

## HUMAN RIGHTS COMMITTEE

### C. Johnson v. Jamaica

Communication N° 592/1994\*\*

20 October 1998

CCPR/C/64/D/592/1994\*

### VIEWS

*Submitted by: Clive Johnson (represented by Mr. Saul Lehrfreund from Simons Muirhead and Burton)*

*Victim: The author*

*State party: Jamaica*

*Date of communication: 8 February 1994*

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

Meeting on 20 October 1998

Having concluded its consideration of communication No. 592/1994 submitted to the Human Rights Committee by Mr. Clive Johnson, 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 Clive Johnson, a Jamaican citizen, at the time of submission of the communication awaiting execution in St. Catherine District Prison, Jamaica. Following the reclassification of his offence as non-capital, the author's death sentence was commuted to life imprisonment. He claims to be a victim of a violation by

Jamaica of articles 6, 7, 10, 14 and 17 of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of Simons, Muirhead & Burton, a law firm in London, England.

#### The facts as submitted by the author

2.1 The author was arrested on 13 October 1985, in connection with the murder, on 11 October 1985, of one Clive Beckford. On 13 November 1987, on the second day of the trial before the Kingston Home Circuit Court, he was found guilty of murder and sentenced to death. The Court of Appeal, on 15 November 1988, dismissed his appeal. On 29 October 1992, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal.

2.2 The author has not applied to the Supreme Court for constitutional redress for the violations of his basic rights. The author argues that a constitutional motion is not available to him because of his lack of funds, the unavailability of legal aid and the unwillingness of Jamaican counsel to act on a pro bono basis.

2.3 The case for the prosecution was based on the evidence of a single eye-witness, R. H., a police constable. He stated that, in the early evening of 11 October 1985, he was walking towards his home with his 8-year-old daughter and Clive Beckford, who was 17 years old. Four men came running from behind and, after a brief conversation, encircled them. The men were holding ice picks and knives; two of them, among whom the author, attacked the witness, the other two attacked Beckford. After three or four minutes, Beckford ran off and was chased by his two attackers, who returned within a minute. After some more fighting, R. H. managed to get away and the men then released his daughter. R. H. and his daughter found Beckford lying in the road, stabbed and dying. Two days later, R. H. saw the author approaching him close to his home. He recognized him as one of the attackers. The author allegedly pulled out a knife and stabbed R. H., who then shot him in the leg.

2.4 At the trial, the author made an unsworn statement from the dock in which he denied having been at the scene of the incident on 11 October 1985. No witnesses were called on his behalf.

#### The complaint

3.1 The author submits that he was born on 21 August 1968 and therefore 17 years and seven weeks old at the time of the incident on 11 October 1985. In support, he furnishes an authenticated copy of his birth certificate. He claims that the death sentence was passed against him in violation of article 6, paragraph 5, of the Covenant.

3.2 The author claims that he has not received a fair trial within the meaning of article 14, paragraph 1, of the Covenant. He submits that the trial judge was wrong in directing the jury that they should apply an objective standard in determining the author's intention. The Court of Appeal agreed that this constituted a misdirection, but failed to remedy it, since it was of the opinion that it had not led to a substantial miscarriage of justice, because, in the opinion

of the Court of Appeal, on a correct direction, the jury would inevitably have arrived at the same verdict. The author argues that the judge's instructions to the jury must meet particularly high standards in a case where capital punishment may be pronounced, and that the judge's failure to direct properly on the essential elements of the crime of murder render the trial unfair and the verdict uncertain.

3.3 The author argues that he was denied adequate legal representation both for the trial and on appeal. He emphasizes that he was held in custody for over 18 months before being granted access to a lawyer; that he was not represented at all at the preliminary hearing; that, when he finally was assigned a legal aid attorney, he only met her for the first time a few days before the trial; that this meeting lasted three minutes; that he only met his lawyer once during the trial itself. He also contends that he never met with his lawyer prior to the hearing of his appeal. The author contends that this constitutes a violation of his rights under article 14, paragraph 3 (b) and (d), to have adequate time and facilities for the preparation of his defence and to have adequate legal assistance assigned to him.

3.4 The author further argues that the State party's failure to grant him legal aid to pursue a constitutional motion amounts to a violation of article 14, paragraph 5, of the Covenant.

3.5 The author also claims that he has been subjected to ill-treatment on death row. In particular, he claims that, on 4 May 1993, during a search by soldiers, he was twice beaten on his testicles with a metal detector. Although the author consequently passed blood in his urine, he did not receive any medical treatment until 8 May 1993, when a doctor was sent by the Jamaica Council for Human Rights. The doctor examined the author and gave a prescription to the prison authorities, but the author never received the medication. It is submitted that this treatment amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant, read together with sections 25 (1) and 31 of the Standard Minimum Rules for Prisoners. Counsel for the author argues that no domestic remedies are available for this complaint and submits in this context that prisoners, including the author, who have complained about their treatment have received death threats from warders. He further claims that the Parliamentary Ombudsman's complaints procedure is ineffective. Reference is made to the Amnesty International report Jamaica - Proposal for an Enquiry into Deaths and Ill-Treatment of Prisoners in St. Catherine District Prison.

3.6 Counsel also contends that article 17, paragraph 1, of the Covenant has been violated in the author's case. He indicates that, on several occasions between 10 January 1991 and 18 June 1992, mail sent by the author never arrived at counsel's office because of unlawful interference by the prison authorities.

3.7 The author finally submits that he has been held on death row since 13 November 1987 and alleges that his lengthy stay on death row, as well as his possible execution after such delay, is contrary to article 7 of the Covenant. In this context, reference is made *inter alia* to the judgement of the Privy Council in Earl Pratt & Ivan Morgan v. the Attorney General for Jamaica, delivered on 2 November 1993.

State party's submission and counsel's comments

4.1 By submission of 25 January 1995, the State party raises no objection to the admissibility of the communication and addresses the merits of the case, in order to expedite its consideration.

4.2 The State party does not accept the author's view that, following the Privy Council's decision in Pratt and Morgan, a delay of over five years in carrying out the death penalty automatically constitutes cruel and inhuman treatment. The State party is of the opinion that each case must be looked at in its entirety and refers to the Committee's Views<sup>1</sup> in this respect.

4.3 The State party states that it is investigating the author's allegations that he was ill-treated while on death row, and that it will inform the Committee about the outcome of the investigations.

4.4 The State party further states that it will investigate the author's allegation that he was denied access to an attorney during the 18 months in which he was held in custody.

4.5 As regards the absence of representation for the author at the preliminary hearing, the State party submits that he was free to seek legal aid. In the absence of any evidence that the State prevented the author from seeking his right, the State party denies that it was responsible for the author's failure to obtain representation. In this context, the State party states that it cannot be held accountable for the alleged failures in the conduct of the defence at trial or at appeal by a legal aid attorney, just like it cannot be held accountable for the conduct of privately retained counsel.

4.6 The State party further rejects the view that the decision by the Court of Appeal not to quash the judgement of the Court of first instance and not to order a retrial constitutes a violation of article 14, paragraph 1, of the Covenant. In this connection, the State party points out that the Court of Appeal examined the facts in the case, exercised its discretion in accordance with the law, and allowed the decision to stand. The State party refers to the Committee's jurisprudence that issues of facts and evidence are best left to appellate courts and argues that it is not within the Committee's competence to examine the way in which the Court of Appeal exercised its jurisdiction.

4.7 The State party denies that a violation of article 14, paragraph 5, took place. It submits that this article is confined to criminal offences, and that it is therefore the State party's obligation to ensure that anyone who is convicted of a crime is allowed to have the conviction and sentence reviewed by a higher tribunal. Since the Jamaican law provides for such a right, and the author exercised it, there is no violation of article 14, paragraph 5.

4.8 As to the author's allegation that he is a victim of a violation of article 17, the State party submits that there is absolutely no evidence of any arbitrary or unlawful interference with the author's mail.

5.1 In his comments on the State party's submission, counsel for the author agrees to the immediate examination by the Committee of the merits of the communication.

5.2 Counsel refers to several judicial decisions<sup>2</sup> in support of his argument that as the author has been incarcerated on death row since his conviction on 13 November 1987, for almost eight years, he has been subjected to inhuman and degrading treatment or punishment in violation of articles 7 and 10, paragraph 1, of the Covenant. In this connection, counsel quotes from the Privy Council judgement in Pratt & Morgan that a State "must accept the responsibility for ensuring that execution follows as swiftly as practical after sentence, allowing a reasonable time for appeal and consideration of reprieve".

5.3 Counsel also refers to the Committee's general comment on article 7,<sup>3</sup> where it is stated that "when the death penalty is applied by the State party ... it must be carried out in such a way as to cause the least possible physical pain and mental suffering". Counsel submits that any execution that would take place more than five years after conviction would undoubtedly result in pain and suffering and therefore constitute inhuman and degrading treatment.

5.4 As regards the State party's contention that it cannot be held accountable for failures of legal aid attorneys, counsel refers to the Committee's Views in communication No. 283/1988<sup>4</sup> where it held that: "In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial". It is submitted that, although the Committee has held that shortcomings of a privately retained counsel cannot be attributed to a State party, this does not apply to legal aid attorneys, who once assigned must provide "effective representation".

5.5 In a further letter dated 17 November 1995, counsel explains that the matter of Mr. Johnson's age was not raised at the trial because there was not enough time and facilities to prepare his defence. Only in October 1992, the Jamaica Council for Human Rights noticed his being under age. The lawyer who represented Mr. Johnson on appeal informed London counsel by letter of 29 March 1993 that, if the birth certificate were authentic, the matter could be brought again before the Court of Appeal. On 18 March 1994, the Jamaica Council for Human Rights sent London counsel an authenticated copy of the birth certificate. London counsel claims that it appears that the author's Jamaican appeal counsel was unwilling to assist in bringing the matter to the attention of the Jamaican authorities. From the copies of correspondence it appears that there has been no further contact with the Jamaican appeal counsel since March 1993.

#### The Committee's admissibility decision

6.1 At its 56th session, the Committee considered the admissibility of the communication.

6.2 The Committee 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 The Committee noted that the State party had not raised any objections to the admissibility of the communication and had forwarded its comments on the merits in order to expedite the procedure, and that counsel for the author had agreed to the examination of

the merits of the communication. Nevertheless, the Committee considered that the information before it was not sufficient to enable it to adopt its Views. The Committee therefore limited itself to issues of admissibility.

6.4 The Committee noted that part of the author's allegations related to the instructions given by the judge to the jury. The Committee referred to its prior jurisprudence and reiterated that it was generally not for the Committee, but for the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee took note of the author's claim that the instructions in the instant case did not meet the high standards required in cases of capital punishment. The Committee also noted the Court of Appeal's consideration of this claim, and concluded that in the instant case the trial judge's instructions did not show such defects as to render them arbitrary or a denial of justice. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 As to the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee noted that the State party had not objected to the admissibility of the claim. The Committee would therefore consider on the merits whether the author's prolonged detention on death row, in view of his young age, constituted a violation of article 7 of the Covenant.

6.6 The Committee noted that the author's claim that some of the letters sent by him in 1991 and 1992 failed to arrive at his counsel's office, lacked specificity and considered that the author had failed to substantiate, for purposes of admissibility, his claim that this was due to unlawful interference by the prison authorities, in violation of article 17 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the author's claims that he was sentenced to death in violation of article 6, paragraph 5, of the Covenant, that he had been subjected to ill-treatment in detention, that he had no access to a legal representative during the first 18 months of his detention and that he was not represented at the preliminary hearing, and that the unavailability of legal aid for constitutional motions constituted a violation of article 14 of the Covenant, had been sufficiently substantiated, for purposes of admissibility, and should be considered on the merits.

7. Accordingly, on 14 March 1996, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 6, paragraph 5, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (b) and (d), and 5, of the Covenant, in respect of the lack of legal representation during the first 18 months of detention, at the preliminary hearing and the unavailability of legal aid for the filing of a constitutional motion.

#### State party's observations and author's comments thereon

8.1 By note of 28 October 1996, the State party informs the Committee that an investigation

has shown that there is no record of an injury report with respect to the beating of the author which allegedly occurred on 4 May 1993. Neither is there a record of any medical treatment or medication. According to the State party, the only record of the incident appears to be contained in the minutes of a meeting held between a representative of the Jamaica Council for Human Rights, a Superintendent and death row inmates. On two occasions attempts were made by a senior probation officer to interview the author, but he was hesitant to speak and indicated that he wished to obtain his attorney's approval before communicating with the interviewer. In the circumstances, the State party denies that a violation of articles 7 and 10(1) took place.

8.2 With regard to the lack of legal representation during pre-trial detention and at the preliminary hearing, the State party reiterates that the author was free to seek legal aid, and that unless it can be shown that such representation was requested and denied, no breach of the Covenant has occurred.

8.3 In respect of the absence of legal aid for constitutional motions, the State party argues that a constitutional motion is designed to seek constitutional redress, and is not an appellate procedure. According to the State party, its obligations under article 14, paragraph 5, concern the Court of Appeal procedures and the Privy Council. Its failure to provide legal aid for a constitutional remedy is said not to be in breach of article 14, paragraph 5.

8.4 The State party points out that the author's death sentence has been commuted, and that as a consequence there has been no breach of article 6, paragraph 5. In this context, the State party notes that section 29(1) of the Juveniles Act prohibits the execution of a person who was under eighteen at the time the offence was committed.

9.1 In his comments, counsel argues that the lack of records into the beating of 4 May 1993, does not negate the author's allegation. Counsel notes that the author gave a statement, on 14 May 1993, to an attorney, in which he set out the facts of the incident. The observations by the State party in no way disprove the allegation made by the author, and the lack of medical records is indeed consistent with the author's claim that he was denied medical treatment. In view of the risk for reprisals, counsel states that it is not surprising that the author was hesitant to speak to the officer sent to interview him.

9.2 Counsel submits that the author's claim under article 14(3)(b) does not only relate to the lack of legal representation before the trial, but also during his trial and appeal, issues not addressed by the State party. Counsel argues that it is the State party's duty to appoint legal aid attorneys in a timely fashion, so that they have sufficient time to prepare the defence for the trial and provide effective representation.

9.3 With regard to the lack of legal aid for constitutional motions, counsel argues that the State party has an obligation under article 2(3) of the Covenant to make the remedies in the constitutional court addressing violations of human rights available and effective. Counsel refers to the Committee's jurisprudence<sup>5</sup> and submits that the absence of legal aid has denied the author the opportunity to assess irregularities of his criminal trial, in violation of article 14(1) juncto article 2(3) of the Covenant. According to counsel, this is particularly pertinent

in view of the author's young age.

9.4 Counsel submits that the author was born on 21 August 1968 and therefore seventeen years and seven weeks old at the time of the incident of 11 October 1985. As he was sentenced to death whilst under eighteen at the time when the offence was committed, article 6(5) has been violated. According to counsel, the violation occurred at the time the author was sentenced to death and continued until his sentence was commuted. The commutation may be a remedy for the violation, but does not mean that the violation did not occur.

9.5 In relation to the violation of article 6(5), counsel argues that the author's prolonged detention on death row amounted to a violation of articles 7 and 10(1) of the Covenant. With reference to the Committee's jurisprudence, it is submitted that the author having been sentenced to death in violation of article 6(5) of the Covenant is a compelling circumstance, over and above the length of detention on death row, that turns the author's detention into a violation of articles 7 and 10(1) of the Covenant.

#### Issues and proceedings before the Committee

10.1 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 in article 5, paragraph 1, of the Optional Protocol.

10.2 With regard to the author's claim that article 14, paragraph 3(b) and (d) was violated in his case, the Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial in the court of first instance, but also to any preliminary hearings relating to the case. In the instant case, the State party has not contested that the author was not represented during the preliminary hearing, but has merely stated that there is no indication that he had requested a lawyer. The Committee considers that, when the author appeared at the preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his right to have legal representation and to ensure legal representation for the author, if he so wished. The Committee therefore concludes that the absence of legal representation for the author at the preliminary hearing constituted a violation of article 14, paragraph 3(d), of the Covenant.

10.3 With regard to the author's death sentence, the Committee notes that the State party has not challenged the authenticity of the birth certificate presented by the author, and has not refuted that the author was under eighteen years of age when the crime for which he was convicted was committed. As a consequence, the imposition of the death sentence upon the author constituted a violation of article 6, paragraph 5, of the Covenant.

10.4 In the circumstances, since the author of this communication was sentenced to death in violation of article 6 (5) of the Covenant, and the imposition of the death sentence upon him was thus void ab initio, his detention on death row constituted a violation of article 7 of the Covenant.

10.5 With regard to the author's claim that he was subjected to ill-treatment on 4 May 1993, the Committee notes that the author has given detailed information, and that the State party's investigation has not refuted the author's allegation. On the basis of the information before it, the Committee finds that the author's claim that he has been subjected to ill-treatment on 4 May 1993 has been substantiated and that there has been a violation of article 7 of the Covenant.

10.6 In the light of the Committee's other findings, the Committee need not address counsel's claim that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant.

11. 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 violations of articles 6, paragraph 5, 7, and 14, paragraph 3(d), of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, Clive Johnson is entitled to an effective remedy. In view of the fact that the author was a minor when he was arrested and that he has spent almost thirteen years in detention, more than seven of which on death row, the Committee recommends the author's immediate release. The State party is under the obligation to ensure that similar violations do not occur in the future.

13. 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 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 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

---

\*/ The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia.

\*\*/ The text of an individual opinion by member David Kretzmer is appended to the present document.

1/ Pratt and Morgan v. Jamaica, communications Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989 (CCPR/C/35/D/210/1986 and 225/1987).

2/ Inter alia, Pratt & Morgan v. Attorney-general (1993) All ER 769, Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, judgement No. SC73/93, 24 June 1993.

3/ General Comment No. 20, adopted at the Committee's 44th session, on 7 April 1992.

4/ Little v. Jamaica, Views adopted on 1 November 1991, para. 8.3.

5/ See Anthony Currie v. Jamaica, Communication No. 377/1989, Views adopted on 29 March 1994.

[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 member David Kretzmer (concurring)

I concur in the view of the Committee that holding the author on death row in this case amounted to cruel and inhuman punishment. However, since the Committee has consistently held in the past that the time on death row does not of itself amount to a violation of article 7, I think it is important to set out the grounds for the different result in this case.

The Committee's view that the mere length of time spent on death row by a person sentenced to death does not amount to cruel and inhuman punishment rests on the notion that holding otherwise would imply that a State party could avoid violating the Covenant by executing a condemned person. As the Covenant strongly suggests that abolition of the death penalty is desirable, the Committee could not accept an interpretation of the Covenant the implication of which was that the Covenant would be violated if a State party refrained from executing a person, but not if it executed him.

This view of the Committee obviously holds only when imposing and carrying out the death sentence are not of themselves a violation of the Covenant. The logic behind the view does not apply when the State party would violate the Covenant by imposing and carrying out the death sentence. In such a case the violation involved in imposing the death penalty is compounded by holding the condemned person on death row, during which time he suffers from the anxiety over his pending execution. This detention on death row may certainly amount to cruel and inhuman punishment, especially when that detention lasts longer than necessary for the domestic legal proceedings required to correct the error involved in imposing the death sentence.

In the present case, as the Committee has held in paragraph 10.4, imposition of the death penalty was inconsistent with the State party's obligation under article 6, paragraph 5 of the Covenant. The author subsequently spent almost eight years on death row, before his sentence was commuted to life imprisonment following reclassification of his offence as non-capital. In these circumstances the detention of the author on death row amounted to cruel and inhuman punishment, in violation of article 7 of the Covenant.

D. Kretzmer [signed]