

HUMAN RIGHTS COMMITTEE

Levy v. Jamaica

Communication N° 719/1996

3 November 1998

CCPR/C/64/D/719/1996*

VIEWS

Submitted by: Conroy Levy (represented by Simons Muirhead & Burton, a law firm in London)

Alleged victims: The author

State party: Jamaica

Date of communication: 17 May 1996 (initial submission)

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

Meeting on 3 November 1998

Having concluded its consideration of communication No. 719/1996 submitted to the Human Rights Committee by Mr. Conroy Levy, 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 Conroy Levy, a Jamaican citizen currently 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, paragraph 3 (b) and (d), of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the

London law firm Simons Muirhead Burton.

The facts as submitted by the author

2.1 On 16 October 1990, the author was arrested and charged with the murder of one Philip Dussard. On 8 April 1992, he was found guilty as charged and sentenced to death by the Home Circuit Court in Kingston. On 13 June 1994, the Court of Appeal of Jamaica dismissed his appeal and classified the author's offence as capital murder under Section 2 of the Offences Against the Person (Amendment) Act 1992. On 22 June 1995, a petition was lodged with the Judicial Committee of the Privy Council for special leave to appeal against the re-classification of the author's offence, on the ground that the Court of Appeal had no jurisdiction to perform the classification at the conclusion of an appeal where the appeal against the conviction had been dismissed. However, the Registrar of the Privy Council would not list the petition for hearing, but instead awaited the outcome of the appeal of Leroy Morgan and Samuel Williams, in which a similar issue had been granted leave to appeal. On 7 March 1996, the Judicial Committee of the Privy Council delivered its judgment in the case of Morgan & Williams. It allowed the appeal and quashed the classifications of the Court of Appeal as having been made with out jurisdiction, and declared them null and void. Consequently, the classification of Mr. Levy's offence was also null and void, and the process of classification had to be restarted in accordance with section 7 of the Offences Against the Person (Amendment) Act 1992, which requires that review is first to be performed by a single judge of the Court of Appeal and then, if appealed, by three designated judges, and not by the Court of Appeal as such. In the author's case, his offence was classified as capital by a single judge in June of 1996 and, on appeal, by three judges on 19 November 1996.

2.2 On the issue of exhaustion of domestic remedies, counsel explains that the author has not applied to the Supreme (Constitutional) Court of Jamaica for redress. It is argued that a constitutional motion in the Supreme Court would inevitably fail, in light of the judicial precedent set by the Judicial Committee of the Privy Council in Huntley v. Attorney General for Jamaica (1995) 1 ALL ER 308. It is further submitted that if it is considered that the author does have a constitutional remedy in theory, in practice it is not available to him because of lack of funds and the unavailability of legal aid. Reference is made to findings of the Committee¹ that in the absence of legal aid a constitutional motion does not constitute an available remedy. With this, it is submitted, domestic remedies have been exhausted.

The complaint

3.1 Counsel contends that the process of reclassification for capital murder violated article 14, paragraphs 1 and 3, of the Covenant. Counsel states that the Offences Against the Person (Amendment) Act 1992 creates two categories of murder, namely capital and non-capital murder. Section 7 of the Act provides for the classification of convictions pronounced prior to the entry into force of the Act as capital or non-capital murder. Murder is to be classified as capital if it is committed, inter alia, in the course of robbery, burglary, or house-breaking. Counsel argues that Section 7 requires a further finding of aggravating factors which were not considered during the original trial. It is submitted that the reclassification amounts to

a "determination of a new criminal charges" against the author, within the meaning of article 14 of the Covenant. Alternatively, it is argued that the reclassification is, in fact, an extension of the original sentencing process and should, therefore, qualify for the procedural safeguards of article 14 which normally apply at the sentencing stage. Specifically, it is argued that article 14 was violated at the time of the initial classification by the single judge as

- the author was not notified of the grounds on which the single judge might decide the classification;

- he was not entitled to legal representation;

- the proceedings were not public.

3.2 Counsel alleges a violation of article 14, paragraph 3(b) and 3(d), on the grounds that (1) the author was not represented by counsel at his preliminary hearing and (2) the author did not meet the legal aid trial lawyer before the day of the trial, and consequently he was not able to give him instructions, including informing the lawyer of witnesses he wanted to be called in his defence, and for this reason the author remained silent throughout the trial. As to the latter ground, it is further alleged that the author wanted the trial to be set for another date, but that his lawyer refused to request an adjournment.

3.3 Counsel alleges that, as a consequence of the alleged violation of article 14, also article 6, paragraph 2, was violated by the imposition of the death sentence, as the provisions of the Covenant were breached, and no further appeal is now possible. Reference is made to the Committee's jurisprudence².

3.4 Counsel alleges that the author's rights under article 7 and 10 of the Covenant were violated after his arrest, because of the police authorities' failure to take account of the author's injured condition and to make proper arrangements for his medical treatment. Counsel states that the author suffered a gunshot wound two days prior to his arrest. In a letter to counsel, the author states that he was knocked unconscious by the bullet which had entered the left side of his face "and mash up my tooth and shift my tonsil to the left side...my jaw bone was broken also." The author further states that four hours after being shot he was taken first to the Spanish Town Hospital and then to Kingston Public Hospital, where he was put on a drip and given medication. After four days, he was taken to the Hunts Bay Police Station where he remained for seven days. The author claims that during this week he received no medication and that his request to see a doctor was declined. Furthermore, the author states that at Hunts Bay Police Station he was kept, in a sick state, in a cell measuring approximately 8' x 10' with nine other prisoners, that there was no lighting, and that he was forced to sleep on the floor which was "filthy with water running through the cell". The lack of proper care is also said to be in violation of the U. N. Standard Minimum Rules fo the Treatment of Prisoners.

3.5 Counsel also alleges a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of incarceration at St. Catherine's District Prison. Counsel invokes

several reports of non-governmental organisations concerning the inhuman conditions of detention at St. Catherine District Prison. In this context, it is submitted that the author spends twenty-three hours of each day in a cell with no mattress, other bedding or furniture, no sanitation, no natural light and with inadequate ventilation. Furthermore, the author claims that the injuries which were inflicted on him by the gun shot prior to his arrest have not yet healed, and that he has been denied proper treatment. It is stated that he should have had an operation on his throat and jaw in April 1995, but that the prison authorities "failed to meet my appointment irrespective of the fact that I am constantly complaining of the swelling in my throat...I find it very difficult to swallow hard food." Counsel further states that the author has been advised by a doctor that unless he has an operation his medical condition will not improve. The prison itself is in a total state of disrepair, the provision of food is not palatable and does not meet the author's nutrition needs and medical assistance is lacking. The conditions under which the author is detained are said to amount to a violation of article 7 and 10 of the Covenant, as well as Sections 10; 11 (a) and (b); 12; 13; 15; 19; 22 (1), (2), (3); 24; 25 (1) and (2); 26 (1); 35 (1); 36 (1), (2), (3), (4); 57; 71 (2); 72 (3); and 77 of the U. N. Standard Minimum Rules for the Treatment of Prisoners.

3.6 Counsel further alleges a violation of articles 7 and 10, paragraph 1, of the Covenant as the author has been awaiting execution for over five years on death row. 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 recognised by the Judicial Committee of the Privy Council in *Pratt and Morgan v. The Attorney General of Jamaica*³ and in *Guerra v. Baptiste & Others*⁴.

The State party's submission and counsel's comments thereon:

4.1 In its submission of 1 November 1996, the State party notes that the author has not exhausted domestic remedies as he did not petition the Judicial Committee of the Privy Council, but recognises that the author's petition would have been based on an issue which was decided in *Morgan & Williams v. R.*, which at the time was pending before the Judicial Committee of the Privy Council, and the State party therefore will not take the point that the author has not exhausted domestic remedies.

4.2 In the remaining part of its submission, the State party addresses the merits of the complaint. As to the alleged violation of article 14 in the single judge's reclassification of the author's offence, the State party denies that this exercise is a "determination of a criminal charge" to which the article 14 guarantees apply. Furthermore, the State party points out that there is a right to appeal the decision of the single judge and that the fair trial guarantees are applicable in the appeal proceedings before the three judge-panel. The State party explains that the grant of these guarantees at the appeal stage are in the interest of justice, not on the basis that the review constitutes a determination of a criminal charge.

4.3 As to the alleged violation of article 14, paragraph 3(b), on the ground that the author was without representation in the preliminary hearing, the State party submits that it was open for the author to apply for legal aid for this hearing. The State party argues that unless it can be shown that agents of the state prevented the author from exercising his right, then

it is not responsible for the lack of representation. With regard to the alleged violation of the same provision on the ground that the author only met his trial lawyer on the first day of the trial, which allegedly prevented the obtaining of a witness for the defence, the State party notes that counsel who conducted the appeal was unable to locate the witness despite several attempts. Further, the State party denies that the manner in which legal aid counsel conducted the case is a matter which can be attributed to the State. In conclusion, the State party submits that the circumstances do not disclose any breach of the Covenant which the State party can be held responsible for.

4.4 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground of lack of medical attention and the conditions of detention at Hunts Bay Police Station, the State party denies that there is any evidence that the author was in as poor a condition as he claims and that he was denied medical attention. The State party argues that given the level of injury which the author alleges that he sustained, it is difficult to appreciate how the author could continue without deteriorating to the point where hospitalization would become essential if he were to survive without being seriously impaired beyond the point now being alleged.

4.5 With respect to the author's treatment in prison, the State party states that it will make inquiries into the allegation that the author was denied opportunity to have surgery.

4.6 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of "agony of suspense" suffered by the author due to the delay of execution, the State party submits that a prolonged stay on death row does not per se constitute cruel and inhuman treatment.

5.1 In his submission of 9 January 1997, counsel reiterates that the provisions of article 14 of the Covenant were breached in the single judge's reclassification of the author's offence in June 1996 as this in itself was a determination of the criminal charge. It is argued that, as the sentence determined at the trial no longer provided authority for his execution, the author was being charged with capital murder effectively for the first time at the reclassification. In this regard, counsel points out that an additional finding had to be made by the single judge performing the reclassification, namely that the offence was one of aggravated or capital murder. Alternatively, if it is not accepted that the reclassification amounts to the determination of a criminal charge, it is submitted that the process of drawing inferences from the evidence at trial was in effect an extension of the original trial process and that the safeguards in article 14 therefore must apply in accordance with the general principle that "due process requirements applied at the conviction stage, extend to the sentencing process as well." With reference to the State party's note that procedural safeguards apply at the appeal stage of the reclassification procedure, i.e. before the three judge-panel, and that these safeguards are granted in the interest of justice, counsel argues that the interest of justice also requires that the safeguards apply at the previous stage where the single judge makes his determination.

5.2 With reference to the allegations of violations of article 14, paragraph 3(b) and 3(d), counsel reiterates that the author, in breach of the Covenant, was not represented at the

preliminary hearing, that the author only met his attorney for the first time on the day of the trial, and that the trial lawyer refused to apply for an adjournment in spite of the author's request. It is submitted that the author was denied an effective opportunity to engage and communicate with his attorney, and that the preparation for the defence therefore was inadequate.

5.3 As to the alleged violations of articles 7 and 10, paragraph 1, on the grounds of lack of medical attention and conditions of detention at Hunts Bay Police Station and St. Catherine's District Prison, and on the ground of prolonged stay on death row, counsel reiterates his previous claims and allegations.

Facts and proceedings before the Committee

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

6.2 The Committee notes that the State party explicitly waives the right to invoke non-exhaustion of domestic remedies and that the State party in its submission has addressed the merits of the communication. This enables the Committee to consider both the admissibility and the merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 As to the author's claim that, in violation of article 14, paragraph 3(b) and 3(d), he only met his lawyer on the day of the trial, and that he therefore had no time to prepare his defence properly, including giving counsel instructions as to witnesses he wanted to be called in his defence, the Committee notes that the trial transcripts show, as opposed to what was explicitly stated by counsel, that the author's legal aid counsel at the trial in fact asked for and was granted an adjournment for two days, in order to interview two possible witnesses of whom he knew the identity. In these circumstances, the Committee finds this claim inadmissible as an abuse of the right to submission, under article 3 of the Optional Protocol.

6.4 The author claims that after his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant, he was denied medical attention while being detained at Hunts Bay Police Station, and that he was kept in inadequate conditions while in a very poor physical condition. The Committee notes the State party's rebuttal of the allegation, and notes also that the author has not brought these allegations to the attention of his trial lawyer, the courts or any other authority prior to his complaint to the Committee, nor has he forwarded any other evidence for his allegations. The Committee finds that the author has failed to substantiate his claim and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 The author claims to be a victim of violations of articles 7 and 10, paragraph 1, also on

two additional grounds. Concerning the claim that his detention on death row since 1992 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence⁵ that detention on death row for any specific period of time does not constitute a violation of articles 7 and 10, paragraph 1, of the Covenant in absence of further compelling circumstances. The Committee has in its jurisprudence⁶ held that deplorable conditions of detention may on their own constitute a violation of articles 7 and 10 of the Covenant, but they cannot be regarded as "further compelling circumstances" in relation to the "death row phenomenon". Consequently, no relevant circumstances have been adduced by counsel or the author, and the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol. On the other hand, the author's claims of violations of the same provisions on the ground of lack of medical treatment and conditions of detention in St. Catherine's District Prison are, in the view of the Committee, sufficiently substantiated to be considered on the merits, and are therefore deemed admissible.

6.6 The Committee also declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 As to the author's claim that the reclassification of his offence as capital murder by the single judge violated article 14, the Committee notes that pursuant to the Offences against the Persons (Amendment) Act 1992, the State party adopted a procedure to reclassify established murder convictions expeditiously by entrusting the initial review of each case to a single judge, enabling him to promptly give a decision in favour of a prisoner who in his opinion had committed a non-capital offence, and thus removing rapidly any uncertainty as to whether he was still at risk of being executed. If the single judge on the other hand found that the offence was of capital nature, the convict was notified and was granted the right to appeal the decision to a three judge-panel, which would address the matter in a public hearing. The Committee notes that it is not disputed that all procedural safeguards contained in article 14 applied in the proceedings before the three judge-panel. The author's complaint is solely directed at the first stage of the reclassification procedure, i.e. the single judge's handling of the matter, of which the author was not notified and in which there was no public hearing where the author could comment on the relevant issues or be represented. The Committee is of the opinion that the reclassification of an offence for a convict already subject to a death sentence is not a "determination of a criminal charge" within the meaning of article 14 of the Covenant, and consequently the provisions in article 14, paragraph 3, do not apply. The Committee considers, however, that the safeguards contained in article 14, paragraph 1, should apply also to the reclassification procedure. In this regard, the Committee notes that the system for reclassification allowed the convicts a fair and public hearing by the three judge-panel. The fact that this hearing was preceded by a screening exercise performed by a single judge in order to expedite the reclassification, does not constitute a violation of article 14.

7.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented in the preliminary hearing that was held prior to the trial. In its jurisprudence⁷, the Committee has held that the requirement that legal assistance must be

made available to an accused faced with a capital crime applies not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case. In the present case, the Committee notes that it is not disputed that the author was unrepresented at the preliminary hearing, and, notwithstanding the State party's contention that it can not be held responsible for the lack of representation as it was open for the author to apply for legal aid, it finds that the facts disclose a violation of article 14, paragraph 3(d). As previously held by the Committee⁸, it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings.

7.3 With regard to the author's claim to be a victim of article 6, paragraph 2, of the Covenant, the Committee notes its General Comment 6[16], where it held that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review of the conviction and sentence by a higher tribunal". In the present case, the preliminary hearing was conducted without meeting the requirements of article 14, and as a consequence the Committee finds that also article 6, paragraph 2, was violated as the death sentence was imposed upon conclusion of a procedure in which the provisions of the Covenant were not respected.

7.4 As to the allegation of a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the author has made specific allegations. He states that he is detained twenty-three hours a day in a cell with no mattress, other bedding or furniture, that the cell has no natural light and inadequate sanitation, and that the food is not palatable. Furthermore, he states that there in general is a lack of medical assistance, and specifically he mentions that he in April 1995 should have had an operation on his jaw and throat, but that the prison authorities made it impossible for him to keep his appointment. The State party has not refuted these specific allegations, and has not forwarded results of the announced investigation into the author's allegations that he was denied opportunity to have an operation in April 1995. The Committee finds that these circumstances disclose a violation of article 10, paragraph 1, of the Covenant.

8. 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 article 10, paragraph 1, article 14, paragraph 3(d), and consequently, article 6, paragraph 2.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Levy with an effective remedy, including commutation and compensation.

10. 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. 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. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ Communication No. 445/1991, Lynden Champagnie, Delroy Palmer and Oswald Chisholm.

2/ Communications Nos. 464/1991 and 482/1991, Garfield Peart and Andrew Peart v. Jamaica, Views adopted 19 July 1995 in the 54th session of the Committee.

3/ Judgement PC Appeal No. 10 of 1993, delivered on 2 November 1993.

4/ (1995) 4 ALL ER.

5/ See, inter alia, the Committee's Views on communication No 588/1994, Errol Johnson v. Jamaica, adopted on 22 March 1996.

6/ See, inter alia, the Committee's Views on communication No. 705/1996, Desmond Taylor v. Jamaica, adopted on 2 April 1998.

7/ See the Committee's Views on communication No. 459/1991, Osbourne Wright and Eric Harvey v. Jamaica, adopted on 27 October 1995.

8/ See, inter alia, the Committee's Views on communication No. 223/1987, Frank Robinson v. Jamaica, adopted on 30 March 1989.

[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.]