

## HUMAN RIGHTS COMMITTEE

### Tomlin v. Jamaica

Communication No. 589/1994\*

16 July 1996

CCPR/C/57/D/589/1994

### VIEWS

*Submitted by: Crafton Tomlin (represented by counsel)*

*Alleged victim: The author*

*State party: Jamaica*

*Date of communication: 26 January 1994 (initial submission)*

*Date of decision on admissibility and of adoption of Views: 16 July 1996*

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

Meeting on 16 July 1996,

Having concluded its consideration of communication No. 589/1994 submitted to the Human Rights Committee by Mr. Crafton Tomlin 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, his counsel and the State party,

Adopts the following:

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

1. The author of the communication is Crafton Tomlin, a Jamaican citizen currently detained at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 14, paragraphs 1, 3 (b) and (e) and 5; and 17, paragraph 1, of the International

Covenant on Civil and Political Rights. He is represented by counsel. The author's death sentence was commuted to life imprisonment on 4 December 1992.

### Facts as submitted by the author

2.1 On 29 December 1988, at 5 p.m., the author turned himself in to the police for the killing of one Devon Peart that same day at about 3 p.m. On 19 June 1989, he was convicted of murder in the Clarendon Circuit Court and sentenced to death. On 16 November 1990, the Court of Appeal of Jamaica dismissed his application for leave to appeal against his conviction. On 6 October 1992, his application for special leave to appeal to the Judicial Committee of the Privy Council was equally dismissed. Following the enactment of the Offences Against the Person (Amendment) Act 1992, the author's offence was reviewed and re-classified as "non-capital murder". His sentence was accordingly commuted to life imprisonment, and the author becomes eligible for parole 15 years from the date of the review (4 December 1992).

2.2 During the trial, the prosecution and the defence gave conflicting accounts of the murder of Devon Peart, but it was accepted that the author had struck the fatal blow. According to the prosecution, the author had run up behind Mr. Peart and struck him in the back with a machete. No evidence of motive for the crime was offered. The author maintained that he had struck Mr. Peart from the front, in self-defence, after a confrontation in which Peart had threatened him with a machete.

2.3 The prosecution's main witness was the deceased's mother. She claimed to have witnessed the incident, that there had been no confrontation and that her son had never removed his own machete from his bag. It was undisputed that the deceased had been carrying a machete himself.

2.4 The medical evidence showed one machete wound extending from the deceased's right shoulder to his upper back, exposing the right lung; however, in court, the pathologist was not asked whether the wound was consistent or not with either the case of the prosecution or that of the defence.

2.5 On trial, the defence sought to argue that Mrs. Peart was either not giving an accurate account of events, or that she was not present at the scene at the time of the incident. The author himself had reported the incident to the police; Mrs. Peart never did so. There was no dispute that Mrs. Peart was present some three hours after the incident; however, she claimed that at that time, her son's machete was in his bag, whereas the defence suggested that she had removed the machete from his hand and placed it in his bag. Mrs. Peart admitted during the trial that she had attempted to remove the deceased's bag (containing his machete) from the scene, but was prevented from doing so by a bystander.

2.6 In addition to the statement the author gave to the police on the day of the incident, he made an unsworn statement during the trial.

### The complaint

3.1 Counsel claims that, during the trial, the judge made comments prejudicial to Mr. Tomlin's case, and that his directions to the jury were inadequate. Thus, during the cross-examination of Mrs. Peart by counsel for the defence, the judge observed, in the presence of the jury, that counsel's contention that Mrs. Peart had not been present at the scene of the crime was inconsistent with his earlier suggestion, to Mrs. Peart, that the author had acted in self-defence. Further, during the summing-up, the judge did not direct the jury to consider whether Mrs. Peart was in fact present at the material time, but, on the contrary, directed them to consider why the defence was suggesting "these inconsistencies". Furthermore, the judge failed to direct the jury that they should consider the possibility that Mrs. Peart had removed her son's machete from his hand.

3.2 The trial judge attached great weight to the medical evidence and invited the jury to carry out experiments to ascertain whether the events could have occurred as suggested by the prosecution or as put forward by the defence. The judge emphasized the fact that the wound was confined to the deceased's right side, whereas the author had claimed that he had "chopped at" the deceased over his left shoulder. Counsel submits that this was an unsatisfactory direction, based on inadequate medical evidence.

3.3 After completing the summing-up, the judge recalled the jury from the jury room to give some further instructions, which counsel submits were without foundation and unduly prejudicial to his client: for example, the judge wrongly implied that there were inconsistencies between the author's statement to the police and his unsworn statement made during the trial.

3.4 Counsel submits that the author's right to have his conviction and sentence reviewed by a higher tribunal has been prejudiced as a result of the above, in violation of article 14, paragraph 5, of the Covenant.

3.5 Counsel also submits that, on appeal, the author's attorney pursued only one of four grounds of appeal, i.e., that the trial judge failed to put the issue of manslaughter to the jury. It is submitted that other grounds of appeal, based on the above matters, should have been argued. Counsel claims that all the above deprived the author of a fair trial, in violation of article 14, paragraph 1, of the Covenant.

3.6 It is further submitted that the author did not have the opportunity to discuss the details or background of his case with his privately retained attorney. Counsel submits that, as a result, the Court was not made aware of a possible motive for an attack on the author by the deceased. In addition, two witnesses who could have supported the author's case were not called to testify on his behalf during the trial. These matters are said to constitute a violation of article 14, paragraph 3 (b) and (e), of the Covenant.

3.7 Counsel further argues that there has been an arbitrary interference with the author's mail, in violation of article 17, paragraph 1. In this respect, he refers to a letter dated 22 April 1991 from the author, concerning his petition for special leave to appeal to the Judicial Committee of the Privy Council, which allegedly was not posted by the prison authorities until 10 July 1991.

## The State party's information and observations on admissibility and the author's comments thereon

4.1 In its submission under rule 91, the State party does not object to the admissibility and offers observations on the merits of the case.

4.2 With regard to the claims that the weight attached to the medical evidence and the comments made by the trial judge during his summing-up as well as those made during counsel's cross examination of a witness were prejudicial to the author, in violation of article 14, paragraph 1, the State party contends that these matters relate to the evaluation of facts and evidence which in accordance with the Committee's own jurisprudence is for the appellate courts of States parties to assess and evaluate. The State party further contends that the fact that the author's counsel chose not to raise these issues on appeal merely reflects that counsel chose to exercise his professional judgement.

4.3 With respect to the claim that the author did not have adequate time to consult with his attorney, the State party contends that an argument of self-defence was put forward together with an attempt to challenge the honesty of a key prosecution witness, which belies the claim under article 14, paragraph 3 (b).

4.4 The State party denies that there has been a violation of article 14, paragraph 5. It submits that the author's case was examined by both the Court of Appeal and the Privy Council, and that therefore it cannot be said the author did not have sentence and conviction reviewed by a higher tribunal according to law.

4.5 As to the author's allegation that he was a victim of a violation of article 17, paragraph 1, the State party submits that there is no evidence whatsoever of any arbitrary or unlawful interference with the author's correspondence.

5.1 In his comments on the State party's submission, counsel reaffirms that his client is a victim of violations of articles 14, paragraphs 1, 3 (b) and 5. With respect to article 14, paragraph 1, counsel considers that the Committee should be allowed to evaluate the prejudicial effect of the deficiencies in the trial judge's instructions. With regard to the adequacy of time in which the author could meet and consult with his lawyer, counsel states that this does not simply mean providing adequate time for consultation between arrest and trial, but also adequate access during that time to a properly paid lawyer. Further, counsel restates that as appellate courts do not usually re-examine findings of fact by the lower courts, the appeal was not properly examined.

5.2 Counsel states that, although the withholding of the author's correspondence for two and a half months appears to be an isolated incident, it must none the less be considered a violation of article 17, paragraph 1.

## Admissibility consideration and examination of merits

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 ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 As regards the author's allegations relating to irregularities in the court proceedings, in particular improper instructions from the judge to the jury on the issue of medical evidence, the Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case; similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations do not show that the judge's instructions suffered from such defects. In this respect, therefore, the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee observes that, with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in October 1992, the author has exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has not raised any objection to the admissibility of the complaint and has forwarded comments on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes. The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

7. In the circumstances of the case the Committee decides that the other claims of the author are admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The author has alleged a violation of article 14, paragraphs 3 (b) and (e), and 5, in that he was unable to adequately consult with his lawyer and to interrogate witnesses on his behalf, thus effectively denying him the right to have his sentence and conviction reviewed. The State party has replied that an argument of self-defence was advanced by counsel, and that counsel merely exercised his professional judgement by not calling witnesses for the defence. The Committee considers that States parties cannot be held accountable for decisions that lawyers may choose to make when exercising their professional judgement, such as the calling and examination of witnesses on behalf of their client unless it is manifestly evident that counsel acted in a manner contrary to his client's interests. Had counsel needed more time to prepare the case, he could have requested additional time or an adjournment; from the record, it appears that no such request was made. By choosing not

to do so, he once again exercised his professional judgement. On the basis of the information available, the Committee concludes that there has been no violation of article 14, paragraph 3 (b) and (e), of the Covenant.

8.2 With respect to the contention that the author was not provided with the opportunity of an effective appeal since the Court of Appeal did not re-examine witnesses and because counsel did not advance the proper grounds of appeal, the Committee observes that these allegations do not in themselves support the contention that the author did not have a review of his sentence by a higher tribunal according to law. The right to have a conviction reviewed by a higher tribunal is not violated if counsel for an appellant chooses, in the exercise of his professional judgement, to concentrate on one arguable ground of appeal rather than advance several grounds. In the present case, the Committee concludes that there has been no violation of article 14, paragraph 5, of the Covenant.

8.3 The author has finally contended that his correspondence has been interfered with arbitrarily, in violation of his right to privacy. The State party contends that there is no evidence to support this claim. The Committee notes that the material before it does not reveal that the State party's authorities, in particular the prison administration, withheld the author's letter to counsel for a period exceeding two months. In this respect, it cannot be said that there was an "arbitrary" interference with the author's correspondence within the meaning of article 17, paragraph 1. The Committee considers, however, that a delay of two and half months in the transmittal of the author's letter to his counsel could raise an issue in respect of article 14, paragraph 3 (b) in so much as it could constitute a breach of the author's right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author's right to prepare adequately his defence, it cannot be considered to amount to a violation of article 14, paragraph 3 (b). After carefully weighing the information available to it, the Committee concludes that there has been no violation of either article 14 paragraph 3 (b), or of article 17, paragraph 1, of the Covenant.

9. 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 do not disclose a violation of any of the provisions of the Covenant.

[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.]

#### Footnotes

\*/ Made public by decision of the Human Rights Committee.