HUMAN RIGHTS COMMITTEE

Baroy v. The Philippines

Communication No 1045/2002

31 October 2003

CCPR/C/79/D/1045/2002*

ADMISSIBILITY

Submitted by: Mr. Alfredo Baroy (represented by counsel, Mr. Theodore Te)

Alleged victim: The author

State party: The Philippines

Date of communication: 4 January 2002 (initial submission)

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

Meeting on 31 October 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 4 January 2002, is Alfredo Baroy, a Philippine national allegedly born on 19 January 1984 and thus aged 17 at the time of submission of the communication. At that time, he was detained on death row at New Bilibid Prisons, Muntinlupa City. He claims to be a victim of violations by the Philippines of article 6, in particular paragraphs 2, 5 and 6, article 10, paragraph 3, article 14, in particular paragraph 4, and article 26 of the Covenant. He is represented by counsel.

1.2 On 9 January 2002, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to carry out the death sentence against the author, while his case was under consideration

by the Committee. The Special Rapporteur on New Communications further requested the State party speedily to determine the age of the author and meanwhile to treat him as a minor, in accordance with the provisions of the Covenant.

The facts as presented by the author

2.1 On 2 March 1998, a woman was raped three times. The author and an (adult) co-accused were thereafter charged with three counts of rape with use of a deadly weapon contrary to article 266A(1),[1] in conjunction with article 266B(2), [2] of the Revised Penal Code. It is alleged that on the date of the offence, the author would have been 14 years, 1 month and 14 days old, by virtue of being born on 19 January 1984.

2.2 At trial, the defense introduced the issue of minority through the author, who claimed to have been born in 1982. The trial court instructed the appropriate government agencies to submit evidence on his true age. Three documents were submitted. A Certificate of Live Birth listed the date as 19 January 1984, while a Certificate of Late Registration of Birth showed the date as 19 January 1981, and an Elementary School permanent record as 19 January 1980. The trial court considered, in the light of the author's physical appearance, that the author's true date of birth was 19 January 1980, thus making him over 18 years of age at the time the offence was committed.

2.3 On 20 January 1999, the author and his (adult) co-accused were each convicted of three counts of rape with a deadly weapon and sentenced to death by lethal injection. In imposing the maximum penalty available, the Court considered that there were the aggravating circumstances of nighttime and confederation, and no mitigating circumstances. By way of civil liability, each was further sentenced to pay, in respect of each count, P50,000 in indemnity, P50,000 in moral damages and P50,000 in civil damages. On 4 January 2002, the communication was submitted to the Committee.

2.4 On 9 May 2002, the Supreme Court, on automatic review, affirmed the conviction but reduced the penalty from death to *reclusion perpetua*, on the basis that no aggravating circumstances had been sufficiently alleged and proven to exist. On the contrary, the trial court had overlooked a mitigating circumstance of "accidental" (that is, non-habitual) intoxication. As to the issue of minority, the Court considered that the record showed that the author had been coached by his mother to lie about it, and thus, having been "obviously fabricated", minority had not been made out.

2.5 The author subsequently filed a partial motion for reconsideration of the 9 May 2002 judgment, reiterating his claim of minority as a privileged mitigating circumstance. The motion was based on a purported certificate of live birth, certified as a true copy by the Office of the Civil Registrar General, showing that the author was born on 19 January 1984 (and making him 14 years of age at the time of the commission of the offence).

The complaint

3.1 The author claims to have been a victim of a violation of article 6, paragraph 2, both alone and in conjunction with paragraph 6. The author explains that following the constitutional abolition of

capital punishment in 1987, the Congress in 1994 reintroduced the death penalty by electrocution through the *Republic* Act 7659. This legislation made, *inter alia*, rape by use of deadly weapon or by two or more persons, a death-eligible offence (that is, the death penalty was the maximum penalty but not mandatory).The mode of death was changed to lethal injection and the range of offences was subsequently expanded by legislation. Up to 2000, seven individuals were executed. In 2000, the former President imposed a temporary moratorium. No concrete moves to repeal or review the death penalty were undertaken over this period. In 2001, the current President revoked the moratorium and announced that executions would resume. The author argues, as a result, that article 6, paragraph 2, in conjunction with paragraph 6, prohibits the re-imposition of the death penalty, once abolished. In addition, the offence for which the author was convicted was not a "most serious crime", as required by article 6, paragraph 2, of the Covenant.

3.2 The author claims a violation of article 10, paragraph 3, as after his conviction he was detained on death row with other convicts sentenced to death, regardless of his age. He was not accorded special treatment as a minor and was detained with adult criminals.

3.3 The author further claims a violation of article 14, in particular paragraph 4. He was not accorded a separate procedure that would protect his rights considering his legal status as a minor. No preliminary determination was made as to his minority, with the trial court simply placing the burden of proof on the defence. Despite evidence from State authorities that the author was either born in 1981 or 1984, in either case making him a minor at the time of commission of the offence, the trial court arbitrarily determined his birth year as 1980, thus making him 18 years at the time of the offence.

3.4 The author finally claims a violation of article 26, in that his age was arbitrarily determined to be 18, despite evidence of his birth being either in 1981 or 1984. The trial court refused to treat him as a minor and singled him out with the intention of arbitrarily determining the year of his birth, contrary to the evidence presented.

3.5 By way of relief, the author petitioned the Committee to request, through interim measures of protection, the State party speedily to determine his age and urgently to transfer to an appropriate facility, consistent with his status as a minor, until he reached majority. As to issues on the merits, he requested the Committee to declare (i) his three death sentences, imposed upon a minor at time of commission of the offences, to be contrary to article 6, paragraph 5, (ii) his detention on death row, as a minor, without regard to his legal status as such, to be contrary to article 10, paragraph 3, (iii) the failure to consider his legal status as a minor during the trial to be contrary to article 14, paragraph 4, and (iv) the re-imposition of capital punishment and the declared policy of the President to carry it out to be contrary to article 6, paragraph 2, in conjunction with paragraph 6. He petitioned the Committee to request the State party to take all appropriate action on the death sentences imposed upon him, consistent with its own laws on juvenile offenders and its obligations under the Covenant.

The State party's submissions on admissibility and merits

4.1 By Note verbale of 9 July 2002, the State party contested the admissibility of the communication. The State party argues that, as the author's appeal was pending before the Supreme Court at the time of submission of the communication, his complaints were "by and large speculative and premature" and the communication was inadmissible for failure to exhaust domestic remedies.

4.2 In addition, the State party argues that the Supreme Court's decision of 9 May 2002 "can very well result in the case before the HRC being considered moot". The Court, for reasons other than alleged minority, reduced the sentence to *reclusion perpetua*. For that reason, the claims with respect to the validity of the death penalty law should be deemed moot. It also rejected the claim of minority, finding it "obviously fabricated" as a result of his mother's coaching. The State party points out that as the author subsequently filed a partial motion for reconsideration of the 9 May 2002 judgment, reiterating his claim of minority as a privileged mitigating circumstance, the claim continues to be pending and should be dismissed for non-exhaustion of domestic remedies.

The author's comments

5.1 By letter of 26 May 2003, the author rejected the State party's arguments, arguing that while a partial motion for reconsideration on the issue of minority is pending, the communication remains admissible because the Supreme Court's affirmation of the author's guilt and its failure to treat him as a minor, despite the documentary evidence presented, demonstrates that all domestic remedies have been exhausted. He submits that a remedy is not "meaningful" unless the tribunal in question is open to considering all the options. In the author's view, the fact that the Supreme Court has remained steadfast to reviewing cases based solely on the trial records presented, even in cases where a clear factual dispute is raised, shows that there is no adequate remedy left. Accordingly, the submission of the communication was not premature and should be deemed admissible.

Supplementary submissions by the parties

6.1 On 16 July 2003, the State party made additional submissions on the admissibility and the merits of the communication. As to admissibility, the State party argues, in addition to its earlier arguments, that the author cannot claim to be a "victim", as required by the Optional Protocol, as there has been no concrete application of law to his detriment. Indeed, as the 9 May 2002 decision of the Supreme Court reduced the imposed penalty to *reclusion perpetua*, the death penalty will not be imposed regardless of the author's age at the time of the offence.

6.2 As to the merits, the State party argues that the alleged violations are also premised on the author being a minor. The State party argues that the author's minority has not yet been satisfactorily proven, and refers to the brief of the Office of the Solicitor-General filed in response to the author's partial motion for reconsideration before the Supreme Court. In the brief, the Office considers itself "not in a position to state whether the certificate of live birth attached □ is authentic or not", and leaves the matter to the "sound judgment" of the court. In any event, the Supreme Court has already rejected the author's claim of minority, which finding stands until such time as the Supreme Court reverses it.

6.3 On the question of the re-imposition of the death penalty in Republic Act 7659, the State party refers to the jurisprudence of its Supreme Court that the Constitution provides for re-imposition by Congress, and further that the Act was "replete with both procedural and substantive safeguards that ensure only [its] correct application".[3] In addition, the Court held that the punishment of death is not, per se, cruel, within the meaning of the State party's constitution. The State party also refers to the Committee's jurisprudence for the proposition that the death penalty per se is not in violation of the Covenant.[4]

6.4 As to the contention that the author should have received a specialized procedure for minors, the State party observes that the Supreme Court noted the trial courts findings of deviousness and criminal propensity on the part of the author. The State party argues that as the trial court's observations should be given weight in view of its first hand assessment of the author, application of any "special procedure", even if he was a minor, would "clearly be prejudicial to the administration of justice".

6.5 On the question of the treatment and segregation of juvenile convicts, the State party refers to the provisions of its Child and Youth Welfare Code (Presidential Decree 603), as interpreted by the Supreme Court. Under this regime, an offender aged over 9 and under 15 years of age at the time of commission of an offence is, in the event of a finding of guilt, not convicted but rather committed to welfare custody. If, however, the offender was aged below 18 years at the time of commission of the offence but is no longer a minor at the time of trial and conviction, such a suspended sentence is unavailable.

6.6 As to whether the author's age had been arbitrarily determined, the State party recalls the authors conflicting statements to the trial court, where he stated alternately that he was 17 years old and later that he could not recall his age but had been instructed by his mother to say 17 years. As a result and in light of his appearance, the trial court solicited official documentation, which it considered before reaching a conclusion that the author was not a minor. This finding was not reversed in the Supreme Court and remains so until such time as the Court should decide otherwise.

7.1 The author did not take the opportunity afforded to him to make additional comments in response to the State party's supplementary submissions.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 The Committee observes that, subsequent to the submission of the communication, the Supreme Court allowed the author's appeal and substituted a term of imprisonment in place of the sentence of death. In this respect, the Committee considers that the issues raised by the author concerning the

alleged violations of article 6 of the Covenant through imposition of the death penalty in his case have become moot, in relation to article 1 of the Optional Protocol. Accordingly, while potentially relevant to the Committee's assessment of the remaining claims, these particular issues need not be further addressed by the Committee.

8.3 Inspite of this conclusion with respect to the claims under article 6, the Committee observes that sentencing a person to death and placing him or her on death row in circumstances where his or her minority has not been finally determined raises serious issues under articles 10 and 14, as well as potentially under article 7, of the Covenant. The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a "partial motion for reconsideration", currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgment of 9 May 2002. The Committee recalls that its position in relation to issues of exhaustion of domestic remedies is that, absent exceptional circumstances, this aspect of a registered communication is to be assessed at the time of its consideration of the case. In the present case, accordingly, the Committee considers that the questions of the authors' age and the means by which it was determined by the courts are, by the author's own action, currently before a judicial forum with authority to resolve definitively these particular claims. It follows that issues arising under articles 10 and 14 and, potentially, article 7 from the author's age and the manner in which the courts sought to determine this question are inadmissible, for failure to exhaust domestic remedies.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2(b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Gl□l□ Ahanhanzo, Mr. Walter K□lin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1. This provision defines rape as committed "by a man who shall have carnal knowledge of woman under any of the following circumstances:

a) through force, threat or intimidation; □.".

2. This provision sets out : "Whenever the rape is committed with a use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death."

3. People v Echegaray 267 SCRA 682 and Echegaray v Secretary of Justice 297 SCRA 754.

4. Suarez de Guerrero v Colombia Case No 45/1979, Views adopted on 31 March 1982.