

HUMAN RIGHTS COMMITTEE

Hamilton v. Jamaica

Communication No. 616/1995

7 July 1997

CCPR/C/60/D/616/1995*

ADMISSIBILITY

Submitted by: Zephiniah Hamilton (represented by the London Law Firm of MacFarlanes)

Alleged victim: The author

State party: Jamaica

Date of communication: 6 January 1995

Documentation references: List: CCPR/C/CL/R.60; Prior decision - Special Rapporteur's rule 86/91 decision, transmitted to the State party on 31 January 1995, (not issued in document form)

Date of present decision: 7 July 1997

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 Mr. Zephiniah Hamilton, a Jamaican citizen who at the time of submission of his communications was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 9, paragraph 3; 10 and 14 paragraphs 1, 3 (c) and 5, of the International Covenant on Civil and Political Rights. He is represented by a counsel of the London law firm, MacFarlanes. The author's death sentence has been commuted.

The facts as submitted by the author

2.1 The author was arrested on 28 March 1989 and charged with the murders of Lynval Henry and Robert Bell, which had occurred on 13 October 1988. The preliminary enquiry was held in May

1990. On 24 October 1991, the author was found guilty as charged and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 12 October 1992. A further application for special leave to appeal to the Judicial Committee to the Privy Council has not been filed and there has been no appeal to the Supreme (Constitutional) Court of Jamaica.

2.2 The prosecution's case rested primarily on the testimony of two witnesses, one Jacksford McDermott and one Patrick Forbes. They testified that on 13 October 1988, at about 9:30 p.m., they were seated, together with Mr. Henry, around a table on the veranda of Mr. Forbes' shop, playing a game. The veranda was lit by a bottle torch on the table, and the shop was lit by a small lamp. Mr. Bell came along and stood watching the game. Mr. Forbes testified that, while he was looking down, he suddenly heard the sound of a blow to Mr. McDermott's head, and he saw him falling; he also saw two upraised machetes, but at that time he did not recognise the persons holding the machetes. Mr. McDermott testified that he fell on his back and when he looked up, he saw the author (whom he knew from his childhood) standing over him and heard him say "this one die". The author then overturned the table, and he and the other assailant turned around with the machetes to Mr. Henry and Mr. Bell, during which time Mr. Forbes and Mr. McDermott were able to escape.

2.3 Mr. Forbes further testified that, while hearing Mr. Henry screaming, he ran around the corner of the shop into another man holding a machete who chopped him on his hand. Mr. Forbes nevertheless managed to escape into a yam field. He stayed there for about fifteen minutes and then, armed with two stones, returned to within eleven yards of the shop. Through the window and door of the shop, he saw the author (whom he had seen three times before) and another man (whom he did not know) ransacking the shop. He watched them for about ten minutes and then threw the stones against the shop, upon which the men fled, the author taking some silver objects with him. On their way down the road, they ran into a man whom they also attacked with their machetes.

2.4 Mr. McDermott further testified that he escaped through the shop into the adjacent house, where he locked himself in. He heard the men asking for him, and he could see them through a window. He confirmed that the men left the scene after stones had been thrown against the shop.

2.5 The bodies of Lynval Henry and Robert Bell, bearing several machete wounds, were found by the police near the shop. A trail of blood led from the shop to Mr. Bell's body. During the trial, the investigating officer of Linstead Police Station testified that he obtained a warrant for the author's arrest on 14 October 1988, but it was not until 28 March 1989, that he traced the author, who was in hospital for gunshot wounds, and was able to execute the warrant.

2.6 The author's defence was based on alibi and mistaken identity. The author made an unsworn statement, denying any knowledge of the murders. He stated that, on 12 October 1988, he had been beaten and chopped with a machete by a group of men, and he therefore had bandages on his left hand, hip and right foot. He mentioned the name of the doctor who had allegedly treated him, but this doctor was not called to testify on his behalf.

2.7 The main ground raised on appeal was that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. It was argued, *inter alia*, that there was no evidence from which it could be concluded that the author and his companion killed the men, because the evidence for the prosecution placed the author and the other man at the scene of the crime, but there

were no direct eye witnesses to the offence itself.

2.8 As mentioned above, leave to appeal to the Privy Council was not sought because the grounds on which such an appeal will be entertained in a criminal court are very limited. Two days after the Court of Appeal of Jamaica dismissed the author's appeal, the Offences Against the Person (Amendment) Act 1992 came into force, on 14 October 1992; this Act provides for a classification system for murders, into capital and non-capital murders, with particular application to persons who had already been convicted and sentenced to death. This legislation, and the procedural requirements to ensure fairness at both stages of the classification system was carefully considered, as a test case, by the Privy Council in Huntley v. A-G for Jamaica (judgment delivered on 12 December 1994). Lord Woolf, delivering the judgment, said that at the commencement of the Act there were some 300 prisoners on death row, of which a substantial number could expect to have their sentences commuted to life imprisonment as a result of Pratt & Morgan v. A-G for Jamaica 1994 2 A.C.1.; nonetheless there remained an estimated 28 prisoners whose fate could depend upon the outcome of the classification process. In the author's complaint there is an annex prepared by another firm of London solicitors and dated 18 November 1994, which lists 10 names of prisoners whose cases were going through the Court of Appeal under the 1992 Act process and who seemed likely to be classified as non-capital cases. A further eight prisoners are then listed, including the author, of whom it is said that a capital classification was likely. On 12 March 1993, written representations were submitted on his behalf to the Court of Appeal, in anticipation of an adverse classification, in accordance with section 7 (4) of the 1992 Act, and as the basis for any further appeal. The author's counsel complains about various provisions of the 1992 Act and its validity within the terms of section 20 of the Constitution, all of which points were rejected by the Privy Council in the Huntley case so far as concerns Jamaican law.

2.9 In the complaint itself, dated 6 January 1995, reference is made to the Huntley decision as a reason why domestic remedies had been exhausted. Nevertheless, the substance of the complaint at paragraph 3.4 below raises, before the Committee, issues which were determined for the purposes of domestic law by the Privy Council in the Huntley case. The author's counsel, in the same context of exhaustion domestic remedies, explains why, because of the precedent of previous decisions in the Privy Council about the scope of a constitutional appeal to the Supreme (Constitutional) Court of Jamaica, no appeal was pursued in that court.

2.10 Counsel continued to keep the Committee informed of the progress of the proceedings. The Court of Appeal on 7 March 1995, classified the author's case as one of capital murder, not on the grounds of his implication under the joint enterprise doctrine but because of his conviction of two murders on the same indictment. Despite the statement in section 7(5) of the 1992 Act that on this issue the Court of Appeal's decision is final, leave was sought to raise the case before the Privy Council. Leave to petition the Privy Council was granted on 6 November 1995, probably without knowledge that, on 9 October 1995, the Governor General had commuted the author's sentence to life imprisonment. The Committee has not been informed of the grounds of appeal raised in that petition, but the Privy Council dismissed the appeal on 16 April 1997: it was decided that the trial and appeal disclosed no error in law, and the Privy Council did indeed have no jurisdiction to review a decision of the Court of Appeal under Section 7 (5) of the 1992 Act. The basis of the original complaint may, therefore, have at least in part been overtaken by subsequent events.

The complaint

3.1 In respect of the claims under article 14, counsel concedes that the murders Mr. Hamilton was convicted of were committed in the course of a robbery, thus warranting prima facie a capital classification under Section 2 (1) (d) (i) of the Offences Against the Person (Amendment) Act 1992. However, it is submitted, the murders of which the author was convicted should be reclassified as non-capital, pursuant to Section 2 (2) of the Act, which provides that: “If, in the case of any murder referred to in sub-section (1) ... two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person: but the murder shall not be capital murder in the case of any other of the persons guilty of it”.

3.2 Counsel argues that, while the two prosecution witnesses placed the author at the scene, there were no eye-witnesses to the offence, nor was it proven that the author himself caused the death of, or inflicted or attempted to inflict grievous bodily harm on, either victim. The trial judge directed the jury that a verdict of guilty in Mr. Hamilton’s case could be reached even if he himself did not do any violent act in relation to the victims (i.e. on the strength of joint enterprise alone). It is argued that it is therefore possible that the jury’s verdict was not based on a belief that Mr. Hamilton himself physically participated in the killings. In this context, reference is made to the findings in the case of R.V. Albert [(1995) 39 CR. App.R 141], that “if two people are jointly charged and the evidence does not point to one rather than the other and there is no evidence that the offence must have been committed by both accused, it must be assumed that the offence may have been committed by only one of the accused. In the case of each of the accused, therefore, it must be accepted that it may have been the other who committed the offence, or inflicted the harm”.

3.3 Counsel adds that it would be very arbitrary and procedurally capricious to deny the benefit of Section 2 (2) of the Act to those defendants who have not physically caused the death of a victim, on the ground that the person who has performed the act(s) which caused the victim’s death has not yet been apprehended or brought to justice. It is submitted that those convicted of murder purely on the basis of joint enterprise or common design (i.e. without any direct evidence of having physically participated) should be classified as having committed a non-capital offence.

3.4 It is further submitted that the retrospective active character of Section 7 of the Offences Against the Person (Amendment) Act 1992, which classifies prisoners already on death row, is contrary to article 14 of the Covenant and the Jamaican Constitution. Counsel argues that under Section 7 of the Act the author was in fact convicted of a new offence, and should therefore have been afforded the right to a full and fair hearing. He was however not provided with any reasons for his classification as a capital offender and he was not given an opportunity to make any contribution to the classification by the single judge.

3.5 Counsel considers the above to be in violation of paragraphs 4 and 5 of the safeguards annexed to Resolution 1984 (50) of the Economic and social Council:

Paragraph 4 provides that: “Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation

of the facts”, and paragraph 5 provides that: “Capital punishment may only be carried out [...] after legal process which gives all possible safeguards to ensure a fair trial at least equal to those in Article 14 [...] including the right [...] to adequate legal assistance at all stages in the proceedings”.

3.6 It is stated that executions in Jamaica were suspended in February 1988 but could re-commence at any time. According to counsel, the fate of the author may not depend on any legal grounds but on a political decision. It is submitted that the continued uncertainty of whether or not the author may lose his life and the severe mental distress this causes, amounts to a violation of articles 7 and 10 of the Covenant. The arbitrary resumption of executions after such a period of delay, unconnected with any legal grounds of procedures is said also to amount to a violation of article 6, paragraph 1.

3.7 With reference to the Committee’s established jurisprudence, counsel claims a violation by Jamaica of article 6, paragraph 2, because the sentence of death was passed on the author without having met the requirement of the Covenant.

3.8 Furthermore, counsel explains that the author was shot by the police in the lower region of his spine while he was in police custody prior to his trial ^{1/}. As a result of this, he is paralysed in both legs and is unable to move from his cell unless he is carried by other inmates. He is also unable to remove his slop bucket from the cell himself and he has therefore been obliged to pay other inmates to remove it. This means that sometimes it has to remain in his cell until he has obtained the necessary funds. The author complained several times to the superintendent about the conditions in which he is kept, to no avail. Furthermore, the London solicitors wrote twice to the Prison Governor on Mr. Hamilton’s behalf, requesting him to ensure that the author is given proper assistance to enable him to leave his cell for some period during the day, and also to make proper arrangements for his slop bucket to be removed from his cell daily. To date no reply has been received. Counsel refers to a 1993 report from a non-governmental organisation in which it is stated that, although the Parliamentary Ombudsman seems to make a genuine effort to address the problems in the prisons of Jamaica, his office does not have sufficient funding to be effective, and the Ombudsman has no powers of enforcing his recommendations which are non-binding. Therefore, counsel argues, the office of the Parliamentary Ombudsman does not provide an effective remedy in the circumstances of the author’s case. It is submitted that the author’s rights under articles 7 and 10 of the Covenant have been violated, because of the prison authorities’ failure to take into account the author’s paralysed condition and to make proper arrangements for him. The lack of proper care is also said to be in violation of the UN Standard Minimum Rules for the treatment of Prisoners.

3.9 Counsel points out that the author was arrested on 28 March 1989, but was not tried until 24 December 1991, and that it took a further ten months before his appeal was heard and dismissed. The delay of thirty-three months between conviction and appeal, is said to amount to a violation of articles 9, paragraph 3, and 14, paragraph 3 (c).

4. On May 11, 1995 the communication was transmitted to the State party, with a request to submit to the Committee information and observations in respect of the admissibility of the Communication. As of July 1997 no reply has been received.

Issues and proceedings before the Committee

5.1 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.

5.2 The Committee notes with concern the absence of co-operation from the State party on the matter under consideration. In particular, it observes that the State party has failed to provide information on the question of admissibility of the communication. On the basis of the information before it the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (a), of the Optional Protocol.

5.3 The Committee notes that the State party has not contested the admissibility of the author's allegations about the conditions of his detention at St. Catherine District Prison which are aggravated by his handicap. In the circumstances, the Committee finds that the author and his counsel have met the requirements of article 5 paragraph 2 (b), of the Optional Protocol in this respect, and considers that the allegations may raise issues under article 10, paragraph 1, which should be examined on the merits.

5.4 The Committee is not clear how much, if any, of the original complaint, as set out in paragraphs 3.1; 3.2 and 3.9 above is still relevant in the light of subsequent events and decisions of the Jamaican Courts and the Privy Council.

6. The Human Rights Committee therefore decides:

(a) that the communication is admissible in as much as it appears to raise issues under articles 10, paragraph 1; 9, paragraph 3, and 14, 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 the 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 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 High Commissioner Centre for Human Rights, United Nations Office in Geneva, within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party and to the author and to his counsel.

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

1/ No further explanation is given as to when exactly or why the author was shot. As to the fact that the author was in hospital for gunshot wounds at the time of his arrest, the investigating officer from the Linstead Police Station indicated during the trial that these gunshot wounds “did not arise from when he was shot at Linstead, but from another matter”.