

HUMAN RIGHTS COMMITTEE

Lumley v. Jamaica

Communication N° 662/1995**

31 March 1999

CCPR/C/65/D/662/1995*

VIEWS

Submitted by: Peter Lumley

Victim: The author

State party: Jamaica

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

Meeting on 31 March 1999

Having concluded its consideration of communication No. 662/1995 submitted to the Human Rights Committee by Mr. Peter Lumley 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, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Peter Lumley, a Jamaican citizen currently incarcerated at the South Camp Rehabilitation Centre, Jamaica. He claims to be the victim of violations by Jamaica of articles 2, paragraph 1; 14, paragraphs 3(d) and (e), and 5, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Facts as submitted by the author

2.1 On 16 September 1987, the Kingston Circuit Court convicted the author of robbery and assault and sentenced him to 15 years for the robbery, and 9 years for the assault, to run concurrently. An application for leave to appeal filed on his behalf was dismissed by the Court of Appeal of Jamaica on 28 November 1988. The author has not filed a Petition for special leave to appeal to the Judicial Committee of the Privy Council.

2.2 The author provides a few details of his trial "from memory", as he has been unable to secure the trial transcripts despite repeated attempts. The author states that he was arrested on 11 July 1986 and held for several nights in detention without being informed of any charges. He was identified by one of two witnesses in a line-up. At the preliminary hearing which followed in October 1986 at the Half Way Tree Magistrate's Court, the witness and the alleged victim of the crime provided evidence which was later modified at trial. The author states that at the preliminary hearing it was said that he entered a "shut down" house in which he found a woman, whom he grabbed around the stomach from behind and allegedly held for "two or three minutes". She, meanwhile, was attempting to assist a female friend who lay unconscious on the floor. At trial evidence was given that the door of the house was "open", and that rather than the friend being on the floor, she was outside the house, and was called in. The author states that the victim of the assault testified that she was stabbed several times.

2.3 The author was represented at the preliminary hearing by paid counsel, and at trial by counsel's "girlfriend". The author states that he was charged with wounding with intent, aggravated robbery, and assault. He was convicted on the lesser charges of robbery and assault. He states that he is innocent and knows nothing of the incident.

2.4 On 28 November 1988, the author learned that an appeal filed on his behalf was that day refused. He states that he was not aware of who represented him on appeal, as he had written to his former counsel who had not responded, and to the Jamaica Council for Human Rights. The author wrote to the Parliamentary Ombudsman in Kingston on 10 December 1988 and received a reply on 26 January 1989, in which he was informed of the means of application for leave to appeal to the Privy Council.

2.5 Between 30 April 1988 to 29 June 1992, the author exchanged several communications with the Jamaica Council for Human Rights, which on his behalf requested the trial transcript from the court in order to determine how best to advise him. He further claims that he himself made numerous requests for the trial transcript. The author states that the last communication he received from the Council was on 29 June 1992, in which the Council stated that it been advised by the Court that the transcript was available. The author has since heard nothing further either from the Court or the Council¹

The complaint

3.1 The author submits that he is the victim of a violation of article 14, paragraphs 3(d) and (e), and 5, since as he was not aware that the Court of Appeal was going to examine his petition for leave to appeal and as he was not informed of who was representing him on appeal, he was unable to prepare his defence. He also contends that he was not given an

opportunity to examine or have examined the witnesses against him.

3.2 The author additionally submits that he is the victim of a violation of article 2, paragraph 1 of the Covenant in connection with article 2 of the Optional Protocol because Jamaica thwarted his attempts to obtain legal assistance to file a Petition for special leave to appeal to the Judicial Committee of the Privy Council by unreasonably delaying the provision of a copy of his trial transcript despite numerous requests. He contends that Jamaica has effectively deprived him of the possibility of submitting a communication to the Human Rights Committee in accordance with article 2 of the Optional Protocol, as without access to the trial transcript it is impossible for the author's legal representatives to ascertain whether the criminal proceedings concerning the author were carried out in accordance with article 14 and other provisions of the Covenant.

3.3 The author submits that he has exhausted all domestic remedies. It is submitted that following many years of attempting to obtain the trial transcripts, and to obtain legal representation to file a Petition for special leave to appeal, the Government's refusal constitutes a "prolonged delay" under article 5 paragraph 2(b) of the Optional Protocol.

3.4 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

State party's observations and author's comments

4.1 By submission of 9 January 1996, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, since the author has not filed an application for leave to appeal to the Judicial Committee of the Privy Council. The State party, however, also addresses the merits of the communication in order to expedite its examination.

4.2 The State party notes that the author's allegations are vague and that this makes it difficult for the State party to respond. It assumes that the claims under article 14 (3)(d) (e) and (5) relate to the circumstances of the filing of the author's appeal and denies that any violation occurred. According to the State party, the Court of Appeal sends out notices to persons wishing to appeal, to inform them of their attorney and the date of the appeal. The State party promises to inform the Committee of the dates of the notices sent to the author. However, no further information has been received.

5.1 In his comments, the author reiterates that he has never received a copy of the trial transcript, although the Jamaica Council for Human Rights received it some years ago.

5.2 He contests the State party's argument that he has not exhausted all available domestic remedies, since he is not in a position to file an application to the Judicial Committee of the Privy Council.

5.3 With regard to his claims, he states that there is no proof that he was represented on appeal, and that since he himself was absent witnesses could not be examined. The author

encloses copies of all correspondence received from the Court of Appeal. From the correspondence, it appears that the author's application for leave to appeal as well as for permission to be present at the hearing of the appeal was filed on 23 November 1987, on grounds of unfair trial, insufficient evidence and improper directions. No application was made to have witnesses heard at the hearing of the appeal, according to the author unjustly so. The application was rejected by a single judge of the Court of Appeal on 14 November 1988, for reasons that the trial judge dealt fairly and adequately with the issue of identification and that the jury had evidence which if they accepted it could result in a verdict of guilty. It further appears that the full Court of Appeal confirmed the single judge's decision, on 28 November 1988.

Issues and proceedings before the Committee

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

6.2 The Committee notes the State party's argument that the communication is inadmissible for non-exhaustion of domestic remedies. The Committee observes, however, that no legal aid was available to the author to petition the Judicial Committee of the Privy Council, and that in the circumstances no further remedies were available to him. The Committee considers therefore that no obstacles exist to the admissibility of the communication and, in order to expedite the examination of the communication, proceeds without further delay to a consideration of the merits of the communication.

7.1 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.

7.2 With regard to the author's complaint that he had no opportunity to examine witnesses on appeal, the Committee notes from the documents of the Court of Appeal that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". The Committee considers therefore that the facts before it do not show a violation of article 14, paragraph 3(e).

7.3 It further appears from the documents that leave to appeal was refused by a single judge whose decision was confirmed by the Court of Appeal. The judge refused leave of appeal only after a review of the evidence presented during the trial and after an evaluation of the judge's instructions to the jury. While on the basis of article 14, paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case. Thus, in the circumstances, the Committee finds that no violation of

article 14, paragraph 5 occurred in this respect.

7.4 With regard to the author's complaint that he was not present at the hearing of his application for leave to appeal and that he does not know who represented him on appeal, the Committee notes that the State party has submitted that in general the Court of Appeal sends notices to all appellants informing them of the date of the hearing and of the name of their representative. In the instant case, however, the State party has failed to provide any specific information as to whether and when the author was so informed. In the circumstances, it is unclear whether the author was at all represented on appeal, and the Committee therefore is of the opinion that the facts before it disclose a violation of article 14, paragraph 3(d) juncto paragraph 5.

7.5 With regard to the availability of the trial transcript, the Committee recalls that under article 14, paragraph 5 of the Covenant, the State party should provide the convicted person with access to the judgements and documents necessary to enjoy the effective exercise of the right to appeal.² In the present case, since the transcript was not made available to the author the Committee finds that the facts before it disclose a violation of article 14, paragraph 5.

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 reveal violations of article 14, paragraphs 3 (d) and 5 of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Lumley with an effective remedy, including release. The State party is under an obligation to take measures to prevent similar violations in the future.

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 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. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell

Yalden, Mr. Abdallah Zakhia.

**/ The text of an individual opinion by two Committee members is appended to the present document.

1/ The Jamaica Council for Human Rights informed the Secretariat on 31 July 1995 that it was in possession of the trial transcript, but that it would be unable to represent Mr. Lumley regarding any appeal of sentence, because it has to limit itself to represent capital prisoners only.

2/ See for example, the Committee's views in communications Nos. 230/1987, Henry v Jamaica, and 283/1988, Aston Little v. Jamaica, adopted on 1 November 1991.

[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 Committee members Nisuke Ando and Maxwell Yalden (partly dissenting)

We agree with all the findings of the Committee in this case except one: the issue of availability of the trial transcript to the author.

The author learned that an appeal on his behalf had been refused on 28 November 1988, although he was not aware of who had represented him on appeal. (See 2.4.) However, the Committee notes that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". (7.2) In addition, the Committee has looked into the appeal proceedings and finds that no violation of article 14, paragraph 5, occurred. (7.3) However, since the trial transcript, which was necessary for the exercise of the author's right to appeal further to the Privy Council, was not made available directly to him, the Committee finds a violation of article 14, paragraph 5. (7.5)

Notwithstanding this finding of the Committee, we conclude that the counsel who represented the author at the appeal was very likely to be in possession of the trial transcript because, without it, he could not have pursued the appeal proceedings. Moreover, between 30 April 1988 and 29 June 1992, the author also exchanged several communications with the Jamaican Council for Human Rights, which was in possession of the trial transcript (2.5, footnote 1), but he apparently heard nothing from the Council on this matter.

It is regrettable that the State party has failed to provide the Committee with any specific information as to whether and when the author was informed by the Court of Appeal about

the date of the hearing and the name of his representative (counsel). (7.4) Nevertheless, it is evident that the appeal counsel as well as the Jamaican Council for Human Rights was provided with the trial transcript and that either or both of them could have made it available to the author. In our opinion, the Committee should take this probability into account before categorically holding the State party responsible for a failure to make available to the author a copy of the trial transcript.

Nisuke Ando [signed]

Maxwell Yalden [signed]

[Done 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]