

HUMAN RIGHTS COMMITTEE

McIntosh v. Jamaica

Communication No. 640/1995¹

7 November 1997

CCPR/C/61/D/640/1997*

ADMISSIBILITY

Submitted by: Michael McIntosh [represented by the London law firm of Denton Hall]

Victim: The author

State party: Jamaica

Date of communication: 9 January 1995 (initial submission)

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

Meeting on 7 November 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Michael MacIntosh, a Jamaican citizen who at the time of the submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 10 paragraph 1; and 14, of the International Covenant on Civil and Political Rights. His death sentence was commuted in 1995. He is represented by Cathy Wilcox, of the London law firm Denton Hall.

The facts as submitted by the author

2.1 The author was convicted together with a co-defendant, Anthony Brown², on 23 November 1988 of the murder of one Marianne Brown and was sentenced to death on 29 November 1988 in the Home Circuit Court of Kingston. He appealed to the Court of Appeal in Jamaica, which, on 22 October 1991, dismissed his appeal. On 1 March 1993, his petition for Special Leave to Appeal to

the Judicial Committee of the Privy Council was dismissed.

2.2 Counsel contends that constitutional remedies are not available to her client in practice, due to his impecunious situation and the unavailability of legal aid. Reference is made to the Human Rights Committee's jurisprudence³, in this respect.

2.3 At the time of submission of the case, an application for review of the capital classification of the author's offence was pending. Counsel argues that this does not constitute an available and effective domestic remedy for the violations claimed in the present communication because even if successful, it will likely only result in the sentence being commuted to life imprisonment. Following a classification hearing in early 1995, the author's death sentence was commuted to life imprisonment. The panel determined that he should serve a period of 18 years before becoming eligible for parole.

2.4 At the trial, the case for the prosecution was that, on 29 January 1987, Michael MacIntosh and Anthony Brown caused the death of Marianne Brown in the course of a robbery of a home, where they allegedly tied and locked Juliette Fields in a closet, tied and gagged Edna Copeland, and gagged the deceased. The prosecution's case was based on the testimony of Juliette Fields and on circumstantial evidence.

2.5 The sole eyewitness called at the trial testified that at the time of the robbery, the three women had been in different parts of the house, the witness staying on the top floor. She stated that she saw two men whom she had never seen before, climbing the stairs. The first man, whom she later identified as Anthony Brown, threatened her, tied her up, locked her in a closet, and took some personal effects from her. She also claimed to have briefly seen the second man, armed with a knife, at the beginning of the robbery, from a distance of 3 yards. After 5-10 minutes, she was able to look out of the closet and saw her aunt-in-law, Edna Copeland, lying on the ground, gagged and tied up. After she managed to obtain help from a neighbour, she saw the same two men enter the yard from a distance of 5-6 yards. A. Brown allegedly made further threats. The two men then took bicycles from the building and left. The witness further testified that after summoning police from a neighbour's house, she returned to her house to discover that others had found her 83-year old aunt, Marianne Brown, dead.

2.6 The witness asserted that the incident on the third floor lasted about 20 minutes, although she apparently told the Examining Magistrate during the preliminary enquiry that it lasted 3 minutes. She also stated that she had seen the face of the second man twice, at the beginning to the robbery and when they returned to the yard, for about 5-10 minutes, although she admitted she had not watched the time.

2.7 The only evidence of the cause of death of the deceased came from Detective Sergeant Cassells, who found the deceased lying on her back with a cloth tied around her neck and a cloth stuffed in her mouth; there were scratches on her neck. He attended an autopsy performed by Dr. Clifford, but no evidence from this examination was presented in court.

2.8 The witness attended 3 identification parades. At the first, she did not identify anyone. At the second, dated 19 February 1987, she identified the author as the second man. She identified Anthony

Brown as the first man at the third parade, which took place on 23 March 1987.

2.9 Counsel for the accused claims that the witness only had a limited recollection of the perpetrators' physical appearance, and did not give any details. Counsel further notes that the investigating officer spoke with the witness before the identification parades were held.

2.10 At the identification parade, the author was not represented by an attorney. The officer who conducted the identification parade testified at trial that the author told him that he did not want an attorney to be present, nor did he want anyone else representing him. A Justice of the Peace was present during the parade.

2.11 In an unsworn statement from the dock, the author asserted that he had asked the police officer to obtain a lawyer for him and that he had inquired about the "Legal Aid Clinic". He was told that there was no lawyer to represent him because the telephone was not working. He also claimed that he was physically abused by the police when he complained about the differences in the physical appearance of the men in the parade.

2.12 The author denied any knowledge of the incident and of his co-defendant throughout the trial. A. Brown allegedly made a statement implicating a certain "Mickey" in the robbery.

The complaint

3.1 Counsel alleges a violation of article 14 of the Covenant, because the trial judge failed to deal properly with the issue of identification in the author's case. It is further asserted that the judge failed to conduct his summing-up in an impartial manner. Counsel argues that the judge did not give sufficient attention to the issue of identification because he gave direction on identification only when reminded by counsel to do so. In addition, he may not have had in mind the different considerations that may have applied in the case of the author and in that of his co-defendant such as the difference in the length of time during which the prosecution witness was able to observe the two men. It is further submitted that the judge failed to warn the jury adequately of the danger of relying on the uncorroborated testimony of only one witness.

3.2 In addition, it is argued that the identification parade itself was conducted without adherence to the statutory rules then in force, requiring the presence of an attorney. Although the judge told the jury to disregard the parade if they thought that it was unfair, he failed to explain the importance of the procedural safeguard of having independent representatives present during the parade. He also did not remind the jury of the potential significance of the failure to identify either defendant by the other intended witnesses.

3.3 Counsel argues that, although the judge left the option of manslaughter open to the jury, he misdirected the jury on the possibility of other causes of death, and did not leave to them the question whether death could have resulted from natural causes. He also removed from the jury the issue of whether the robbers' intent could have been other than to cause grievous bodily harm such as to keep the deceased quiet. In this connection, counsel notes that the judge drew no attention to the prosecution's unexplained failure to adduce evidence from the post-mortem examination.

3.4 It is claimed that the judge wrongly invited the jury to speculate about the two defendants' choice not to subject themselves to cross-examination, in a way favourable to the prosecution, and to speculate about the absence of fingerprinting evidence.

3.5 A no-case submission by counsel was rejected by the judge in the presence of the jury. It is contended that, in light of the irregularities and shortcomings of the evidence, the trial judge should have allowed the submission and withdrawn the author's case from the jury (sic).

3.6 In addition, counsel submits that the Court of Appeal of Jamaica erred in holding that the judge correctly directed the jury with regard to the issues of identification and the identification parades, further violating article 14.

3.7 Counsel further argues that the "agony of suspense" resulting from having been on death row for over six years amounts to cruel, inhuman and degrading treatment, in violation of articles 7 and 10, paragraph 1. Reference is made to the Pratt and Morgan⁴ judgment of the Judicial Committee of the Privy Council. In addition, it is submitted that the overcrowded and unhealthy conditions at St. Catherine's District Prison amount to a breach of articles 7 and 10 paragraph 1. Reference is made to reports by America Watch and Amnesty International documenting, among other things the lack of mattresses, sanitation and medical care.

State party's observations and counsel's comments thereon

4.1 By submission of 17 October 1995, the State party submits comments on the admissibility of the communication and argues that the author has failed to substantiate his claims, since there has been no violation of any of the author's rights under the Covenant.

4.2 The State party refers to the Committee own jurisprudence in respect of the evaluation of facts and evidence, in so far as claims under article 14 are concerned. In respect of the allegations under article 7 and 10, paragraph 1, the State party submits that the fact that the author has spent six years on death row does not constitute a violation of the Covenant.

5.1 By submission of 22 December 1995, counsel reiterates her claims, and states that the commutation of the author's death sentence in no way alters the fact that a death penalty was imposed after a trial which was flawed, in breach of article 6, paragraph 2, of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.⁵

The Committee observes that neither the author nor his counsel have shown in what particular ways he was treated in ways that constitute "further compelling circumstances" that would be contrary to articles 7 and 10 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol, on the basis of the lack of substantiation.

6.3 The Committee notes that the author's claims under article 14 relate primarily to the conduct of the trial by the judge and his summing-up to the jury. It recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. MacIntosh's trial suffered from such defects. In particular, it is not apparent that the judge should have asked the jury to retire while the author's counsel made a no case submission, nor that his instructions on the conduct of the identification parade were incorrect or in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, to the author of the communication and his counsel.

[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.]

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

1/ The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Danilo Tüürk.

2/ Anthony Brown, because he was under 18 at the time of the crime, was not sentenced to death.

3/ Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

4/ Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993,

judgment delivered on 2 November 1993.

5/ See Committee's Views on communication Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992; Communication No. 541/1993 (Errol Simms v. Jamaica), declared inadmissible on 3 April 1995; Communication No. 588/1994 (Errol Johnson v. Jamaica), Views adopted 22 March 1996, paragraphs 8.1 to 8.6.