

## HUMAN RIGHTS COMMITTEE

### Finn v. Jamaica

Communication No 617/1995

31 July 1998

CCPR/C/63/D/617/1995

### VIEWS

*Submitted by: Anthony Finn (represented by Ms. Lyanne Loucas of the London law firm of Lovell White Durrant)*

*Victim: The author*

*State party: Jamaica*

*Date of communication: 16 January 1995 (initial submission)*

*Date of decision on admissibility: 17 October 1995*

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

Meeting on 31 July 1998,

Having concluded its consideration of communication No.617/1995 submitted to the Human Rights Committee by Anthony Finn, 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 Anthony Finn, 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 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 1, 2, 3 (b),(c) and 5, of the International Covenant on Civil and Political Rights. He is represented by Ms. Lyanne Loucas of the London Law firm Lovell White Durrant. The author's death sentence was commuted in early 1995.

The facts as submitted by the author:

2.1 The author was arrested in December 1987, and charged, together with Junior Leslie The Committee's Views on Mr. Leslie's communication, No. 564/1993, were adopted on 31 July 1998 at the 63rd session. and one L.T., with the murders, on 8 November 1987, of Mercelin Morris and Dalton Brown. The preliminary hearing was held on 14, 21 and 22 March 1988 at the Kingston Gun Court. On 4 April 1990, the author and Junior Leslie were found guilty as charged and sentenced to death by the Kingston Circuit Court; L.T. was acquitted on the direction of the trial judge at the close of the prosecution's case. The author then applied to the Court of Appeal of Jamaica for leave to appeal against conviction and sentence, but subsequently he signed a notice of abandonment. Nevertheless, the Court of Appeal decided to consider the author's application together with Mr. Leslie's application; it dismissed their appeal on 15 July 1991. The Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 12 January 1995. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The prosecution relied on the testimony of the daughter [respectively sister], Carol Brown, and grandson [respectively nephew], Orlando Campbell, of the deceased. Carol Brown testified that, on 8 November 1987 at about 8:00 p.m., her mother and Orlando Campbell were inside the house; she herself was sitting at the doorway and her brother, Dalton Brown, was in the yard with a friend, one C. The yard was lit by a 100 watt bulb on the exterior wall, and by lights within the house. Suddenly two armed men, whom she identified as the author and Junior Leslie, entered the yard. Immediately thereafter she heard explosions and she ran away. She stopped two houses further along, heard several more explosions, and saw C. running past her, followed by the author and Junior Leslie, who were still holding guns. Her mother, covered with blood, ran towards her, and told her that her brother had been shot. Her mother and brother died in hospital. Carol Brown testified that she knew the author for about eight years, and that she had last seen him some three to four weeks prior to the incident. With respect to Junior Leslie, she stated that she had first seen him one week prior to the incident, when he was pointed out to her as one of the persons involved in the beating and stabbing of her brother two weeks earlier.

2.3 Orlando Campbell testified that, on the night of the incident, he was in bed when he saw his uncle, Dalton Brown, followed by the author, running into the house. His uncle held on to his grandmother, who tried to block the author. He then saw the author shooting his grandmother. Having turned his face to the wall, he then heard the author calling his uncle, followed by several explosions, and he heard his uncle begging for mercy. More shooting, from different directions, followed and he then heard the author talking to another person. Orlando Campbell testified that he saw the author, whom he knew, leaving through the gate, followed by a short stout person whose face he could not see, and by co-defendant L.T., whom he also knew.

2.4 No identification parade was held in the case; during the trial, i.e. 29 months after the murders, Carol Brown identified the author from the dock.

2.5 The author presented an alibi defence. He testified at the trial, inter alia, that on 8 November 1987 he was at home with his family in the afternoon and that he went to bed at around 9:00 p.m. No witnesses were called on his behalf.

2.6 It appears from the Court of Appeal's written judgment that the author was represented by the same legal aid lawyer that had represented him at trial. It further appears that the lawyer informed the Court that "he had read the record and consulted a colleague, who agreed with him, that there was no arguable point of substance which he could put forward. He had so advised the author who had signed a notice of abandonment". The Court stated: "We do not propose to regard the application as abandoned and will deal with it as if it were still extant". After having reviewed the case, and having dismissed the grounds of appeal argued by Mr. Leslie's lawyer, the Court stated: "With respect to the other applicant (i.e. the author), we are of the view that the case against him was quite strong. Two witnesses, one of whom grew up with him, identified him. [...]. Our review of the facts and circumstances and our analysis of the summing-up compel us to agree entirely with the view expressed by counsel. We were assured by him that he had personally communicated his view to this applicant who signed notice of abandonment."

2.7 The principal grounds on which the author's petition for special leave to appeal was based were that:

-the trial judge failed to prevent a dock identification by Carol Brown of the author;

-the investigating officer was permitted to give evidence that he had taken a statement from the deceased Mercein Morris and to suggest that the statement implicated the author. It was submitted that the indirect admission of an inculpatory statement by the deceased was improper and highly prejudicial;

-the trial judge perpetuated this injustice by inviting the jury to draw the inference that the deceased implicated the accused;

-the trial judge failed to direct the jury's attention to the specific weaknesses and inconsistencies of the identification evidence given by the prosecution witnesses.

2.8 Counsel refers to the Committee's jurisprudence on the question of whether a constitutional motion is an available remedy which an author should exhaust, in light of article 5, paragraph 2(b), of the Optional Protocol; he contends that this remedy is not available to Mr. Finn because of his lack of funds and the unavailability of legal aid for the purpose of filing a constitutional motion. He concludes that it is extremely difficult to find a Jamaican lawyer who is willing to represent applicants, on a pro bono basis, for the purpose of a constitutional motion, and that it is therefore the State party's inability or unwillingness to provide legal aid for such motions which absolves Mr. Finn from pursuing any constitutional remedies.

### The Complaint:

3.1 With regard to articles 7 and 10, paragraph 1, of the Covenant, counsel points out that the author has been on death row for almost five years now. It is submitted that the "agony of suspense"

resulting from such long awaited and expected execution of the death sentence amounts to cruel, inhuman and degrading treatment, as is reflected in the decision of the Judicial Committee of the Privy Council in the case of *Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica Privy Council*<sup>1</sup>, and in the decision of the Supreme Court of Zimbabwe in the case of the *Catholic Commission for Justice and Peace in Zimbabwe*<sup>2</sup>. Counsel concludes that, although the Privy Council suggested a delay of five years as a guideline, the delay in the author's case of four years and nine months is in itself inhuman and degrading, and that, for the reasons set out above, Mr. Finn is unable to file a constitutional motion to test the legality of execution after a delay of four years and nine months.

3.2 Furthermore, counsel refers to a questionnaire completed by the author for the purpose of his communication to the Human Rights Committee, in which he describes, inter alia, the circumstances of his arrest and detention by the police. In this context, he claims the following: "Rainy. Curfew 5:00 - 5:30 a.m. Soldiers and police. I was in bed [...] and taken on the road where I joined several other men, who were lying face down on the road. I was ordered to lay face down with the other men. Next. From this scene to the police lock up...I was beaten. Abusive language was used. Threats were made, and against my life. I was ill for quite some time. No medical treatment was given. I made complaints to the high authority at the police station, but my complaint fell on deaf ears; and I was further abused. I also made complaints to my lawyer". It is submitted that the treatment the author was subjected to by the police, and the subsequent lack of medical treatment, is in violation of articles 7 and 10, paragraph 1, of the Covenant, as well as of articles 24, 25 and 26 of the Standard Minimum Rules for the Treatment of Prisoners. It is further submitted that the author has made all reasonable efforts to seek redress for the ill treatment suffered by complaining to the police authorities and to his lawyer, and that he therefore has fulfilled the requirements of article 5, paragraph 2(b), of the Optional Protocol, in respect of this claim.

3.3 Counsel adduces documentary evidence of the inhuman conditions of detention at St. Catherine District Prison. In this context, it is submitted that the prison is holding more than twice the capacity for which it was constructed in the 19th century; that there are no mattresses, other bedding or furniture in the cells; that there is a constant shortage of soap, tooth paste and toilet paper; that there is no integral sanitation in the cells; that the quality of food and drink is very poor; that there are only small air vents through which natural light can enter the cells; that there is a lack of recreational, rehabilitation and other facilities; and that no doctor is attached to the prison with the result that medical problems are generally treated by warders who receive very limited training. The particular circumstances in the author's case are that he is confined to his cell for twenty-two hours each and every day, that he spends this time in darkness, and with nothing to keep him occupied. The conditions under which the author is detained are said to amount to violations of articles 7 and 10, paragraph 1, of the Covenant, as well as of articles 10, 11, 12, 19, 20 and 22 of the Standard Minimum Rules for the Treatment of Prisoners.

3.4 The author claims undue delay in the judicial proceedings against him, in violation of articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant. In this context, he points out that there was a delay of two years and five months between his arrest (early December 1987) and the trial (2 to 4 April 1990).

3.5 It is submitted that the author's rights under article 14, paragraphs 1 and 2, have been violated,

because in his summing-up to the jury, the trial judge aggravated the prejudice caused earlier to the author (by the allegedly wrongful admission of hearsay evidence) by referring again to the hearsay evidence and suggesting that it was as a result of that evidence that the author was arrested. The author's rights under these provisions are further said to have been violated because the judge allowed the prosecution witness to identify the author in court.

3.6 As to the preparation of his defence, the author contends that an attorney was first made available to him one month and two weeks after his arrest. He claims that he did not meet with his attorney before the preliminary hearing. He was assigned another lawyer for the trial, and he claims that, prior to the trial, he only met with his lawyer once, and only for fifteen minutes. He further claims that, during the trial, he was not able to discuss the progress of the trial with his lawyer. Finally, in respect of his appeal, he claims that he only met once with his lawyer (who had also represented him at the trial) before the hearing. The above is said to amount to a violation of article 14, paragraph 3(b) and (d).

3.7 As to a violation of article 14, paragraph 5, reference is made to the relevant paragraph in the Court of Appeal's written judgment, where the author's lawyer stated before the Court of Appeal that he could not find any grounds to argue on his client's behalf, and that he had advised his client to this effect, who had consequently signed a notice of abandonment. The author claims, in a letter addressed to London counsel, dated 28 October 1994, that he signed the notice of abandonment of appeal for the following reasons: "The reason [his lawyer] gave me is that my case was in progress at the Appeal Court and he did not have every thing together, so he is trying to put off the case so I must sign this paper. I did not put under pressure to sign the notice, but it seem I was trick into something I did not understand". Counsel submits that it is clear that the author did not understand the legal effect of signing the notice of abandonment and that he believed that this would merely postpone the hearing. He concludes that the author must have been prejudiced by the notice of abandonment of appeal and by the opinion put forward by his lawyer to the Court of Appeal.

The State party's information and observations on admissibility and the author's comments thereon:

4.1 In its submission under rule 91, the State party does not contest the admissibility of the communication but rather and in order to expedite consideration of the case offers comments on the merits of the communication.

4.2 The State party by submission dated 6 March 1995, contends that there has been no violation of articles 7 and 10, paragraph 1, of the Covenant on the basis that the Privy Council judgment in Pratt and Morgan is not an authority for the proposition that incarceration on death row for a specific period of time constitutes cruel inhuman and degrading. Each case must be examined on its own facts, in accordance with applicable legal principals.

4.3 With respect to the delay of 2 years and 5 months between arrest and trial, the State party contends that a preliminary hearing was held during that period and that consequently the delay cannot be considered excessive or in violation of articles 7; 9, paragraph 3; and 14, paragraph 3 (c), of the Covenant.

4.4 With respect to the allegations of unfair trial for the wrongful admission of hearsay evidence on

the part of the trial judge, in violation of article 14, paragraphs 1 and 2, of the Covenant, the State party refers to the Committee's own jurisprudence, in respect of the evaluation of facts and evidence (Communication No.237/1987).

4.5 With regard to the allegation of a violation of article 14, paragraph 3 (b), because the author was unable to consult with his legal aid attorney, the State party contends that it is unfair to hold the State party accountable for the professional conduct of legal aid counsel.

4.6 Finally, the State party contends that there has been no violation of article 14, paragraph 5, of the Covenant, in the circumstances that surrounded the author's appeal, because even though the author had signed a notice to abandon the appeal, the Court of Appeal ignored this and heard the application.

5.1 In her comments, dated 18 April 1995, counsel objects to the consideration of the merits at this stage. However, she offers comments on the State party's submission, but points out that the State party has not addressed all the claims. In this respect, counsel states that the State party has not rebutted the allegations regarding the author's ill-treatment while in pre-trial detention and at St. Catherine District Prison.

5.2 With regard to the claims of delay; the judges instructions, the dock identification of the author; the State party's responsibility for the professional conduct of legal aid counsel; the abandonment of appeal and the death row phenomenon; counsel reiterates the allegations made in her initial submission.

#### The Committee's admissibility decision

6.1 During the 58th session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee had ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 As to the requirement in article 5, paragraph 2 (b), of the Optional Protocol that domestic remedies be exhausted, the Committee observed that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 12 January 1995, the author had exhausted domestic remedies for purposes of the Optional Protocol.

6.4 The Committee considered that the author and his counsel had sufficiently substantiated his claim for purposes of admissibility, that the communication might raise issues under articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant, which need to be examined on the merits.

6.5 With regard to the author's claim that the length of his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant, in the absence of some further compelling circumstances.<sup>3</sup> The

Committee observed that the author had not shown which circumstances raised an issue under articles 7 and 10 of the Covenant concerning the length of detention. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.6 As to the claim under articles 7 and 10, paragraph 1, with respect to the author's arrest and his pre-trial detention, and the prison conditions he suffered, while on death row, at St. Catherine's District Prison the Committee noted that he brought the lack of medical treatment to the attention of the authorities and to that of his counsel. As no reply or follow-up was given to his complaints, the Committee considered that, in this respect, the author had met the requirements of article 5, paragraph 2(b), of the Optional Protocol. It found that the author's claims about ill-treatment in detention had been sufficiently substantiated and should be examined on the merits.

6.7 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial in violation of article 14, paragraph 3 (b) and (d), the Committee recalled its prior jurisprudence that it was not for the Committee to question counsel's professional judgment, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there was no reason to believe that counsel was not using his best judgment. Additionally, the Committee recalled that article 14, paragraph 3 (d) does not entitle the accused to choose counsel provided to him free of charge. The Committee found therefore that in this respect, the author had no claim under article 2 of the Optional Protocol.

6.8 With regard to the author's claim concerning his representation on appeal and the circumstances in which he signed a notice of abandonment, the Committee noted from the information before it that counsel did in fact consult with the author prior to the hearing, and that, in accordance with its practice in all capital cases, at the hearing the Court of Appeal examined the case even though the author had signed a notice to abandon the appeal. The Committee recalling its prior jurisprudence considered that this part of the communication was therefore inadmissible, not raising a claim within any of the provisions of the Covenant, under article 2 of the Optional Protocol.

6.9 The author's remaining allegations concerned claims about irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of identification. The Committee reiterated that, while article 14 guarantees the right to a fair trial, it is not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the judge's instructions suffered from such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.10 The Human Rights Committee therefore declared the communication admissible in so far as it appeared to raise issues under articles 7, and 10 paragraph 1 in respect of the treatment the author received when he was arrested and the conditions of his imprisonment and articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant in respect of the delay in the judicial proceedings.

6.11 Consequently, on 17 October 1996, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7, 10, paragraph 1, in respect of

the treatment the author received when he was arrested and the conditions of his imprisonment and articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant, in respect of the delay in the judicial proceedings.

States party's merits observations and the counsel's comments:

7.1 In a submission dated 30 April 1997, the State party addressed the alleged violations of articles 7 and 10, paragraph 1, on the grounds of ill-treatment and lack of medical attention during the author's pre-trial detention. The State party notes that the author complained of the treatment both to the authorities at the police station and to his attorney. The State party finds it difficult to accept that the author's attorney took no steps to address the situation had the author really been ill. It further adds that the State party's own investigations do not support the author's allegations. Consequently, it accepts no breaches of the Covenant.

7.2 With regard to the alleged breach of articles 9, paragraph 3, and 14, paragraph 3 (c), the State party concedes that a delay of two years and five months between arrest and trial is longer than desirable. However, it rejects that this delay constitutes a violation of the Covenant, particularly as during that period a preliminary enquiry was held four months after the arrest.

8.1 In her comments on the State party's submission, counsel informs the Committee of the difficulties she has had trying to contact the author in order to obtain further clarifications regarding his ill-treatment. She notes that the State party has said that if the author's attorney had not acted in respect of the author's complaints of ill-treatment it was probably due to the fact that they were untrue. Counsel interprets the non action in a different manner and states that it is not known what counsel did in respect of the allegations of ill-treatment, the fact that nothing was done could well be interpreted in the sense that despite counsel's best efforts the State party failed to do anything. The State party has said that its own investigations did not support the statements made in the communication, but does not provide any evidence as to what kind of investigation was carried out or by whom. Counsel reiterates her claims that articles 7 and 10, paragraph 1, have been violated.

8.2 As regards the violations of articles 9, paragraph 3, and 14, paragraph 3 (c), counsel reiterates her original claims. She notes that the fact that a preliminary enquiry took place 4 months after arrest does not justify a delay of 25 months in trying the author. Counsel notes that the State party has conceded that a delay of two years and five months it is longer than desirable, but rejects any violation of the Covenant.

Examination of the merits:

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

9.2 With regard to the author's complaints of ill-treatment while in police detention, the Committee notes that author has made very precise allegations relating to the incident in which he was beaten (see paragraph 3.2 supra). It notes the State party's contention that if despite the issue being put to defence counsel nothing was done, it must mean that the author was not truly ill. The Committee

reiterates its jurisprudence where it has held that it is insufficient for the State party to simply say that there has been no breach of the Covenant. Consequently, the Committee finds that in the circumstances where the State party has not provided any evidence in respect of the investigation it alleges to have carried out, due weight must be given to the author's allegations. Accordingly, the Committee finds that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant.

9.3 With regard to the conditions of detention while on death row at St. Catherine's District Prison, the Committee notes that the author has made specific allegations about the deplorable conditions of his detention. He claims that he is kept in a cell for twenty-two hours a day, most of the time in enforced darkness with nothing to occupy himself with. The State party has not addressed these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

9.4 The author has claimed a violation of articles 9, paragraph 3, and 14, paragraph 3 (c), on account of the undue delay in bringing him to trial two years and five months after arrest. The Committee notes that the State party itself admits that a delay of two years and five months between arrest and trial "is longer than desirable", but contends that there has been no violation of the Covenant because a preliminary enquiry took place in that time, within the first four months after arrest. The Committee is of the view that the mere affirmation that a delay does not constitute a violation is not sufficient explanation. The Committee therefore finds that two years and five months to try an accused does not comply with the minimum guarantees required by the Covenant. Consequently, and in the circumstances of the case, the Committee finds that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3 (c).

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 before it disclose a violation of articles 7, 10, paragraph 1, 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Finn with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. 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 the communication is subject to the continued 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 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 ninety days, information about the measures taken to give effect to the Committee's Views.

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\*/ The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin and Mr. Maxwell Yalden.

1/ Appeal No. 10 of 1993; judgment delivered on 2 November 1993.

2/ Judgment No. SC73/93, unreported, delivered on 24 June 1993.

3/ See Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paragraphs 8.2 to 8.5.

[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.]