HUMAN RIGHTS COMMITTEE

Young v. Jamaica

Communication No 615/1995*

4 November 1997

CCPR/C/61/D/615/1995/Rev.1*

VIEWS

Submitted by: Byron Young [represented by Kingsley Napley, a London law firm]

Victim: The author

State party: Jamaica

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

Meeting on 4 November 1997,

Having concluded its consideration of communication No. 615/1995 submitted to the Human Rights Committee on behalf of Mr. Byron Young 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 Byron Young, a Jamaican citizen who at the time of submission of the communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 14 and 15 of the International Covenant on Civil and Political Rights. He is represented by Mr. David Smythe of the London law firm of Kingsley Napley. On 8 September 1995, counsel informed the Committee that the death sentence against his client had been commuted to life imprisonment.

Facts as submitted

2.1 On 25 April 1990, the author and three co-defendants were convicted of the murder, on 24 January 1989, of one Elijah McLean, and sentenced to death. Their appeals were dismissed by the Court of Appeal of Jamaica on 16 March 1992. On 11 January 1995, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal. It is submitted that with this, all available remedies have been exhausted. Subsequently, the offence of which the author was convicted was classified as a capital offence under the Offences against the Person (Amendment) Act, 1992.

2.2 At the trial, the prosecution argued that the four accused were among seven men who entered the house of the deceased in the early morning of 24 January 1989, dragged him out of his bed, took him out of the house into the yard and slashed him several times with their machetes, thereby causing his death.

2.3 The prosecution relied primarily on the evidence of three relatives of the deceased, aged 11, 14 and 17 at the time of the crime, and who lived in the deceased's house. They testified that they were woken up by sounds emanating from the room in which the deceased and his common law wife were sleeping. They went to the doorway and saw the author - whom they knew - holding a flashlight in one hand and a gun in the other, pointed at the deceased. Six other men carrying machetes were also standing by the bed of the deceased, and one of them hit him on the forehead. All seven then pulled the deceased from his bed and carried him outside. The deceased held onto one of the doors and was hit on his hand by one of the men. The witnesses further testified that, once in the yard, he was slashed several times by six of the men, while the author stood in their midst, with the gun still in his hand. Thereafter, all seven men left.

2.4 The author's defence was based on alibi. He made an unsworn statement from the dock, simply indicating that he had no knowledge of the murder. Therefore, the issue was one of identification and the defence was solely directed at the eyewitnesses' credibility and their ability, given the lighting conditions in the room and the yard at the time of the incident, to identify the author and the co-accused correctly. On trial, the author was represented by a legal aid attorney. No witnesses were called to testify on the author's behalf.

2.5 Upon conclusion of the judge's summing-up, the jury retired, at 2:31 p.m. It returned at 3:14 p.m. to inform the judge that it had been unable to arrive at a unanimous verdict. The judge replied that he could not, at that stage, accept anything but a unanimous verdict, and the jury once again retired at 3:16 p.m. The jury returned at 4:27 p.m., and the foreman once again announced that no unanimous verdict had been arrived at. The judge thereupon stated: "I am afraid that this is not a case in which I can accept a majority verdict, this is a murder case and your verdict must be unanimous one way or another. [...] None must be false to the oath he has taken to return a true verdict, but in order to arrive at a collective verdict, a verdict upon which you all agree, there must necessarily be some giving and taking. There will be arguments [...], but at the same time there must be [...] certain adjustment of views. Each of you must listen to the voices of the other and don't be dogmatic about it [...]. None of you should be unwilling to listen to the argument of the other. If any of you have a strong

view, or you are in a state of uncertainty, you are not obliged or entitled to sink your view and agree with the majority, but what I tell you to do is to argue out and discuss the matter together and see whether or not you can arrive at a unanimous verdict." The foreman then asked the judge a question related to evaluation of evidence, and after this had been explained, the jury retired a third time at 4:41 p.m. It returned at 5:30 p.m., and the foreman announced that the jury had reached a unanimous verdict, finding all four accused guilty as charged.

2.6 Counsel forwards the sworn affidavits from Terence Douglas and Daphne Harrison, two jury members who sat throughout the trial and were present during the deliberations of the jury.

2.7 In his affidavit of 3 May 1990, Mr. Douglas states: "[...] On the last day of the trial - out of twelve jurors - only three jurors found the men guilty. Because it was getting late and the foreman was pressuring us, we just told him to do what he wants. The foreman then stood up [...] and said he found all four men guilty. [...] I was inside talking to the three jurors when the foreman turned to me and said he was going to tell the judge that I got money to let the men go. I then told him to go ahead and tell the judge because I can talk for myself. After the case was dismissed I went outside and started to cry because I know that the four men are innocent [...]. I would like the [Jamaica] Council [for Human Rights] to get a re-trial for these men because they did not get a fair trial."

2.8 In her affidavit of 12 June 1990, Ms. Harrison states: "[...] On our first deliberation, nine of us had come to the decision that the quality of the evidence was so poor and conflicting, that we saw no reason why the men should not be acquitted. After the foreman had informed the court that we could not arrive at a unanimous verdict, we were further addressed by the trial judge. However, on our second deliberation, the situation remained the same. On our final deliberation, the nine - eight others and myself - held steadfast to our decision as we genuinely believed that the evidence was poor. However, as it was getting late and we all wanted to go home, and the fact that we were becoming frustrated, we all turned to the foreman and two jurors and said: 'Alright, you can do whatever you want to do, but remember, we are not a party to any guilty verdict.' The foreman then remarked 'I can only hope that when I get out there none of you say anything'." Ms. Harrison further states that she is willing to attest to her statement in any court at any time.

2.9 The author's appeal was based on the trial judge's alleged failure, in his directions to the jury, to highlight certain discrepancies in the evidence of prosecution witnesses, his directions to the jury that their verdict must be unanimous one way or the other, the effect of which is said to have "cajoled" the jury into a verdict of guilty, and his directions to the jurors on the issue of the unsworn statements made by the author and his co-defendants. The appeal was dismissed on all grounds.

2.10 Mr. Young's subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was based inter alia on the following grounds:

* that the trial judge had erred, in his summing up to the jury, by over-emphasizing the

requirement of unanimity and by failing to advise the jurors appropriately on their right and duty to disagree;

* that there had been a material irregularity in the course of the trial, in that although nine out of the twelve jurors had intended to acquit the author and his co-defendants, the foreman wrongly and improperly announced to the court that a unanimous verdict had been reached against the author.

2.11 Counsel further explains that the issue of the alleged material irregularity during the course of the jury's deliberations was not raised before the Court of Appeal of Jamaica, apparently because the author's lawyer for the appeal was of the opinion that the judgment of the Judicial Committee of the Privy Council in Lalchan Nanan v. The State [1986] 3 AER 248. prevented the Court of Appeal from questioning and investigating the jury's deliberations. He also explains that while the issue was raised in the petition for special leave to appeal to the Privy Council, the Privy Council refused to examine the matter on account of the precedent in Nanan.

The complaint

3.1 Counsel argues that the irregularities in the course of the jury's deliberations, as outlined above, constitute a violation of the author's rights under article 14 of the Covenant, notwithstanding the restrictions which are placed upon the State party's courts by established case law and judicial precedents.

3.2 Counsel alleges a violation of article 14, paragraph 3(e), of the Covenant, since the author's legal aid lawyer for the trial failed to call any witnesses for the defence. In that context, he forwards a sworn affidavit dated 22 October 1993, signed by three individuals who state that they had been with the author in a bar from 11:00 p.m. to 4:00 a.m., some seven miles away from the place where the murder occurred, on the night in question. These individuals emphasize that the author had been with them all the time and is thus innocent of the crime he was tried for; they confirm that they were not called to testify during the author's trial.

3.3 Counsel indicates that at the time of the author's trial, only one category of murder resulted in the mandatory imposition of capital punishment. After Mr. Young's conviction, Jamaica passed the Offences against the Person (Amendment) Act 1992, which creates two categories of murder, capital and non-capital. Section 7(4) of the Act provides for the classification of sentences that were passed before the entry into force of the Act as capital or non-capital. Murder must be classified as capital if it is committed, inter alia, in the furtherance of robbery, burglary or housebreaking. According to counsel, none of these additional grounds had been invoked by the prosecution at the author's trial and, since the issue was irrelevant at the time of the trial, no determination of fact was made as to whether these additional facts had occurred.

3.4 Section 2(2) of the Act requires, for an individual to be found guilty of capital murder, that he, by his own act, caused the death of, or inflicted or attempted to inflict grievous

bodily harm on the victim, or himself used violence. The issue of whether the person identified as Mr. Young had himself inflicted any injury or used direct force against the victim was not considered during the trial, being legally irrelevant then. Counsel contends that under the Act, a convicted prisoner is not allowed to adduce fresh evidence, or to have witnesses examined, when the review concerns a conviction handed down prior to the entry into force of the Amendment Act.

3.5 Counsel submits that to classify the author's conviction as capital murder nearly five years after the trial and to deny him a trial on the above-mentioned issues deprives him of the protection afforded to a person charged with murder after the entry into force of the Act. Moreover, the author was classified as guilty of capital murder on the basis of witness testimony only, and the issue of capital/non-capital murder was not explored at any point prior to or during the trial. It is therefore argued that, under the Amendment Act, the author was denied the opportunity to examine effectively any of the witnesses whose evidence may have had a bearing on the additional grounds now required under the Amendment Act for capital murder. Counsel also submits that the author was deprived of the right to be presumed innocent in respect of the (under the new definition of capital murder) required additional acts/offences. Counsel argues that the above is not only contrary to article 14, but also to article 15.

3.6 Counsel alleges that the author is a victim of a violation of article 7 because of the conditions of his detention. Thus, the author is allowed few visitors, is not permitted to work or to educate himself, and remained (while on death row) confined to a cell measuring 2 square metres. He allegedly suffered ill-treatment at the hands of prison warders, which included theft of personal effects, assault and continued/repeated soaking of his bedding.

3.7 After the commutation of the author's death sentence in mid-1995, counsel abandoned his claims related to alleged violations of article 6 (arbitrary deprivation of life), article 7 (length of detention on death row), and article 15 of the Covenant.

State party's observations

4.1 By submission of 16 June 1995, the State party concedes the admissibility of the communication and provides comments on the merits of the author's claims. It refutes the allegation of the author that he was denied the benefit of the classification process under the Offences against the Person (Amendment) Act 1992, and that but for the failure to address evidence about certain circumstances of the offence of which he was convicted, he would have been entitled to a lighter sentence, in accordance with article 15. In this context, it points out that Section 2(4) of the Act enables convicted prisoners to apply for a review of the classification within 21 days of the notice of classification. That review is conducted by three judges of the Court of Appeal, and the applicant may appear himself or be represented by counsel. The State party notes that Mr. Young failed to avail himself of this possibility of review of the classification; failure to do so cannot be attributed to the State party. In any event, the State party adds, the evidence upon which the author was convicted included evidence of housebreaking, and under Section 2 of the Act, capital murder includes murder committed in the course of burglary or housebreaking. Therefore, under the Amendment

Act, the author's conviction was properly classified as a capital crime, and article 15 of the Covenant does not apply.

4.2 The State party asserts that there can be no question of a violation of article 14, paragraph 3(e), because it is not for State party authorities to interfere with the conduct of a case by counsel for the defence. Issues related to the conduct of the defence must be left to the accused and his legal representative, and the fact that Mr. Young's representative did not call any defence witnesses thus cannot be attributed to the State party.

Decision on admissibility and consideration on the merits

5.1 The Committee has considered the present communication in the light of all the information provided by the parties, as required by article 5, paragraph 1, of the Optional Protocol. It notes that the State party has conceded the admissibility of the communication; it considers that the author's claims relating to article 7 and to article 14 of the Covenant are admissible, and the Committee therefore proceeds directly with their examination on the merits. As counsel for the author no longer relies on the initial claims under articles 6, 7 (concerning the length of the author's detention on death row) and 15, the Committee need not address these issues.

5.2 Counsel claims that Mr. Young is a victim of violation of article 7, in that he was subjected to ill-treatment by prison warders, including assault and repeated soaking of his bedding. The State party has not replied to this allegation, although it had an opportunity to do so. In the circumstances, the Committee concludes that Mr. Young was subjected to degrading treatment, in violation of article 7.

5.3 Concerning article 14, two issues are before the Committee: (a) whether the judge's insistence that the jury must reach a unanimous verdict and the alleged material irregularities in the jury's deliberations constituted a violation of article 14, paragraph 1, and (b) whether defence counsel's failure to call witnesses on the author's behalf during the trial constitutes a violation of article 14, paragraph 3(e).

5.4 The Committee observes that issue of the judge's summing up to the jury and his emphasis that the jury reach a unanimous verdict was examined by the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, and that both instances found the instructions to be acceptable. It is not for the Committee to review the findings of these bodies in the absence of any indication that their conclusions were arbitrary or otherwise amounted to a denial of justice. As to the alleged irregularities in the jury's deliberations, the Committee notes the sworn affidavits of the two jurors referred to in paragraphs 2.7 and 2.8 above. There is no indication in the present case that the trial itself was unfair, or that jurors made any objection, at the conclusion of the trial, to the instructions which the judge gave the jury at around 4:30 p.m., on 25 April 1990; nor did the jurors object to the jury foreman's announcement that the jury had arrived at a unanimous verdict of "guilty". As these possibilities would have been available, the Committee cannot find that the refusal of the Judicial Committee of the Privy Council to reconsider its conclusions in the case of Nanan v. The State would constitute a violation of article 14 of the Covenant, although the

Committee is in no way bound by a State party's jurisprudence.

5.5 As to article 14, paragraph 3(e), it is uncontested that no effort was made to have three potential alibi witnesses testify on the author's behalf during the trial. It cannot be assumed that the judge would have disallowed such a request, had it been made. However, it is not apparent from the material before the Committee and the trial transcript that counsel's decision not to call witnesses was not made in the exercise of his professional judgment. In these circumstances, the failure to examine witnesses on the author's behalf cannot be attributed to the State party, and there is no basis for a finding of a violation of article 14, paragraph 3(e).

6. 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 reveal a violation by Jamaica of article 7 of the Covenant.

7. Under article 2, paragraph 3(a), of the Covenant, Mr. Byron Young is entitled to an effective remedy. The Committee welcomes the commutation of the author's death sentence by the State party in the summer of 1995, but considers that the author is entitled to compensation for the ill-treatment he was subjected to during his detention on death row.

8. 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.

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* The following Committee members participated in the adoption of the present Views: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

** The text of an individual opinion signed by one Committee member is appended to the present document.

[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.]

Appendix

Individual opinion by Mr. Prafullachandra N. Bhagwati

I am in agreement with the Views expressed by the Committee but I would like to add my own reasons to what has been stated in the Views expressed by the Committee.

The verdict of the jury was announced by the foreman on 25 April 1990. The foreman announced that the jury had reached a unanimous verdict of guilty against all the accused. Neither of the two jurors, who subsequently made affidavits stating that in their view the accused were not guilty and that they were not party to the guilty verdict, got up and contradicted the foreman when he said that the verdict was unanimous. If their subsequent version in the affidavits was correct, there is no reason why they should not have told the judge that what the foreman was saying was not correct and that the jury had not reached a unanimous verdict. The only reason given by the two jurors for not contradicting the foreman was that they were pressurised by the foreman and they wanted to go home as it was getting late. This reason can hardly carry conviction. The jurors have to take oath when they are empanelled and it is difficult to believe that the two jurors in question could have violated their oath and allowed the foreman to announce that all the jurors including them had reached the verdict of guilty when in fact they had not, for the only reason that they were pressurised and wanted to go home. In any event, how can the Committee believe the affidavits of persons who were prepared to sanction death penalty for the accused, though in their view the accused were not guilty, merely because they were getting late and wanted to go home. It is therefore not possible for me to accept the affidavits of the two jurors and no reliance can be placed on these affidavits.

It was however contended in the submission made by counsel for the author, that since the State did not file an affidavit disputing the correctness of the affidavits of the two jurors, what was stated in those affidavits must be accepted as correct. In the first place, under the law of Jamaica which is the same as the law in England and the other common law countries where there is jury trial, the jurors cannot be required to disclose which way they voted in the verdict. There is an obligation of confidentiality on them. The State could not have therefore enquired from the other jurors as to what was their verdict and filed an affidavit on the basis of such information. No reference can therefore be drawn from the fact that the State did not file an affidavit contradicting the statements in the affidavits of the two jurors. Moreover, as pointed out by me above, even in the absence of an affidavit from the State, the affidavits of the two jurors are, on account of their inherent infirmity, unacceptable and the Committee cannot place any reliance on them.

I may point out that according to the domestic law of Jamaica as laid down by the Judicial Committee of the Privy Council in Nanan's case, the Court cannot enter the jury box and enquire into the deliberations of the jurors. The Court cannot go behind the verdict as announced by the foreman on behalf of the jurors. The decision in Nanan's case is however not binding on the Committee nor is the Committee governed by the domestic law of Jamaica. The Committee has to test the validity of the verdict on the anvil of article 14 of

the Covenant and examine whether the trial was fair and in accordance with the standards and norms laid down in article 14. But, if the affidavits of the two jurors cannot be relied upon, there is nothing on record to show that the trial was unfair or not in compliance with the requirements of article 14.

The reasons given by me in this individual opinion for reaching the conclusion that there was no violation of article 14 are by way elaboration of the reasons set out in the Views expressed by the Committee to which I fully subscribe. I am in agreement with the Committee in taking the view that there was violation of article 7, for which the author is entitled to compensation.

[Prafullachandra N. Bhagwati]

[signed]

[Original: English]