

HUMAN RIGHTS COMMITTEE

Kelly v. Jamaica

Communication No 537/1993

17 July 1996

CCPR/C/57/D/537/1993

VIEWS

Submitted by: Paul Anthony Kelly [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 15 February 1993 (initial submission)

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

Meeting on 17 July 1996,

Having concluded its consideration of communication No. 537/1993 submitted to the Human Rights Committee on behalf of Mr. Paul Anthony Kelly 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 Paul Anthony Kelly, a Jamaican citizen born in 1951, at the time of submission of his complaint awaiting execution in St. Catherine District Prison, Spanish Town, Jamaica. He claims to be a victim of a violation by Jamaica of articles 2, paragraph 3, and 14, paragraphs 1, 3 (b) and 3 (d), of the International Covenant on Civil and Political Rights. He is represented by counsel. In the spring of 1995, the author's death

sentence was commuted to life imprisonment, as a result of the judgment of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General.

The facts as submitted by the author:

2.1 On 28 April 1988, the author was found guilty by the Home Circuit Court of the murder, on 21 March 1987 at around 7.30 p.m., of Mr. Aloysius James at Chelsea, Irwin. The author's co-accused, one Errol Williams, was found guilty of manslaughter. The murder was committed during an armed robbery of the deceased's home, carried out by a gang of six during a power failure. The prosecution called two eyewitnesses, the deceased's common law wife and his brother. The evidence of the brother, however, was judged to be unreliable and the jury was instructed to disregard it. The wife testified during the trial that she witnessed the shooting and that she had seen the face of the murderer by the light of a single candle.

2.2 The author's appeal against his conviction was dismissed on 13 March 1989 by the Court of Appeal of Jamaica. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 June 1991.

2.3 The author was arrested at his work place in Love Lane on 24 March 1987. He claimed to be innocent of any crime and insisted that he had spent the evening of 21 March in Love Lane in Montego Bay, several miles away from Chelsea, and that he had witnesses to corroborate his claim. He suggests that the police held a grudge against him because of a prior affair, and that this is why he was arrested. After his arrest, he was not allowed to see a lawyer for five days; he did not make a statement to the police. On 2 April 1987, an identification parade took place, in the presence of the author's counsel, and the author was identified by the deceased's wife as the murderer. The author claims that she was able to identify him only because he has part of an ear missing; he claims that the police had instructed her accordingly. Moreover, the identification was allegedly conducted only after a policeman prompted the witness to make an identification by asking her who killed her husband when she stood in front of the author.

2.4 During the trial, the prosecution's case was based on identification, while the defence was based on alibi. The author gave sworn evidence that he had been in Love Lane on the evening of 21 March 1987. Of the 10 people who could, according to the author, corroborate his alibi, only two were called by his lawyer to give evidence. The first defence witness, an acquaintance of the author, corroborated the author's story. The second defence witness, a police woman who had been in the area in relation to a domestic dispute, testified at first that she had seen the author in Love Lane immediately before the power failure; the author claims that, upon indications by police officers present in the court room, she changed her testimony and told the Court that the last time she had seen the author had been around 5:45 p.m., well before the moment of the power failure. The author maintains that any other of the 10 witnesses could have testified that he was in Love Lane and seen by the policewoman much later that evening.

2.5 At the trial, the author and his co-accused both stated that they first met while in custody. The co-accused testified that he did not remember where he had been on the night of the

killing. The author, however, claims that, before the trial, he discovered a piece of parchment in his co-accused's shoe with the names of the author, a policeman and two or three judges on it. When raising his discovery with his co-accused, the latter confessed his involvement in the robbery in front of the author, his lawyer and the lawyer representing the co-accused. The co-accused allegedly also disclosed the true identity of the murderer. According to the author, his co-accused made a statement, admitting that he was one of the gunmen and that the author was not involved, to a police sergeant at Banhurst Police Station. He did not, however, give evidence on the author's behalf during the trial, nor did the author's lawyer produce the parchment as evidence or question any witnesses about the co-accused's confession.

2.6 The author moreover states that he was informed by a police officer, Lester Davis, that the deceased's wife had admitted, when questioned on the night of the murder, that she had not been able to see the murderer's face. Although the author informed his lawyer accordingly, the issue was not raised during the trial and the deceased's wife was not cross-examined on this point. Counsel provides a copy of a written statement by Mr. Davis, dated 24 April 1990, in which he states that the deceased's wife, on the night of the killing, said that she could not identify the assailants easily, and that his impression was that none of the eyewitnesses could identify any of the gunmen because of lack of light.

2.7 On appeal, the author was represented by a different legal aid lawyer, who allegedly did not inform the author about the date of the appeal, did not consult with him, and conceded before the Court that there were no merits in the appeal. Although the lawyer was informed that there were a number of witnesses who could corroborate the author's alibi, he made no attempt to interview them, nor did he pay attention to the confession made by the author's co-accused, and the statement of the police officer. Although the author had confirmed that he wanted to be present at the appeal hearing, he was not informed about the date of the appeal until after it had been dismissed.

The complaint:

3.1 The author claims that his rights under article 14, paragraph 3 (b), have been violated, since (a) he was denied access to his lawyer until five days after having been taken into custody, (b) he was not informed of the date of the appeal hearing and therefore unable to consult fully with his lawyer in respect of matters pertinent to the appeal, and (c) his lawyer failed to consult with him prior to the appeal.

3.2 The author further claims to be a victim of a violation of article 14, paragraph 3 (d), and refers in this context to the above mentioned and in addition to the failure of his counsel during the trial to object to irregularities and deficiencies of the identification parade, his failure to call key witnesses in support of the author's alibi, and his failure to put the evidence of the author's co-accused's confession before the Court and to examine witnesses on this point. He also claims that the failure of his appeal lawyer to act on the information given to him, his concession to the Appeal Court that there was no merit in the appeal, and the Court's failure to replace the lawyer in the light of this concession, amounts to a violation of article 14, paragraph 3 (d).

3.3 The author further claims to be a victim of a violation of article 14, paragraph 1, because of his counsel's negligence and because of the judge's failure, during the trial, to prevent other police officers in court from influencing the testimony of the police woman who testified on the author's behalf.

3.4 The author finally claims that article 2, paragraph 3, of the Covenant was violated, because he was denied an effective remedy in respect of the violations suffered. He claims that the constitutional motion is only a theoretical remedy for him, as the costs of instituting proceedings in the Supreme (Constitutional) Court are prohibitive and no legal aid is made available for the purpose.

3.5 Counsel argues that in capital cases, legal representation should follow the highest possible standards, and not just be pro forma but effective. In this connection, he refers to the jurisprudence of the Human Rights Committee that it is axiomatic that legal assistance must be made available in capital cases. Counsel claims that the statement made by author's counsel on appeal, that he saw no merit in the case, effectively left the author without legal representation, and refers in this connection to the Committee's Views on communication No. 250/1987 (Reid v. Jamaica), adopted on 20 July 1990. Counsel moreover submits that the matters complained of are not merely a function of professional judgment, and that the actions and opinions of the lawyers who represented the author before the Jamaican courts do not fall within the range of reasonable professional assistance which can be expected from a defence counsel. He claims that, given that the author's conviction was based on identification evidence of a sole witness, that key alibi witnesses were not called by the defence, and that the identification evidence was insufficiently tested, the ineffective representation in the author's case led to his conviction.

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

4. By submission of 12 October 1993, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, dated 4 January 1994, counsel notes that, since legal aid is not made available for constitutional motions, such a motion does not constitute an effective remedy in the author's case.

The Committee's admissibility decision:

6.1 During its 53rd session, the Committee considered the admissibility of the communication. It noted the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies and 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. As to the State party's argument that a constitutional remedy was still open to the author, the Committee noted that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of

fundamental rights, after the criminal appeals in these cases had been dismissed. It also recalled that the State party had indicated on several occasions that no legal aid is 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 case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. The Committee therefore found that it was not precluded by article 5, paragraph 2 (b), from considering the communication.

6.2 The Committee considered that the author and his counsel had sufficiently substantiated, for purposes of admissibility, that the communication might raise issues under article 14 juncto 2, paragraph 3, of the Covenant, which needed to be examined on their merits.

6.3 On 15 March 1995, therefore, the Committee declared the case admissible.

State party observations on the merits and counsel's comments thereon:

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 20 October 1995, the State party notes that the admissibility decision did not specify which provisions of article 14 might have been violated, and that it is clear from the author's case that not all provisions of article 14 are at issue.

7.2 On the alleged violation of article 14, paragraph 3 (b), the State party notes that the author's allegation that he was denied access to an attorney for five days following his detention "will be investigated".¹ It concedes, however, that under Jamaican law, the author had the right to consult with a lawyer following his arrest. As to the alleged failure to notify the author of the date of the hearing of the appeal, the State party recalls that it is the responsibility of the Court of Appeal Registry to notify inmates of the date on which their appeals will be heard. It affirms that this "is a function which is carried out very effectively and cases of failure to discharge this duty are rare." In the author's case, the records show that the author was informed of the date of his appeal, although the exact date of the letter is not available.

7.3 As to the author's allegation that since he was unaware of the date of his appeal, he could not consult with the attorney for his appeal and this attorney failed to consult with him, the State party reaffirms that since Mr. Kelly was notified of the date of his appeal, this could not have prevented him from consulting with his counsel. Furthermore, the State party argues that it has no responsibility for the way in which legal aid counsel conducts his case: rather, it is the State's duty to appoint competent counsel to assist the accused and not to obstruct him in the conduct of the case. Once this is done, the responsibility for the conduct of the case rests with counsel, and errors of judgment or other failings cannot be attributed to the State party. The State party thus denies that there was a violation of article 14, paragraph 3 (b), in respect of notifying the author of his appeal and the latter's ability to contact his counsel.

7.4 Regarding the alleged violation of article 14, paragraph 3 (d), because of counsel's conduct of the case during trial and on appeal, the State party reiterates that it cannot be held

accountable for the way in which counsel conducts the defence of his client: the same considerations as in paragraph 7.3 are said to apply. The perceived negligence of counsel, including failure to object to discrepancies in the conduct of the identification parade, failure to call key alibi witnesses, or to put the co-accused's confession into evidence and to examine witnesses on this point, relates, for the State party, to the conduct of the case by counsel, who merely chose to exercise his professional judgment. The State party therefore denies that there was a violation of article 14, paragraph 3 (d).

7.5 Concerning the alleged violation of article 14, paragraph 1, because of the trial judge's failure to prevent police officers in the court room from influencing the testimony of a policewoman who testified for the defence, the State party notes that "there is no indication other than the author's assertion that policemen in court persuaded the policewoman to change her testimony. In the unlikely event that this did occur, there is no evidence that this fact was brought to the trial judge's attention". In the State party's opinion, it would have been clearly incumbent upon counsel to bring such an important matter to the attention of the judge. As there is no evidence whatsoever that this was done, the State party refutes that article 14, paragraph 1, has been violated.

7.6 As to the alleged breach of article 2, paragraph 3, because of the alleged unavailability of a constitutional motion to the author due absence of legal aid, the State party reaffirms that there is no obligation under the Covenant to provide legal aid for constitutional motions, as article 14, paragraph 3, clearly states that the minimal guarantees of the defence, including legal assistance, concern the determination of criminal charges. Furthermore, the absence of legal aid is not a bar to the filing of constitutional motions even for indigent persons, as demonstrated by the case of Pratt and Morgan v. Attorney-General.²

8.1 In her comments, counsel notes that she only learned of the commutation of the author's death sentence by letter of 29 August 1995 from the Permanent Secretary of the Governor-General's office. As a result of the commutation, her client was removed from St. Catherine District Prison, but counsel has been unable to ascertain where Mr. Kelly was transferred, in spite of two requests addressed to the State party's authorities; she thus cannot obtain his instructions as to how to respond to the State party's submission, and qualifies her comments as preliminary ones. She qualifies the State party's failure to communicate the whereabouts of Mr. Kelly as a further violation of article 14, paragraph 3 (b), of the Covenant.

8.2 Counsel reaffirms that her client had a right, under article 14, paragraph 3 (b), to consult with a lawyer following his arrest. That he was unable to do so for five days - something the State party is unable to prove wrong - violated his right under said provision. As to the State party's contention that Mr. Kelly was notified of the date of his appeal, counsel notes that the State party is unable to provide the exact date of the notification letter, or indeed a copy of it. To her, Mr. Kelly's case should thus prima facie be held to constitute one of the "rare failures" to which the State party admits. Furthermore, to counsel, it "is axiomatic that the Court of Appeal had a duty to enquire into the absence of the applicant during his appeal hearing, and that the hearing should not have continued until [he] had been informed and had been given the opportunity to be present". As a result of the State party's failure to notify him of the date of the appeal, Mr. Kelly could not have consulted with counsel in preparation for

the appeal hearing.

8.3 Counsel reiterates that the State party violated article 14, paragraph 3 (d), because it appointed incompetent legal aid counsel to assist the author. These lawyers failed in the following: (a) to notify the author of the date of the appeal when he (the lawyer) became aware of it; (b) to consult Mr. Kelly to prepare for the appeal hearing; (c) to secure the author's attendance at the appeal hearing; (d) to alert the Court to the co-accused's confession; (e) to secure the attendance of witnesses; (f) to draw the court's attention to defects in the case against the author; (g) to protect generally Mr. Kelly's interests; and (h) by stating, during the appeal hearing, that there were no merits in the case. The last point, in particular, is said to be an example of "active obstruction" of the author's defence.

8.4 Still in the context of article 14, paragraph 3 (d), counsel submits that legal assistance within the meaning of this provision should be effective rather than nominal, and that the issue of competence must be determined by reference to the range of reasonable professional assistance that may be expected from a defence counsel: the Committee's jurisprudence, according to which "legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice"³, is invoked.

8.5 In the light of the considerations in paragraphs 8.2 to 8.4 above, counsel contends that Mr. Kelly's trial or appeal was not "fair" within the meaning of article 14, paragraph 1. Defence counsel's failure to examine defence witnesses, his failure to draw the Court's attention to the co-accused's confession, etc. are set to underline the unfairness of the appeal.

8.6 Finally, counsel argues that contrary to the State party's contention, the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General does not support the contention that the absence of legal aid for the purpose of constitutional motions is no bar for the filing of such motions by indigent persons. It is submitted that since legal aid is not provided for such motions, they are neither an available nor an effective remedy for the violations suffered by the author, contrary to article 2, paragraph 3.

Examination of the merits:

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

9.2 The author has claimed a violation of article 14, paragraph 3 (b), because he was unable to communicate with a lawyer of his choosing until five days after his being taken into custody. The State party has promised to investigate the allegation but failed to report to the Committee on its findings; it does however admit that, under Jamaican law, the author had the right to consult with an attorney following his arrest. According to the file, which was made available to the State party for comments, the author, when brought to the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer, Mr. McLeod, but the police officers ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, paragraph 3 (b), to

communicate with counsel of his choice, was violated.

9.3 Regarding the alleged violation of article 14, paragraph 3 (d), because of the perceived incompetence of the author's legal aid lawyer during the conduct of the trial, the Committee notes that the materials available to it do not reveal that Mr. Kelly's lawyer's decision not to call several potential alibi witnesses, or failure to point to discrepancies in the identification parade, was attributable to anything other than the exercise of his professional judgment; this is confirmed by the author's replies to a questionnaire that was put to him by counsel for the present communication. The author did not bring his counsel's perceived failures or omissions to the attention of the Court of Appeal. In the circumstances, the Committee concludes that there was no violation of article 14, paragraph 3 (d), as far as the conduct of the trial is concerned.

9.4 As to the author's notification of the date of his appeal and his representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to convicted prisoners under sentence of death. This applies to all stages of the judicial process. In the author's case, the first issue to be determined is whether he was properly notified of the date of his appeal and could prepare his appeal with the lawyer assigned to represent him before the Court of Appeal. Mr. Kelly insists that he was not informed of the hearing of his appeal until after its dismissal, whereas the State party argues that the Registry of the Court of Appeal notified Mr. Kelly of the date of his appeal. While the State party is unable to pinpoint the exact date of the notification or to provide a copy of the notification letter, the Committee notes from the file that the lawyer assigned to the author for the appeal, Mr. D. Chuck, was notified of the date of the appeal. This lawyer, in turn, wrote to the author in prison on 24 February 1989, asking him whether he had anything further to convey in preparation of the appeal. Mr. Kelly contends that he had had no contacts with Mr. Chuck before the receipt of the letter on 1 March, but that he sent explanations to Mr. Chuck immediately thereafter. In these circumstances, the Committee concludes that the author was aware of the imminence of the hearing of his appeal.

9.5 The second issue to be determined is whether the author's legal aid lawyer for the appeal had a right to effectively abandon the appeal without prior consultation with the author. It is uncontested that Mr. Chuck did not inform the author that he would argue that there were no merits in the appeal, thereby effectively leaving Mr. Kelly without representation. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a 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 other counsel. The Committee is of the opinion that in the instant case, Mr. Kelly should have been informed that his legal aid 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.⁴ In the present case, the Committee concludes that there has been a violation of article 14, paragraph 3 (d).

9.6 The author contends that article 14, paragraph 1, was violated, as the trial judge failed to intervene when police officers present in the court room during the trial sought to influence the testimony of a defence witness. None of the court or other documents made available to the Committee indicate, however, that any attempts to influence the defence witness were ever brought to the attention of the court, or that the matter was raised as a ground of appeal. It would have been incumbent upon defence counsel, or the author himself, to raise a matter of such importance with the trial judge. In these circumstances, the Committee finds no violation of article 14, paragraph 1.

9.7 As to the author's argument that the absence of legal aid for constitutional motions in itself constitutes a violation of the Covenant, the Committee recalls that the determination of rights in proceedings before the Constitutional Court must conform with the requirements of a fair hearing, within the meaning of article 14, paragraph 1. This means that the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles of paragraph 3 (d) of article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial does not have sufficient means to defray the costs of legal assistance in order to pursue said constitutional remedy, and where the interests of justice so require, legal aid should be provided by the State⁵. In the instant case, the absence of legal aid denied the author an opportunity to test the regularity of his criminal trial in the Constitutional Court in a fair hearing, and thus constitutes a violation of article 14, paragraph 1, juncto article 2, paragraph 3.

9.8 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, when 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." In the present case, since the final sentence of death was passed without adequate representation of the author on appeal, there has consequently also been a violation of article 6 of the Covenant.

10. 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 as found by the Committee reveal violations by Jamaica of article 14, paragraph 3 (b) and (d), and of article 14, paragraph 1, juncto article 2, paragraph 3, of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Paul Anthony Kelly is entitled to an effective remedy, which, in the circumstances of the case, should entail the author's release.

12. 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, under 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.

[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:

1/ As of 15 May 1996, no information about the result of the promised investigation had been received from the State party.

2/ Judgment of the Judicial Committee of the Privy Council of 2 November 1993.

3/ See Views on case No. 232/1987 (Daniel Pinto v. Trinidad and Tobago), adopted 20 July 1990, paragraph 12.5.

4/ See Views on communication No. 461/1991 (Morrison and Graham v. Jamaica), adopted on 25 March 1996, paragraph 10.5.

5/ See the Views on case No. 377/1989 (Anthony Currie v. Jamaica), adopted on 29 March 1994, paragraphs 13.2 to 13.4.