

## HUMAN RIGHTS COMMITTEE

### Peart v. Jamaica

Communication No. 464/1991

17 March 1994

CCPR/C/50/D/464/1991\*

### ADMISSIBILITY

*Submitted by:* Garfield Peart (represented by counsel)

*Alleged victim:* The author

*State party:* Jamaica

*Date of communication:* 17 July 1991 (initial submission)

*Documentation references:* Prior decision - Special Rapporteur's combined rule 86/rule 91 decision, dated 14 February 1992 (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 decision on admissibility.

### **Decision on admissibility**

1. The author of the communication is Garfield Peart, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violation by Jamaica of articles 2, 6, 7, 9,10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

#### Facts as submitted by the author

2.1 The author was arrested on 5 March 1987 and charged with the murder, on 24 June 1986, of one Derrick Griffiths. The author's brother Andrew had been arrested on 14 July 1986, in connection with the same murder. 1/ On 26 January 1988, after a trial lasting six day, the two brothers were convicted and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal

dismissed their appeal on 18 October 1988. On 6 June 1991, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. In December 1992, the author's offence was classified as capital murder under section 7 of the Offences against the Person (Amendment) Act 1992.

2.2 During the trial, the principal witness for the prosecution, Lowell Walsh, who at the time of the trial was 15 years old, testified that he had been watching a bingo game, around 9 p.m. on 24 June 1986. Among those present was the deceased. According to Walsh, the author's brother Andrew came up to the group and called Griffiths. Griffiths, Walsh and another person, Horace Walker, together with the author's brother then went to the latter's house. On arrival there, Walsh testified that he saw the author, whom he had known since childhood, sitting outside in the yard. It was night, and there was no lighting. He then witnessed what appeared to be an ambush; an armed man told Griffiths not to move, the author's brother wrestled Griffiths to the ground, while the author threatened him with a gun. Walsh and Horace ran indoors to hide. Walsh testified that he heard gunshots and a voice saying "make sure he is dead". Walsh was then discovered by the author's brother, who tied him up and threatened him. During a further incident between the two brothers and a newcomer, Walsh managed to escape.

2.3 The author's defence was based on alibi. Upon his arrest, he had immediately denied involvement and said that he had been at the cinema with friends when the incident took place. At the trial, he made an unsworn statement from the dock, repeating what he had told the arresting officer. He added that, while at the cinema, he had received a message from his child's mother that a shooting had taken place at his house. His alibi was supported by the sworn evidence of Claudette Brown, who said that she had been with the author at the cinema, and by Pamela Walker, who confirmed having given the message to the author at the cinema.

### Complaint

3.1 The author claims that the trial against him was unfair. He points out that he was convicted upon the uncorroborated evidence given by Walsh. He submits that the trial transcript contains a suggestion that the other eyewitness, Walker, was not called because his evidence would not have supported that of Walsh. It is submitted that Walsh made a written statement to the police on the night of the incident which contained material discrepancies from the evidence which he gave at the trial. This statement was not released to the defence, even though under Jamaican law the prosecutor is obliged to provide the defence with a copy of any such statement. During the trial, the author's lawyer applied to see the original statement, but the judge refused the application. A copy of the statement first came into the possession of the author's counsel in February 1991. In the statement, Walsh does not identify the author as one of the attackers, and mentions another person as the one who shot Griffiths. It is submitted that without hearing evidence as to the contents of the statement the jury was not in a position to give a fair and proper verdict.

3.2 The author further claims that he was not put on an identification parade, although he had asked for one, and that the judge should therefore have disallowed the dock identification made by Walsh. It is stated that Walsh may have been mistaken in his identification of the author as being present because he knew that the author lived at the premises.

3.3 The author further claims that the judge was not impartial, but biased in favour of the prosecution. In this context, it is said that the judge allowed the jury to remain in Court during a submission by the author's lawyer of "no case to answer", and the judge then dismissed that submission in the presence of the jury. It is submitted that the jury thereby heard weaknesses and inconsistencies in the arguments which should have been heard by the judge alone, thus prejudicing the jury against the author.

3.4 The author also claims that the judge's instructions to the jury were inadequate. In particular, it is alleged that the judge did not give proper instructions with regard to the evaluation of the identification evidence. It is stated that the judge failed to draw the jury's attention to the evidence, given during the trial by the investigating policeman, that it was dark that night, that he needed a lamp to see at the premises, and that, in order to make out a man holding a gun in his hand, he would have had to have been very close. In this connection, it is stated that the jury could at first not agree upon a verdict in respect of the author and asked for a further direction from the judge as to whether, if they believed that the author was present at the premises, they were obliged to come back with a guilty verdict. The judge then simply reminded them of the evidence given by Walsh, without pointing out its weaknesses.

3.5 The author further claims that he did not have adequate time and facilities for the preparation of his defence and that he did not have the opportunity to examine or have examined the witnesses against him. It is further contended that counsel's efforts to obtain the attendance of an expert witness from the Meteorological Office to give evidence failed, because of non-availability of the witness. It is submitted that evidence as to the state of the moon on the night of the incident would have assisted the court in deciding how clearly Walsh could have seen the author.

3.6 The author claims that he has been arbitrarily deprived of his liberty, in violation of article 9 of the Covenant, because he was not given a fair trial and has been kept in custody without release on bail.

3.7 The author also claims that he is a victim of a violation of article 6 of the Covenant, since he has been sentenced to death following a trial which was not in accordance with the provisions of the Covenant. In this connection, reference is made to the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty contained in the annex to Economic and Social Council resolution 1984/50.

3.8 The author further claims that his prolonged detention on death row, under degrading conditions, is in violation of articles 7 and 10 of the Covenant. He submits that the conditions in St. Catherine District Prison are hard and inhuman and that he is not being offered treatment aimed at reformation and rehabilitation. The author in particular refers to an incident on 4 May 1993 when he was badly beaten during the course of an extensive search of the prison, allegedly because his brother Andrew was a witness in a murder case involving some senior warders. All his personal belongings were destroyed. Upon indication of a prison warder, a soldier beat him with a metal detector on his testicle. Later he was taken to the sick bay and given pain killers, but no doctor came to see him. The author reported the incident to the acting Superintendent, who, however, disclaimed responsibility. The author's London counsel, in September 1993, wrote to the Jamaican Commissioner of Police, also to no avail. The author states that he has exhausted all domestic

remedies in this respect and claims that the remedies of filing a complaint with the Superintendent, the Ombudsman or the Prison Visiting Committee are not effective.

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

4.1 The State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. In this context, the State party points out that the author has lodged a petition with the Judicial Committee of the Privy Council, which is still pending. The State party further argues that it is also open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion.

4.2 As regards the author's claims under article 10 of the Covenant, the State party notes that the author has not given any explanation for his contention that the available remedies are not effective and it submits that the author has not shown that he has attempted to exhaust domestic remedies in this respect. In addition, the State party argues that the author also could bring a civil action in order to obtain damages for assault and battery and destruction of property.

5.1 In his comments on the State party's submission, the author notes that his petition to the Judicial Committee of the Privy Council for leave to appeal against the 1988 decision of the Court of Appeal was dismissed on 6 June 1991, and that therewith all domestic remedies relating to his trial and conviction are exhausted. He explains that in May 1993, he filed a further petition for leave to appeal on the grounds that his continued detention on death row, where he had already been for over five years, constituted cruel and inhuman treatment, and that therefore the death sentence against him should not be executed.

5.2 The author further states that he has no means to retain counsel and that legal aid is not made available either for constitutional motions or for civil actions, and that for this reason said remedies are not available to him. As regards the constitutional motion, the author further refers to the Committee's jurisprudence that a constitutional motion is not an effective remedy. 2/ Moreover, the author claims that, even if the constitutional motion were an available remedy to him, it would entail an unreasonable prolongation of the application of domestic remedies.

#### 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 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 notes that the author has filed a petition for special leave to appeal to the Judicial Committee of the Privy Council on the grounds that his prolonged detention on death row amounts to cruel and inhuman treatment. The Committee therefore considers that the author has not exhausted domestic remedies with regard to that specific complaint. That part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 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. As regards the State party's argument that a constitutional remedy is still open to the author, 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 those cases had been dismissed. However, the Committee also recalls that the State party has indicated on several occasions 3/ 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.

6.4. As regards the author's claim that the circumstances in detention amount to a violation of article 10 of the Covenant and that, on 4 May 1993, he was subjected to inhuman and degrading treatment, in violation of articles 7 and 10 of the Covenant, the Committee notes that the author has claimed that the available remedies are not effective and that his complaints to the Superintendent and to the Commissioner of Police were not followed up. In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering that part of the communication.

6.5 The Committee notes that part of the author's claim relates to the instructions given by the judge to the jury with regard to the evaluation of the identification evidence. 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.

6.6 The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that the judge was not impartial. As regards to author's argument that the judge should not have heard the submission of "no case to answer" in the presence of the jury, the Committee notes that author's counsel at the trial raised no objections in that respect. That part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee also considers that the author has failed to substantiate, for purposes of admissibility, his claim that he did not have adequate time and facilities of the preparation of the defence and no opportunity to cross-examine the witnesses against him. In this context, the Committee notes that the author was represented at the preliminary hearing by the same counsel who represented him during the trial and at the appeal, that at no time did the author or his legal representative complain to the trial judge that the time or facilities to prepare the defence were inadequate, and that the main witness for the prosecution was extensively cross-examined by the author's counsel. That part to the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.8 The author also claims that his continued detention is arbitrary and in violation of article 9 of the covenant. The Committee notes that the author was arrested and charged with the offence of

murder, and subsequently was brought to trial, convicted and sentenced. In this respect, the author cannot claim that he is a victim of a violation of article 9 of the Covenant, and that part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.9 The Committee considers that the failure to make available to the defence the content of Walsh's original statement, as well as the unavailability of a material defence witness, at the trial, may raise issues under article 14, paragraphs 1 and 3 (e), which should be examined on the merits.

7. The Human Rights Committee therefore decides:

(a) That the communication is admissible in as much as it appears to raise issues under articles 7, 10 and 14, paragraphs 1 and 3 (e), 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 author while his 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 author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(e) That this decision shall be communicated to the State party, to the author and to his counsel.

[Done in English, French and Spanish, the English text being the original version.]

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

1/ Andrew Peart's communication to the Human Rights Committee, communication No. 482/1991, was declared admissible on 19 March 1993 and is presently pending before the Committee for consideration of the merits.

2/ Reference is made to the Committee's decision in communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, and No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.

3/ See, for example, communications No. 238/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, No. 321/1988 (Maurice Thomas v. Jamaica), Views adopted on 19 October 1993, No. 352/1989 (Douglas, Gentles and Kerr v. Jamaica), Views adopted on 19 October 1993.