

HUMAN RIGHTS COMMITTEE

Chung v. Jamaica

Communication No 591/1994

9 April 1998

CCPR/C/62/D/591/1994*

VIEWS

Submitted by: Ian Chung (represented by Mr. Saul Lehrfreund from Simons, Muirhead & Burton)

Victim: The author

State party: Jamaica

Date of communication: 1 December 1993 (initial submission)

Date of decision on admissibility: 13 October 1994

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

Meeting on 9 April 1998,

Having concluded its consideration of communication No.591/1994 submitted to the Human Rights Committee by Mr. Ian Chung, 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 Ian Chung, a Jamaican citizen who at the time of 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, paragraphs 1, 2 and 3(g), of the International Covenant on Civil and Political Rights. He is represented by Saul Lehrfreund of the London law firm of Simons Muirhead and Burton. On 11 July 1995, the author's death sentence was commuted to one of life imprisonment.

Facts as submitted by the author:

2.1 Ian Chung was arrested together with two co-defendants, Dwayne Hylton¹ and Dennie Wilson, and charged with the murder, on 21 August 1986, of a taxi driver. He was tried in the Manchester Circuit Court (Mandeville District), found guilty as charged and sentenced to death on 26 May 1988, together with his co-defendants. The Court of Appeal dismissed the appeal on 16 May 1990. A subsequent petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 21 June 1993.

2.2 The prosecution's case was that the author and his co-defendants had, during the night of 6 to 7 July 1986 and after a visit to a discotheque in Mandeville, boarded a taxi and then stabbed its driver, who died of the stab injuries. A witness for the prosecution, who initially was charged along with the defendants, testified that he had seen the taxi with the defendants on board and entered it himself, only to find a dead body lying in the car. He left the vehicle in Kingston, after having been threatened by the author not to reveal anything to the police.

2.3 On trial, the prosecution presented as evidence statements which had been given by the defendants to the police after their arrest and after having been cautioned. From the statements, it transpired that the author and the co-defendants wanted to leave Jamaica as stowaways on a ship. They had promised the taxi driver money to drive them to Kingston but then killed him, since they were penniless. In his statement, the author indicated that he was told by one of the co-defendants to cut the taxi driver's throat, but that he had aimed his knife at the victim's chest instead, as he did not want to kill him. The victim was placed in the trunk of the taxi and abandoned next to a mud lake. When driving away, the three realized that the victim was still alive - one of the co-defendants left the car and stabbed the victim in the back.

2.4 According to the forensic evidence tendered during the trial, the deep cut on the chest, allegedly the result of the author's stab, could have caused the victim's death by itself, as it had punctured the heart at its base.

2.5 During the trial, the author made an unsworn statement from the dock, stating that he had been at the discotheque until 11:30 p.m. on 6 July 1986, and then returned home with some friends in the taxi in question. He argued that the police had forced him to sign the statement later produced as evidence by the prosecution. After a voir dire, the trial judge admitted said statement as evidence.

The complaint:

3.1 The author contends that during interrogation by three policemen at Mandeville Police

Station on 21 August 1986, he was brutally beaten by one of the investigating officers. He claims that he was threatened with a gun; under duress, he agreed to sign a prepared statement to avoid further beatings and stress. At this moment, the author was without legal representation. It is said that this treatment violated articles 7, 10, paragraph 1, and 14, paragraph 3(g), of the Covenant.

3.2 It is submitted that the author and his co-defendants were brutalized and terrorized , mentally and physically, by members of the public every time they attended the court sessions; Mr. Chung adds that his family and legal representative were also threatened. At the start of the trial, counsel requested a change of venue as, in the circumstances, the author's defence was highly prejudiced and his client would be deprived of a fair trial. He also pointed out that the pre-trial publicity given to the case had severely prejudiced the public, including all of the jurors drawn from the Parish of Manchester, who would be prejudiced against the author. This, it is argued, violated the author's right to a fair trial and his right to be presumed innocent until found guilty.

3.3 Counsel argues that the judge erred in not leaving the issue of manslaughter to the jury's consideration. On the basis of the statement given to the police, many doubts about the author's intentions remained, which would have precluded a verdict of guilty of murder. Counsel contends that the judge's instructions to the jury amounted to a denial of justice, in violation of article 14, paragraph 1. The death sentence pronounced against the author allegedly violated article 6, paragraph 2, as it was imposed upon conclusion of a trial which did not meet the requirements of article 14.

3.4 The author submits that during his incarceration on death row, he was subjected to beatings and other forms of ill-treatment, in violation of articles 7 and 10, paragraph 1. He notes that after one inmate had been beaten to death in front of his cell by warders in 1989, warders returned the following day and beat him up as well. Although he suffered a kidney injury, he was left in his cell for a full four days before he was brought to a hospital. Mr. Chung complained about this treatment to the Parliamentary Ombudsman, by letters of 12 January and 10 September 1989. Subsequently, counsel requested information from the Ombudsman's Office about the author's complaints, to no avail.

3.5 It is submitted that the period of confinement to death row - from May 1986 to July 1995 - amounts to a violation of article 7 of the Covenant. Reference is made to the judgment of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan v. Attorney-General of Jamaica* .

State party's submission on admissibility and counsel's comments:

4.1 By submission dated 17 February 1995, the State party argues that the judgment of the Privy Council in *Pratt and Morgan* is no authority for the proposition that the execution of an individual detained on death row for over five years automatically constitutes cruel and inhuman treatment contrary to the Jamaican Constitution. It refers to the Committee's own Views on the above case, where it was held that prolonged judicial proceedings and detention on death row did not per se constitute cruel, inhuman and degrading treatment.

4.2 The State party notes that the author's claims under articles 7, 10 and 14(3)(g) concerning ill-treatment during police interrogation were examined in a voir dire during the trial. Thus, the claims were subject to judicial scrutiny at a time when the author *was* represented. As the judge was not satisfied of the accuracy of the allegations, and these claims being related to the evaluation of evidence in the case, the State party considers that they are inadmissible *ratione materiae*, as incompatible with the provisions of the Covenant.

4.3 As to the author's alleged ill-treatment in 1989, the State party promises an investigation of the matter. It adds that its readiness to investigate the author's claim does not in any way imply that it accepts the assertion that the Parliamentary Ombudsman routinely fails to investigate such claims. Nor does the State party accept that death row inmates are generally afraid to notify the authorities of instances of ill-treatment: the Inspectorate of the Ministry of National Security and Justice is investigating several cases of allegations of ill-treatment of inmates.

4.4 According to the State party, there was no violation of article 14, paragraph 1, because of the judge's refusal to change the trial venue and his failure to put the possibility of a manslaughter verdict to the jury: both issues relate to matters of evaluation of facts and evidence. On the issue of change of trial venue, Section 34 of the Judicature (Supreme Court) Act allows a judge to grant a change of venue where good cause is shown: in the author's case, the judge exercised her discretion and did not allow such a change. The State party argues that the exercise of such discretion is not a matter to be considered by the Committee, unless there was a flagrant violation of fundamental rights.

4.5 As to whether the issue of manslaughter should have been left to the jury, the State party notes that this issue was properly examined by the Court of Appeal. For the State party, " in a situation where a determination depends on an assessment of facts and evidence, [the Committee] is in no position to hold that there has been a breach of the Covenant, unless [there was] a case of flagrant abuse of fundamental rights".

5.1 In his comments, counsel challenges the State party's interpretation of the Privy Council's judgment in *Pratt and Morgan* on the death row phenomenon. He asserts that the Judicial Committee's Guidelines apply to all prisoners on death row incarcerated for over five years - if detention on death row exceeds five years, then this constitutes *per se* cruel, inhuman and degrading treatment.

5.2 Counsel argues that the examination, in a voir dire during the trial, of the alleged ill-treatment of the author in police interrogation, does not relate to evaluation of facts and evidence and thus cannot be considered an admissibility issue; rather, this is a matter to be examined on its merits.

5.3 As to Mr. Chung's ill-treatment on death row, counsel recalls that the author made separate complaints to the Office of the Parliamentary Ombudsman, who replied on 2 February and 26 September 1989 assuring the author that the complaints would receive prompt attention. Counsel himself wrote to the Office of the Ombudsman on 15 September and 19 October 1993 to request further details on his client's complaint - no reply was

received.

5.4 Counsel reiterates that Mr. Chung's claim of harassment and brutalization on the occasion of his attendance at the trial in Manchester Circuit Court points to gross and flagrant violations of article 14, paragraphs 1 and 2. These claims have nothing to do with evaluation of facts and evidence in the case and thus deserve consideration on the merits.

Committee's admissibility decision:

6.1 During its 55th session, the Committee considered the admissibility of the case. On the death row phenomenon claim (article 7), it recalled that detention on death row for any specific period of time would not amount to a violation of article 7 in the absence of further compelling circumstances². In this case, the author had not substantiated the existence of further compelling circumstances which would raise an issue under article 7 of the Covenant. This part of the complaint was thus inadmissible under article 2 of the Optional Protocol.

6.2 On the issue of the author's alleged ill-treatment during interrogation, the Committee noted the State party's argument that as these claims were the subject of a voir dire during the trial and found to be lacking in substance, they concerned the evaluation of facts and evidence and thus should be held inadmissible. The alleged forced confession of the author was considered in detail during the trial and left for the jury to evaluate. The Committee reiterated its jurisprudence on the issue of evaluation of facts and evidence, which are best left for the appellate courts of States parties to decide, and the instructions of the trial judge to the jury, which the Committee could not generally challenge unless the instructions were clearly arbitrary or amounted to a denial of justice. There was no evidence that the judge's decision to admit the author's caution statement as evidence or her instructions to the jury suffered from such defects. This part of the case was thus inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.3 The Committee reached the same conclusion with respect to the author's claim that the judge erred in not leaving the possibility of a verdict of manslaughter to the jury. The material before the Committee did not show that the judge's instructions to the jury on this issue were manifestly arbitrary or amounted to a denial of justice.

6.4 The Committee noted the claim that Mr. Chung's trial was unfair because of the pressure he and his co-defendants were subjected to in the Manchester Circuit Court, and the judge's refusal to change the venue of the trial. It did not accept the State party's contention that the judge's exercise of discretion not to change the venue had to be subsumed under the evaluation of facts and evidence - the author's claim suggested an atmosphere of hostility and bias which might have had a bearing on his right to a fair trial before an independent and impartial tribunal; this matter should be considered on its merits.

6.5 The Committee regretted that the State party had not provided it with information about the results of its investigation into the author's ill-treatment by warders on death row. The author's claim that his attempts to bring his grievances to the attention of prison authorities and the Parliamentary Ombudsman had not been challenged. In the circumstances, the

Committee concluded that the author had met the requirements of article 5, paragraph 2(b), of the Optional Protocol.

6.6 On 13 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 1 and 2, of the Covenant.

State party's merits observations and counsel's comments:

7.1 By submission of 13 January 1997, the State party contends that its investigation has not substantiated the author's allegation that he was ill-treated by warders on death row - therefore, it denies any violation of articles 7 and 10, paragraph 1.

7.2 The State party denies a violation of article 14, paragraphs 1 and 2, because of the pressure the author and his lawyer allegedly were subjected to in the Manchester Circuit Court, and the judge's refusal to change the venue. It reiterates that the exercise of the judge's discretion is a matter of evaluation of facts - an application for a change of venue must be based on the presentation of particular facts. It would be for the judge who was present in the same environment to make an evaluation of the situation and to exercise his discretion. The exercise of his discretion would be reviewed by appellate instances, a matter which the Committee has no jurisdiction to examine.

7.3 In his comments, counsel observes that the State party has rejected the author's claim of ill-treatment by warders on death row in blanket terms: he notes that the State party has not provided any information as to what investigations were carried out, what the actual findings were, nor who carried out the investigations. Nor does the State party's blanket denial of a violation of articles 7 and 10(1) challenge the author's contention that his efforts to bring his grievances to the attention of the authorities and the Parliamentary Ombudsman were unsuccessful.

7.4 As to the trial judge's refusal to change the venue, author's counsel reiterates that *if* there is a possibility that Mr. Chung's defence was prejudiced in such a way as to deprive him of his right to a fair trial before an independent tribunal, then the Committee must have jurisdiction to consider the complaint on its merits.

Examination on the merits:

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

8.2 The Committee has noted the State party's argument that investigations into the allegations of ill-treatment of Mr. Chung have not substantiated his version of beatings and ill-treatment sustained while on death row. It observes that the State party has not indicated whether a formal report on the result of these investigations was issued, nor who investigated the claim and when it was investigated. On the other hand, Mr. Chung has given a detailed

account of the beatings he sustained at the hand of warders in 1989. The Committee recalls that a State party is under the obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol procedure.³ This entails forwarding the outcome of the investigations to the Committee, in detail and without undue delay. In the absence of a detailed reply from the State party, due weight must be given to the author's allegations. The Committee finds that the ill-treatment described by the author constitutes a violation of articles 7 and 10, paragraph 1, of the Covenant.

8.3 As to the claim that the trial judge's refusal to change the venue of the trial deprived Mr. Chung of a fair trial and of his right to be presumed innocent, the Committee notes that the request for a change of venue was examined in detail by the judge at the start of the trial (pages 3 to 11 of the trial transcript). The judge heard both Mr. Chung's representative and the Deputy Director of Public Prosecutions on the issue; she noted that the author's fears related to expressions of hostility towards him which well preceded the trial, and that the author was the only one, out of five co-accused, to have requested a change in venue. After hearing the parties' submissions and having satisfied herself that the jurors had been selected properly, she exercised her discretion and allowed the trial to proceed in the parish of Manchester. The Committee does not consider, in these circumstances, that the judge's decision not to change the venue deprived the author of his right to a fair trial or to be presumed innocent until found guilty. An element of discretion is necessary in decisions such as the judge's on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision, the Committee is not in a position to substitute its findings for those of the trial judge. Accordingly, there has been no violation of articles 14, paragraphs 1 and 2, 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 disclose a violation by Jamaica of articles 7 and 10, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a) of the Covenant, Ian Chung is entitled to an effective remedy entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol, it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or 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 ninety days, information about the measures taken to give effect to the Committee's Views.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. Rajssoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ Mr. Hylton's communications to the Committee were registered as cases Nos. 407/1990 and 600/1994. (Views adopted on 8 July 1994 and 6 July 1996, respectively).

2/ See inadmissibility decision in case No. 541/1993 (*Errol Simms v. Jamaica*), adopted 3 April 1995, paragraph 6.5.

3/ See inter alia the Committee's Views in case No. 161/1983 (*Herrera Rubio v. Colombia*), adopted on 2 November 1987.

[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.]