

## HUMAN RIGHTS COMMITTEE

### Wright and Harvey v. Jamaica

Communication No. 459/1991

27 October 1995

CCPR/C/55/D/459/1991

### VIEWS

*Submitted by: Osbourne Wright and Eric Harvey [represented by counsel]*

*Victims: The authors*

*State party: Jamaica*

*Date of communication: 27 February 1991 (initial submission)*

*Date of decision on admissibility: 17 March 1994*

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

Meeting on 27 October 1995,

Having concluded its consideration of communication No. 459/1991 submitted to the Human Rights Committee by Messrs. Osbourne Wright and Eric Harvey 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 authors of the communication, their counsel and the State party,

Adopts its

### Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Osbourne Wright and Eric Harvey, two Jamaican citizens at the time of submission 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.

The facts as submitted:

2.1 The authors were charged with the murder of one 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 judgement 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.

2.2 At trial, the case for the prosecution was that the authors and one or two other men, on 2 November 1980, after having robbed a butcher 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, a 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.

2.3 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.

The 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. The trial was not held immediately in 1986, but postponed until April 1988. The delay is said to be detrimental to the defence in view of the prosecution's reliance on 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. Detective 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 the 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 on admissibility and authors' comments thereon:

4. By submission of 18 November 1991, the State party argued that the communication was inadmissible on the ground of failure to exhaust domestic remedies. It conceded that the authors had exhausted their criminal appeal possibilities, but argued that they had failed to pursue the remedy provided by the Jamaican Constitution. In this connection, the State party submitted that articles 6, 7 and 14 of the Covenant were 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 referred 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.

The Committee's admissibility decision:

6.1 At its 50th session, the Committee considered the admissibility of the communication.

6.2 With regard to the State party's claim that the communication was inadmissible on the ground of failure to exhaust domestic remedies, the Committee recalled 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 noted that the Supreme Court of Jamaica had, 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 recalled that the State party had indicated on several occasions<sup>1</sup> that no legal aid was made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2(b), from considering the communication.

6.3 The Committee considered inadmissible the part of the authors' claims which related 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 reiterated that it was in principle for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the Judge, unless it was 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 did not show that the Judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee considered 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, might 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 considered inadmissible the authors' claim that their lengthy stay on death row, under allegedly deplorable circumstances, violated the Covenant, since the authors had failed to show what steps they had taken to bring this complaint to the attention of the authorities in Jamaica.

7. Accordingly, the Human Rights Committee decided that the communication was admissible in so far as it appeared to raise issues under article 14, paragraphs 3(b), (c) and (d), of the Covenant. Under rule 86 of the Committee's rules of procedure, the State party was requested not to carry out the death sentence against the authors while their

communication was under consideration by the Committee.

State party's submission on the merits and authors' comments:

8.1 By submission of 7 November 1994, the State party states that it is making inquiries into Mr. Wright's allegation that he was not represented at the preliminary hearing. As regards the claim that the period of five years between the end of the first trial and the beginning of the retrial constitutes undue delay in violation of article 14, paragraph 3(c), the State party argues that the delay was not wholly attributable to the State. In this context, the State party notes that the retrial was postponed on several occasions because of the absence of either defence counsel or the accused, and points out that Mr. Wright was at large for two years, during which period the retrial could not proceed.

8.2 With regard to the appeal, the State party submits that an examination of the Court of Appeal's records shows that counsel for Mr. Wright did in fact argue the appeal on his behalf. Moreover, the State party states that there is no indication that Mr. Wright ever signalled his dissatisfaction with his legal representation to the relevant authorities and that in those circumstances, the State party cannot be held responsible for the alleged improper representation.

8.3 On 15 September 1995, the State party informs the Committee that the authors' sentences have been commuted to life imprisonment.

9.1 In his response to the State party's submission, Mr. Wright reiterates that his legal aid counsel was absent at the preliminary hearing and that the magistrate should either have adjourned the hearing or have provided him with a new legal aid lawyer. As regards the delay in obtaining a retrial, Mr. Wright acknowledges that he was at large for two years, during which he could not be brought to trial. He submits however that this does not explain why the retrial against his co-defendant did not take place and why it took another two years after his rearrest to begin with the retrial. As regards the appeal, Mr. Wright states that he has never claimed that his counsel did not argue the appeal, but only that he was not informed beforehand when the appeal was going to take place and therefore had no occasion to consult with his counsel.

9.2 Counsel for the authors, by submission of 3 April 1995, argues that, taking into account that the preliminary hearing took place 14 years ago, the State party will never be able to explain satisfactorily why the preliminary hearing proceeded in the absence of Mr. Wright's legal representative. In this context, counsel recalls that Mr. Wright was only 18 years old at the time and not familiar with the criminal process. At the hearing he failed to cross-examine the prosecution witnesses, in particular detective Ashman. This failure to cross-examine was held against the defence by the judge at the authors' retrial, when the opportunity to cross-examine detective Ashman no longer existed. In this context, it is stated that detective Ashman was cross-examined at the first trial, but that no transcript of the first trial was available at the retrial. It is said that the information contained in the transcript might have helped to assess the value of the identification evidence and that the absence of the trial transcript seriously prejudiced the authors' defence.

9.3 It is further accepted that the State party cannot be held responsible for the two years' delay in the retrial for Mr. Wright while he was at large. However, counsel points out that the retrial was ordered in July 1983 and that Mr. Wright was released from custody in February 1984, and argues that there was no reason why the retrial could not have taken place before February 1984. Alternatively, after Mr. Wright's rearrest in early 1986, there was no reason why a trial date could not have been fixed immediately. Counsel argues that as a consequence of the delay the authors' defence was seriously prejudiced, since detective Ashman's evidence could only be read and not cross-examined, dock-identifications took place seven years after the event and Mr. Wright's main alibi witness was nowhere to be found.

9.4 As regards Mr. Harvey, counsel refers to his submissions made for Mr. Wright above and adds that there is no reason why Mr. Harvey could not have been tried even while Mr. Wright was at large. Counsel points out that at the retrial Mr. Harvey was identified in the dock by two of the witnesses seven years after the event, but that the same witnesses had been unable to identify him at an identification parade shortly after the incident. Further, at the retrial the alibi witness called for Mr. Harvey could not exactly remember the date when he had been with Mr. Harvey, thereby weakening his evidence. It is submitted that, if the retrial would have been held earlier, the witness' memory might have been clearer.

9.5 Counsel recalls that counsel for Mr. Harvey on appeal conceded that there were no merits to the appeal and argues that the factual abandonment of the appeal by Mr. Harvey's lawyer constitutes a violation of article 14, paragraphs 3(b) and (d).

#### Examination of the merits:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes that the State party has stated that it will investigate Mr. Wright's allegation about the lack of legal representation at the preliminary hearing, but that it has not provided any further information. In the circumstances, the Committee considers that it is undisputed that Mr. Wright was not represented by counsel at the preliminary hearing of the charges against him. The Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. The Committee notes that there is no indication that the lack of representation at the preliminary hearing was attributable to Mr. Wright. The Committee finds therefore that the failure to make legal representation available to Mr. Wright at the preliminary hearing constitutes a violation of article 14, paragraph 3(d), of the Covenant.

10.3 The Committee notes that the first trial against the authors ended on 29 July 1983 with a hung jury and that a retrial was ordered. It appears from the file that a trial date was set for 22 February 1984 and that the trial was postponed, because the accused Wright was no longer in custody. Although Mr. Harvey remained available for trial and regular hearings

were being held throughout and trial dates were set on several occasions, the retrial did not start until 26 April 1988, 22 months after Mr. Wright's rearrest. The Committee finds that in the circumstances of the instant case, such a delay cannot be deemed compatible with the provisions of article 14, paragraph 3(c), of the Covenant.

10.4 Mr. Wright has claimed that his counsel did not consult with him beforehand about the appeal and that this indicates that he was not effectively represented. The Committee notes that Mr. Wright was represented at the appeal by the lawyer who defended him at trial, and that counsel filed and argued several grounds of appeal, challenging several decisions made by the judge, and questioning his directions to the jury. In these specific circumstances, the Committee finds that Mr. Wright's right to an effective representation on appeal has not been violated.

10.5 As regards Mr. Harvey's claim that he was not effectively represented on appeal, the Committee notes that the Court of Appeal judgment shows that Mr. Harvey's legal aid counsel for the appeal conceded at the hearing that there was no merit in the appeal. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage another counsel. The Committee is of the opinion that in the instant case, Mr. Harvey should have been informed that his counsel was not going to argue any grounds in support of the appeal so that he could have considered any remaining options open to him. In the circumstances, the Committee finds that Mr. Harvey was not effectively represented on appeal, in violation of article 14, paragraphs 3(b) and (d).

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal."<sup>2</sup> In the present case, since the final sentence of death was passed without legal representation for Mr. Wright at the preliminary hearing, without due respect for the requirement that an accused be tried without undue delay, and without effective representation for Mr. Harvey on appeal, there has consequently also been a violation of article 6 of the Covenant.

11. 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 before it disclose a violation of article 14, paragraph 3(b), (c) and (d), and consequently



of article 6, of the International Covenant on Civil and Political Rights.

12. The Committee is of the view that Mr. Osbourne Wright and Mr. Eric Harvey are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The Committee is of the opinion that in the circumstances of the case, this entails their release. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State 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 and 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 90 days, information about the measures taken to give effect to the Committee's Views.

#### Footnotes

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.

2/ See CCPR/C/21/Rev.1, page 7, paragraph 7.

[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.]