

HUMAN RIGHTS COMMITTEE

Kennedy v. Trinidad and Tobago

Communication No. 845/1998

26 March 2002

CCPR/C/74/D/845/1998

VIEWS

Submitted by: Mr. Rawle Kennedy (represented by counsel, Mr. Saul Lehrfreund, Saul Simons Muirhead & Burton)

State party concerned: Trinidad and Tobago

Date of registered communication: 7 December 1998 (initial submission)

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

Meeting on 26 March 2002,

Having concluded its consideration of communication No. 845/1998, submitted to the Human Rights Committee by Mr. Rawle Kennedy 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 Rawle Kennedy, a citizen of Trinidad and Tobago, at the time of submission awaiting execution under a sentence of death, which was subsequently commuted. He is currently serving a sentence of seventy-five years' imprisonment¹ in the State prison of Port-of-Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3(c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died of the wounds the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and brought before a magistrate on 10 February 1987. He was tried from 14 to 16 November 1988 and found guilty as charged. On 21 January 1992, the Court of Appeal ordered a retrial, which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but on 26 January 1996, the Court of Appeal refused leave to appeal, providing its reasons on 24 March 1998. On 26 November 1998, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal as a poor person.

2.2 The prosecution's case was that Norris Yorke had been at work in his gasoline station along with the supervisor, one Ms Shanghie, in the evening of 3 February 1987. While Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution claimed that the author asked Ms. Shanghie for a quart of oil, and that when she returned, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. Matthews allegedly told the author that Mr. Yorke was reaching for a gun, dealt Mr. Yorke several blows to the head with a piece of wood and left the room. Mr. Yorke then told the intruders to take the money. Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Matthews upon which the author pointed the gun at her and told her to be quiet. Matthews then ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders thereafter escaped with the money, in a vehicle belonging to Mr. Yorke. The next day Mr. Yorke died from the head wounds.

2.3 All available domestic remedies are said to have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice because of the State party's unwillingness or inability to provide legal aid for such motions and the difficulty of finding a local lawyer who would represent an applicant pro bono in a constitutional motion.

The complaint

3.1 The author argues that article 9, paragraphs 2 and 3, was violated, as he was not informed of charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel recalls that the Covenant requires that such actions be undertaken "promptly", and submits that the periods between arrest and charges in his case do not meet that test.

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3(c) and 5, on the ground of undue delays in the proceedings. He recalls that it took 1) 21 months from the date on which the author was charged until the beginning of his first trial, 2) 38 months from the conviction until the hearing of his appeal, 3) 21 months from the decision of the Court of Appeal to allow his appeal until the beginning of the re-trial, 4) 27 months from the second conviction to the hearing of the second appeal, and 5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse

as to why the re-trial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay.

3.3 The author claims violations of articles 6, 7, and 14, paragraph 1, on account of the mandatory nature of the death penalty for murder in Trinidad and Tobago. He recalls that the distinction between capital and non-capital murder, which exists in law in many other common law countries², has never been applied in Trinidad and Tobago.³ It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule in Trinidad and Tobago, under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death could possibly result from that robbery.

3.4 It is submitted that, given the wide variety of circumstances under which murder may be committed, a sentence indifferently imposed on every category of murder, does not retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment contrary to article 7 of the Covenant. It is similarly submitted that article 6 was violated, since to impose the death penalty irrespective of the circumstances of the crime constituted cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 It is submitted that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case, as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. Counsel makes reference to a Bill to Amend the Offences Against the Persons Act, which has been considered but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category, had this bill been passed.

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the exercise of the prerogative of mercy. In Trinidad and Tobago, the President has the power to commute any sentence of death under Section 87 of the Constitution, but he must act in accordance with the advice of a Minister designated by him, who in turn acts pursuant to the advice of the Prime Minister. Under Section 88 of the Constitution, there shall be an Advisory Committee on the Power of Pardon, chaired by the designated Minister. Under Section 89, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in the practice of Trinidad and Tobago, the Advisory Committee has the power to

commute death sentences, and it is free to regulate its own procedure; but in doing so, it does not have to afford the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.⁴

3.7 For counsel, the right to apply for mercy under article 6, paragraph 4, must be interpreted to be an effective right, i.e. it must be construed in such a way that it is practical and effective rather than theoretical or illusory. It must thus afford the following procedural rights to a person applying for mercy:

- The right to notification of the date on which the Advisory Committee is to consider the case
- The right to be supplied with the documentation before the Advisory Committee at the hearing
- The right to make representations in advance of the hearing both generally and with regard to the material before the Advisory Committee
- The right to an oral hearing before the Advisory Committee
- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

3.8 Counsel notes that in the author's case, the Advisory Committee may have met several times to consider the author's application without his knowledge, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, paragraph 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to participate fully in the decision making process.

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as he was tortured and beaten by police officers after his arrest, whilst awaiting to be charged and brought before a magistrate. He allegedly suffered repeated beatings and was tortured to admit to the offence. He notes that he was hit on the head with a traffic sign, jabbed in the ribs with a rifle butt, stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author complained about the beatings and showed his bruises to the magistrate before whom he was brought on 10 February 1987, and the judge ordered that he be taken to hospital after the hearing.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he was detained in appalling conditions both on remand and on death row. Thus, for the duration of the periods on remand (21 months before the first trial and 21 months before the second trial), the

author was kept in a cell measuring 6 by 9 feet, shared with between five to ten other detainees. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Medical and dental care is, despite requests, infrequently made available.

3.11 In view of paragraph 3.10 above, the author claims that carrying out the death sentence would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee's judgment in *Pratt and Morgan*, in which it was held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same arguments apply in the present case.

3.12 Finally, the author claims a violation of articles 2, paragraph 3, and 14, paragraph 1, since because of the lack of legal aid he is de facto being denied the right to apply to the High Court for redress of violations of fundamental rights. He notes that the costs of instituting proceedings in the High Court are far beyond his own financial means and beyond the means of most of those charged with capital offences.

3.13 With regard to the State party's reservation made upon re-accession to the Optional Protocol on 26 May 1998, it is argued that the Committee has competence to deal with the communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

The State party's submission and author's comments

4.1 By submission of 8 April 1999, the State party refers to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

"...Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

5. In his comments of 23 April 1999, the author submits that the State party's claim that the Committee exceeded its jurisdiction in registering the present communication is wrong as a matter of international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24, paragraph 18⁵, and to the Order of the International Court of Justice of 4 December 1998 in *Fisheries Jurisdiction (Spain v. Canada)*.

The Committee's admissibility decision

6. At its 67th session, the Committee considered the admissibility of the communication. It decided that the reservation could not be deemed compatible with the object and purpose of the Optional Protocol, and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol. The Committee noted that the State party had not challenged the admissibility of any of the author's claims on any other ground than its reservation and considered that the claims were sufficiently substantiated to be considered on the merits. On 2 November 1999, the Human Rights Committee therefore declared the communication admissible.⁶

Consideration of the merits

7.1 The State party's deadline for the submission of information on the merits of the author's allegations expired on 3 July 2000. No pertinent information has been received from the State party, in spite of two reminders addressed to it on 28 February 2001 and 13 August 2001.

7.2 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.3 Counsel has claimed that the mandatory character of the death sentence, and its application in Mr. Kennedy's case, constitutes a violation of articles 6(1), 7 and 14(1) of the Covenant. The State party has not addressed this claim. The Committee notes that the mandatory imposition of the death penalty under the laws of Trinidad and Tobago is based solely on the particular category of crime of which the accused person is found guilty. Once that category has been found to apply, no room is left to consider the personal circumstances of the accused or the particular circumstances of the offence. In the case of Trinidad and Tobago, the Committee notes that the death penalty is mandatory for murder, and that it may be and in fact must be imposed in situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the victim. The Committee considers that this system of mandatory capital punishment would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant.⁷ The Committee accordingly is of the opinion that there has been a violation of article 6, paragraph 1, of the Covenant.

7.4 The Committee has noted counsel's claim that since Mr. Kennedy was at no stage heard in relation to his request for a pardon nor informed about the status of deliberations on this request, his

right under article 6, paragraph 4, of the Covenant, was violated. In other words, counsel contends that the exercise of the right to seek pardon or commutation of sentence should be governed by the procedural guarantees of article 14 (see paragraph 3.8 above). The Committee observes, however, that the wording of article 6, paragraph 4, does not prescribe a particular procedure for the modalities of the exercise of the prerogative of mercy. Accordingly, States parties retain discretion for spelling out the modalities of the exercise of the rights under article 6, paragraph 4. It is not apparent that the procedure in place in Trinidad and Tobago and the modalities spelled out in Sections 87 to 89 of the Constitution are such as to effectively negate the right enshrined in article 6, paragraph 4. In the circumstances, the Committee finds no violation of this provision.

7.5 In connection with counsel's claim that the length of judicial proceedings in his case amounted to a violation of article 14, paragraphs 3(c) and 5, the Committee notes that more than ten years passed from the time of the author's trial to the date of the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. It considers that the delays invoked by counsel (see paragraph 3.2 above), in particular the delays in judicial proceedings after the ordering of a re-trial, i.e. over six years from the ordering of the re-trial in early 1992 to the dismissal of the second appeal in March 1998, were 'unreasonable' within the meaning of article 14, paragraphs 3(c) and 5, read together. Accordingly, the Committee concludes to a violation of these provisions.

7.6 The author has alleged violations of articles 9, paragraphs 2 and 3, because he was not charged until five days after his arrest, and not brought before a judge until six days after arrest. It is uncontested that the author was not formally charged until 9 February 1987 and not brought before a magistrate until 10 February 1987. While the meaning of the term "promptly" in paragraphs 2 and 3 of article 9 must be determined on a case by case basis, the Committee recalls its jurisprudence under the Optional Protocol pursuant to which delays should not exceed a few days. While the information before the Committee does not enable it to determine whether Mr. Kennedy was "promptly" informed of the charges against him, the Committee considers that in any event he was not brought "promptly" before a judge, in violation of article 9, paragraph 3.

7.7 The Committee has noted the author's allegations of beatings sustained after arrest in police custody. It notes that the State party has not challenged these allegations; that the author has provided a detailed description of the treatment he was subjected to, further identifying the police officers allegedly involved; and that the magistrate before whom he was brought on 10 February 1987 ordered him to be taken to hospital for treatment. The Committee considers that the treatment Mr. Kennedy was subjected to in police custody amounted to a violation of article 7 of the Covenant.

7.8 The author claims that his conditions of detention are in violation of articles 7 and 10(1). Once again, this claim has not been addressed by the State party. The Committee notes that the author was kept on remand for a total of 42 months with at least five and up to ten other detainees in a cell measuring 6 by 9 feet; that for a period of almost eight years on death row, he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention amount to a violation of article 10, paragraph 1, of the Covenant.

7.9 The Committee has noted the claim (see paragraph 3.11 above) that the execution of the author would amount to a violation of articles 6 and 7 of the Covenant. It considers, however, that this particular claim has become moot with the commutation of the author's death sentence.

7.10 The author finally claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under Section 14(1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

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 by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3(c) and 5, and 14, paragraphs 1 and 3(d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

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

10. The Committee is aware that Trinidad and Tobago has denounced the Optional Protocol. The present case however was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12(2) of the Optional Protocol, it continues to be subject to the 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 90 days, information about the measures taken to give effect to the Committee's Views.

** The following Committee members participated in the adoption of the present decision: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee members, Mr. Nisuke Ando Mr. Eckart Klein and Mr. David Kretzmer, and the text of an individual (concurring) opinion signed by Mr. David Kretzmer and Mr. Maxwell Yalden are appended to the present document.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

¹ Note : On an unspecified date after expiry of the five-year period set by the Privy Council as a threshold for commutation of death sentences, the author's death sentence was commuted to a sentence of seventy-five years' imprisonment. The author was so informed on 8 February 2000.

² Reference is made to the United Kingdom's Homicide Act 1957, which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder committed in the furtherance of theft, murder committed for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5, and murder committed on more than one occasion pursuant to section 6.

³ The law in Trinidad and Tobago does contain provisions reducing the offence of murder to manslaughter where murder was committed with diminished responsibility or under provocation.

⁴ Counsel invokes the principles set down by the *Judicial Committee in Reckley v. Minister of Public Safety* (No.2) (1996) 2WLR 281 and *De Freitas v. Benny* (1976) A.C.

⁵ I/GEN HR/1/Rev. 3, 15 August 1997, p. 48.

⁶ . For the text of the decision, see the Annual Report of the Human Rights Committee for 2000, A/55/40, Vol. II, Annex XI.A.

⁷ Views on Communication 806/1998 (*Thompson v St. Vincent and the Grenadines*), adopted on 18 October 2000, para. 8.2 (A/56/40, Vol.II, Annex X.H.).

Appendix

Individual opinion by Committee members Mr. Nisuke Ando, Mr. Eckart Klein and David Kretzmer

When the Committee considered the admissibility of this communication we were of the opinion that in the light of the State party's reservation quoted in paragraph 4.1 of the Committee's Views the Committee was not competent to consider the communication and it should therefore be declared inadmissible. Our view was not accepted by the Committee, which held that it was competent to consider the communication. We respect the Committee's view as to its competence

and so have joined in considering the communication on the merits.

[Signed] Nisuke Ando
[Signed] Eckart Klein
[Signed] David Kretzmer

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual Opinion by Committee members, Mr. David Kretzmer and Mr. Maxwell Yalden (concurring)

In communication No. 806/1998 (Thompson v. St. Vincent and the Grenadines), I dissented from the Committee's view that the mandatory nature of the death sentence for murder according to the law of the State party necessarily meant that by sentencing the author to death the State party had violated article 6 (1) of the Covenant. One of the main grounds for my opinion was that according to the law of the State party the death penalty was mandatory only in the case of the intentional killing of another human being, a penalty which, while deeply repugnant to the undersigned, was not in our view in violation of the Covenant. In the present case which carries a mandatory death sentence, however, it has been shown that the definition of murder, may includes participation in a crime which involves violence that results inadvertently in the death of another. Furthermore, the prosecution in this case did not claim that the author had intentionally killed Norris Yorke.

In these circumstances, it is not self-evident that the author was convicted of a most serious crime, which is a condition for imposing the death sentence under article 6, paragraph 2, of the Covenant. Furthermore, the mandatory nature of the sentence denied the court the opportunity of considering whether the specific crime of the author was indeed a most serious crime, within the meaning of article 6, paragraph 2. I am therefore of the opinion that in imposing a death sentence the State party violated the author's right to life protected under article 6, paragraph 2, of the Covenant.

[Signed] David Kretzmer
[Signed] Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]