 14, paragraphs 3 (b), (c) and (d), of the Covenant;

(b) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) That the State party shall be requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the authors while their communication is under consideration by the Committee. This request does not imply a determination of the merits of the communication;

(d) That any explanations or statements received from the State party shall be communicated by the Secretary-General, under rule 93, paragraph 3, of the rules of procedure, to the authors, with the request that any comments which they may wish to make should reach the Human Rights Committee, in care of the Centre of Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(e) That the decision shall be communicated to the State party, to the authors and to their counsel.

*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ See, for example, communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, No. 321/1988 (Maurice Thomas v. Jamaica), Views adopted on 19 October 1993, and No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), Views adopted on 19 October 1993.