

HUMAN RIGHTS COMMITTEE

Gentles et al. v. Jamaica

Communication No. 352/1989

15 March 1990

CCPR/C/38/D/352/1989*

ADMISSIBILITY

Submitted by: E. Gentles, L. Kerr and D. Douglas

Alleged victims: The authors

State party concerned: Jamaica

Date of communication: 9 March 1989 (date of initial letter)

Documentation references: Prior decisions -CCPR/C/35/D/352/1989 (Combined rule 86, rule 91 decision, dated 27 March 1989)

Date of present decision: 15 March 1990

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following:

Decision on admissibility

1. The authors of the communication (initial submission dated 9 March 1989 and subsequent correspondence) are Errol Gentles, Lorenzo Kerr and Dennis Douglas, three Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They claim to be the victims of a violation of their human rights by the Government of Jamaica. They are represented by counsel.

2.1 The authors were charged with the murder, on 30 August 1980, of one Howard Campbell, in the Parish of Clarendon, Jamaica. No identification parade was held following their arrest. During their trial before the Clarendon District Court, from 31 March to April 1981, they maintained that they were innocent and testified that they had been elsewhere when the crime occurred. On 14 April 1983, the Jamaican Court of Appeal dismissed their appeal. Subsequently, they filed a petition for special leave to appeal to the Judicial Committee of the Privy Council; this was dismissed on 6

October 1988.

2.2 The authors state that the deceased was sitting on a bench by the roadside in the village of Woodside, Clarendon, when a van with armed men passed through the village. These men, together with two motor cyclists, began to molest and attack the villagers. The prosecution contended that the raiders had acted with intention to kill. In particular, they caught the deceased, beat and stabbed him to death. Furthermore, as the attack occurred during the campaign for a general election, it was suggested that it could have had political overtones.

2.3 The authors claimed to be innocent and denied to have taken part in the raid. In particular, Mr. Gentles' uncle supported the author's alibi defence, testifying that he had been home with him at the time in question. The authors further claim that no identification parade was held following their arrest. In this connection, Lorenzo Kerr and Errol Gentles claimed, in their petition for special leave to appeal to the Privy Council, that identification evidence was central to their case: they alleged that three police constables who testified during the trial were invited by the prosecution to identify them from the dock; this, however, happened seven months after the murder. Thus, the principal ground of appeal was that the trial judge in his summing-up to the jury misdirected the jurors on the issue of identification evidence and permissibility of dock identification, that he erred in not pointing out the dangers inherent in such method of identification. Moreover, they argued that the trial judge, in reviewing the identification evidence, did not remind the jury that, during the preliminary inquiry, one of the constables who testified against them had not stated that he had seen the authors stabbing the deceased.

2.4 Messrs. Kerr and Gentles add that the Court of Appeal, when dealing with the issue of identification evidence, rejected the authors' appeal and observed: "In our view, the learned trial judge in directing the jury on the dangers inherent in visual identification had in mind R. v. Whyllie 27 W.I.R. The language of the directions is the language of that case". The authors object to this reasoning and, by reference to relevant case law, contend that the dangers inherent in dock identification have been recognized by the courts in most Commonwealth countries.

2.5 As to the case of Dennis Douglas, it is claimed that the trial judge erred in not putting the issue of manslaughter to the jury. Without an alternative manslaughter verdict to consider, the jury was bound to convict him of murder after rejecting his alibi defence.

3. By decision of 27 March 1989, the Special Rapporteur of the Human Rights Committee on cases involving the death penalty, transmitted the communication, under rule 91 of the rules of procedures, to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The authors were requested to provide the Committee with the text of the written judgment of the trial court and the Court of Appeal. The State party was further requested, under rule 86 of the rules of procedure, not to carry out the death sentence against the authors while their communication was under consideration by the Committee.

4. In its submission under rule 91, dated 20 July 1989, the State party contends that the communication should be declared inadmissible on the ground of non-exhaustion of domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. Although the authors' petitions for leave to appeal to the Judicial Committee of the Privy Council were dismissed, they had

been submitted in respect of their criminal cases; consequently, the authors would still have constitutional remedies open to them, which they must pursue in respect of the alleged violations of the Covenant. The State party points out that, at the earliest stage of the Committee's deliberation on a communication, all the alleged violations of the Covenant and the articles to which such violations relate should be identified by the Committee.

5. In a further submission from the authors, dated 11 August 1989, it is stated that the authors were victims of a miscarriage of justice, in that the police did not place them on an identification parade. It is further submitted that they did not have an opportunity to consult with the court-appointed lawyers assigned to their appeals.

6. In her comments, dated 7 September 1989, counsel rejects the State party's contention that constitutional remedies remain open to the authors and submits that the authors lack the means to retain a lawyer to submit a constitutional motion to the Supreme (Constitutional) Court. Furthermore, there are no provisions in the Poor Prisoner's Defence Act for legal aid to be made available for that purpose; notwithstanding, the Jamaican Council for Human Rights had made considerable but successful efforts to retain lawyers on a pro bono basis. Counsel contends that if a constitutional remedy is available theoretically to the authors, this is not the case in practice, due to the unavailability of legal aid. She concludes that a remedy which cannot be pursued in practice is not an available remedy and that accordingly, the communication should be declared admissible.

7.1 Before considering any claims 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.

7.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee has taken note of the State party's contention that the communication is inadmissible because of the author's failure to pursue constitutional remedies available to him under the Jamaican Constitution. In this connection, the Committee observes that Section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, while Section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme (Constitutional) Court may "hear and determine" applications with regard to the alleged non-observance of constitutional guarantees, but limits its jurisdiction to such cases where the applicants have not already been afforded "adequate means of redress for the contraventions alleged" (Section 25, paragraph 2, in fine). The Committee notes that the State party was requested to clarify, in a number of interlocutory decisions, whether the Supreme (Constitutional) Court has had the opportunity to determine, pursuant to section 25, paragraph 2, of the Jamaican Constitution, whether an appeal to the Court of Appeal and the Judicial Committee of the Privy Council constitute "adequate means of redress" within the meaning of section 25, paragraph 2, of the Jamaican Constitution. The State party has replied to these interlocutory requests in the negative. Taking into account the State party's clarification, together with the absence of legal aid for filing a motion in the Constitutional Court and the unwillingness of Jamaican counsel to act in this regard without remuneration, the Committee finds that recourse to

the Constitutional Court under section 25 of the Jamaican Constitution is not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee has considered the material submitted to it by the authors' counsel, including the authors' petitions for special leave to appeal to the Judicial Committee of the Privy Council. On the basis of this information, the Committee notes that the claims of Dennis Douglas are based on the sole issue of the trial judge's failure to properly direct the jury on the possibility of a manslaughter verdict. It also takes note of Lorenzo Kerr's allegation that the judge instructed the jury improperly on the evaluation of identification evidence and the permissibility of dock identification. The Committee reiterates that, although article 14 guarantees the right to a fair trial, it is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary and amounted to a denial of justice. The Committee does not dispose of sufficient evidence that the trial judge's instructions suffered from such defects. The Committee therefore, concludes that this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.5 In as much as the authors' allegations about inadequate opportunities to consult with their counsel are concerned, the Committee notes that they relate to article 14, paragraphs 3 (b) and (d) and 5; they should accordingly, be considered on the merits.

8. The Human Rights Committee therefore decides:

(a) The communication is admissible inasmuch as it may raise issues under article 14, paragraphs 3 (b) and (d) and 5, of the Covenant;

(b) In accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) The State party shall be requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author while his communication is under consideration by the Committee. This request does not imply a determination on the merits of the communication;

(d) Any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the Committee's rules of procedure, to the author and his counsel, with the request that any comments that they may wish to submit thereon should reach the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(e) This decision shall be communicated to the State party, to the author and to his counsel.

*/ All persons handling this document are requested to respect and observe its confidential nature.