

HUMAN RIGHTS COMMITTEE

Osbourne v. Jamaica

Communication No. 759/1997

15 March 2000

CCPR/C/68/D/759/1997

VIEWS

Submitted by: George Osbourne (represented by S. Lehrfreund of the London law firm Simons Muirhead and Burton)

Alleged victim: The author

State party: Jamaica

Date of communication: 12 June 1997 (initial submission)

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

Meeting on 15 March 2000

Having concluded its consideration of communication No. 759/1997 submitted to the Human Rights Committee by Mr. George Osbourne 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 George Osbourne, a Jamaican national currently detained at the General Penitentiary, Kingston, Jamaica. He claims to be a victim of a violation by Jamaica of articles 7 and 10, paragraph 1, of the International Covenant of Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the London law firm Simons Muirhead and Burton.

The facts as submitted by the author

2.1 In October 1994, the author was convicted by the Westmoreland Circuit court, Savannah-la-Mar, along with a co-accused for illegal possession of firearm, robbery with aggravation and wounding with intent. He is serving a sentence of 15 years' imprisonment with hard labour and is subject to receive 10 strokes of the tamarind switch.

2.2 The author's appeal against the conviction and the sentence was heard and dismissed on 25 September 1995. Counsel claims that there is no known record of proceedings before the Court of Appeal, and that no reasons for dismissal were given in writing.

2.3 Counsel contends that the applicant is unable to pursue a constitutional motion before the Supreme (Constitutional) Court of Jamaica because he has no private means and is not entitled to any form of legal aid for such a motion. Counsel cites decisions by the Human Rights Committee which have consistently rejected the Jamaican Government's contention that an applicant under the Optional Protocol must pursue a Constitutional motion before the Supreme (Constitutional) Court of Jamaica in order to exhaust domestic remedies.

The complaint

3.1 The author submits that the use of the tamarind switch as a form of punishment is inherently cruel, inhuman and degrading and therefore in violation of article 7 of the Covenant.¹

3.2 Counsel states that the basic provision for flogging and whipping in Jamaica is preserved by the Constitution of Jamaica 1962. The relevant statutory provisions governing flogging and whipping are the Flogging Regulation Act 1903, the (Prevention of) Crime Act, 1942 and the Approval and Directions under section 4 thereof, dated 26 January 1965. It is claimed that in the absence of regulations more extensive than those set out in the Approval and Directions, the actual procedure used appears to be largely at the discretion of the implementing prison authorities. In this context, counsel refers to the affidavit of E.P., formerly incarcerated in the General Penitentiary, Kingston, Jamaica.

3.3 In his affidavit, Mr. E.P. states that on 8 August 1994 after pleading guilty to wounding with intent, he was sentenced to four years hard labour and six strokes of the tamarind switch. He was scheduled for release on 1 March 1997 after being granted one-third remission of his sentence for good behaviour. The day before his release, a batch of more than 12 correctional officers came and took him from his cell to another section of the prison. When he realized that the sentence of flogging was about to be carried out, he protested, with the result that he was hit in the stomach by one of the officers. He was then seized, blindfolded and ordered to remove clothing from the lower part of his body. When this was done, he was forced to lean forward across a barrel and one of the warders placed his penis into a slot in the barrel. He was then strapped into that position and struck across the buttocks with an instrument that he was unable to see. E.P. states that an unnecessary number of prison warders (25) were present at the time of the whipping and that this added to his humiliation. He further states that the doctor was the only outsider present and that he was not examined by the doctor after the whipping.

3.4 It is further submitted that the specific features of the regulation of whipping in Jamaica as shown in the case of E.P., including delay between sentence and execution causing additional anguish, the humiliating number and identity of witnesses to the punishment, no provision for the attendance by witnesses on behalf of the prisoner and the humiliation of being strapped naked to a barrel, aggravate the humiliation inherent in the punishment.

3.5 Counsel states that corporal punishment has not been practised in Jamaica in 25 years up to 1994, and contends that if a rising incidence of serious crime in Jamaica is advanced as justification for the reintroduction of corporal punishment, the empirically established lack of deterrence destroys this justification. Counsel further notes that by regulation 9 of the Flogging Regulation Act 1903 "in no case shall a sentence of flogging be passed upon a female." He contends that if deterrence of crime were the purpose of the provision, such an exception would not arise.

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

4.1 In its submission of 28 August 1997, the State party challenges the admissibility of the communication under article 5, paragraph 2, of the Optional Protocol, claiming that domestic remedies have not been exhausted as the author has not petitioned the Judicial Committee of the Privy Council.

4.2 Without prejudice to its response on admissibility, the State party also responds to the merits by simply stating that it denies that articles 7 and 10 were breached by the imposition of a sentence of flogging on the author, as the relevant legislation, e.g. the Flogging Regulation Act and the Crime (Prevention) Act, are protected from unconstitutionality by Section 26 of the Constitution.

5.1 In his submission dated 13 November 1997, the author contends that the State party's observations are wrong and that the communication is admissible. In this regard, counsel states that there is no known record of the proceedings before the Court of Appeal on 25 September 1995, and that no reason for the dismissal of the appeal was given in writing. Furthermore, counsel points out that the author did not petition the Privy Council on the advice of Counsel, Mr. Hugh Davies. It is stated that Mr. Davies was requested to advise on the merits of an application for Special Leave to Appeal to the Judicial Committee of the Privy Council. In his advice, a copy of which has been made available to the Committee, he explains that the constitutionality of the sentence could only be contested through a constitutional motion before the relevant Jamaican courts, a motion which London counsel were not in a position to forward. With this background, the author was advised by Mr. Davies that there was no reasonable prospect of leave to appeal being granted.

5.2 The author also submits that a constitutional motion to the Supreme Court of Jamaica was not an available remedy in this case. Counsel argues that the lack of private funding and the unavailability of legal aid or lawyers willing to undertake such representation without payment inhibited the pursuit of such a motion which, given the complexity of the Constitution as a legal document, clearly required expert legal representation to establish a reasonable prospect of success. In conclusion, it is submitted that on account of lack of legal aid the remedy before the Constitutional Court of Jamaica was not available to the author and that the domestic remedies must therefore be taken to be exhausted.

5.3 With regard to the merits of the case, counsel submits that the State party's reference to its constitution cannot in itself protect the sentence from challenge of a violation of articles 7 and 10, paragraph 1, of the Covenant.

New claim submitted by the author

6.1 In his letter of 6 January 1998, the author forwards a new claim that, on 13 December 1997, he was beaten severely by three warders at the General Penitentiary in Kingston.

6.2 The author states that on 13 December 1997, he was stabbed in the back with a knife by an inmate after having been attacked by him and three other inmates. Upon notifying a warder of the stabbing, the author was sent to see a named corporal, who allegedly asked the author to identify the assailants. The author states that he pointed out three of the assailants, and that the corporal recovered two knives and one icepick from them and then started beating the inmate who had admitted to stabbing the author. However, after having been beaten for a while, the inmate allegedly claimed that the author had provoked the stabbing by first attacking him with a knife. The author states that this was not true, but the corporal nonetheless started beating him. Two other warders allegedly joined him, and the author was beaten until he fell unconscious. He claims that he remembers blood running through his nose and mouth, and that he remained unconscious until he woke up in a vehicle on its way to the Kingston Public Hospital.

6.3 The author states that as a result of the beating, he suffered internal bleeding and that he was treated for this at the hospital until 16 December 1997. He claims that on 15 December 1997, he was visited by some policemen from Elliston Road Police Station who took a statement from him. He also claims that after his discharge from hospital, he gave a statement to an assistant of the Superintendent of the prison, but that all subsequent requests to see the Superintendent have been denied.

6.4 The author's letter was sent to the State party, with a request for comments, in order to enable the Committee to deal with all claims in the same procedure.

The State party's submission concerning the new claim

7.1 In its Note of 2 November 1998, the State party states that the Department of Correctional Services had been requested to investigate the new claims, and that the results of its investigation would be communicated to the Committee upon receipt.

7.2 In its submission of 17 May 1999, the State party forwards the results of its investigations and denies that any breaches of the Covenant had occurred. The State party submits that an injury report from the Tower Street Adult Correctional Centre, dated 13 December 1997, indicates that the author was stabbed by another inmate, and that he was taken to the institution's hospital for initial treatment, before he was referred to the Kingston Public Hospital where he remained hospitalized until 15 December 1997. A medical report from Dr. N. Graham, General Surgeon at the Kingston Public Hospital, a copy of which is attached to the State party's submission, states that the author "had no loss of consciousness, no dyspnea nor did he vomit or spat blood." Furthermore, the report states that his injuries consisted of a stab wound to the chest. There is no mention of injuries

received as results of beatings.

7.3 The State party further states that the Staff Officer in question ("the corporal") denies having used any force against the author on the date in question. He only admits to having questioned him on whether he had a knife in his possession. Another warder who was present during the alleged incident also admits to having questioned the author whether he had a knife. Allegedly, this warder states that the author was questioned because the prison authorities suspected that he had a knife in his possession, and admits that some force was used in attempting to retrieve the knife. However, he states that the use of force did not last very long, on account of the author's injuries. This warder cannot recall whether the previously mentioned Staff Officer was in the vicinity at the time.

7.4 In conclusion, based on its investigation, the State party submits that the Staff Officer ("the corporal") did not beat the author on 13 December 1997. The State party admits that, while attempting to ascertain whether the author had a knife in his possession, some force was used against him, but it states that the force used was not excessive and not to the extent alleged by the author. It is further submitted that the medical report provides evidence that excessive force was not used, because of the absence of injuries other than those caused by the stabbing incident.

Admissibility consideration and examination of the merits

8.1 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.

8.2 The Committee notes that the State party has contested the admissibility of the original claim, contending that domestic remedies have not been exhausted since the author has not petitioned the Judicial Committee of the Privy Council. The Committee recalls its constant jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. With respect to the author's possibility of challenging the legitimacy of the sentence imposed on him, the Committee notes counsel's assertion that such a challenge could only be lodged as a constitutional motion before the Jamaican courts, and that a petition to the Judicial Committee of the Privy Council on this point thus would have no prospect of success. The Committee also notes that in its observations on admissibility, the State party merely in a single sentence claims that the Privy Council could have been petitioned, without elaborating on whether this would be an effective and available remedy, and without commenting on counsel's assertions in this regard. In the circumstances, the Committee holds that petitioning the Judicial Committee of the Privy Council would not have constituted an available and effective remedy for purposes of article 5, paragraph 2(b), of the Optional Protocol.

8.3 With regard to the author's possibility of filing a constitutional motion, the Committee notes that this issue has not been commented by the State party and considers, in view of its constant jurisprudence, that in the absence of legal aid, a constitutional motion was not an available and effective remedy in the present case. In conclusion, the Committee finds that it is not precluded by article 5, paragraph 2(b), of the Optional Protocol from considering the original claim.

8.4 Noting that the State party has not contested the admissibility of the new claim, the Committee

also declares this claim admissible, and proceeds with the examination of the merits of the 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.

9.1 The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has contested the claim by stating that the domestic legislation governing such corporal punishment is protected from unconstitutionality by section 26 of the Constitution of Jamaica. The Committee points out, however, that the constitutionality of the sentence is not sufficient to secure compliance also with the Covenant. The permissibility of the sentence under domestic law cannot be invoked as justification under the Covenant. Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that by imposing a sentence of whipping with the tamarind switch, the State party has violated the author's rights under article 7.

9.2 With regard to the author's claim that, on 13 December 1997, he was beaten severely by three warders of the General Penitentiary in Kingston, the Committee notes that the State party in its investigations of the allegations found that the warders had not exercised more force than that which was necessary to ascertain whether the author was in possession of a knife. Furthermore, the State party has provided the Committee with copies of medical reports which contain no mention of the injuries which the author claims to have sustained as a result of the alleged beatings. Based on the material before it, the Committee therefore cannot find a violation of the Covenant on this ground.

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 reveal a violation of article 7 of the International Covenant on Civil and Political Rights.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Osbourne with an effective remedy, and should compensate him for the violation. The State party is also under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

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. 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. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ Reference is made to the Zimbabwean decisions of S. V. Ncube and others, and S. V. A Juvenile, a decision from Barbados, Hobbs and Mitchell v. R. and a judgement of the European Court of Human Rights, Tyrer v. United Kingdom.

[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.]