HUMAN RIGHTS COMMITTEE

Smart v. Trinidad and Tobago

Communication No. 672/1995

5 July 1996

CCPR/C/57/D/672/1995 */

ADMISSIBILITY

Submitted by: Clive Smart (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

Date of communication: 11 December 1995 (initial submission)

Documentation references: List - CCPR/C/CL/R.63; Prior decisions - Special Rapporteur's rule 86/91 decision transmitted to the State party on 18 December 1995 (not issued in document form)

Date of present decision: 5 July 1996

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.

Decision on admissibility

1. The author of the communication is Clive Smart, a Trinidadian citizen and carpenter who, at the time of submission of his communication, was awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. The author claims to be a victim of a violation by Trinidad and Tobago of articles 7; 9, paragraph 3; 10, paragraph 1 and 14, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 On 22 June 1988, the author was arrested for the murder of one Josephine Henry. He was found guilty as charged in the Scarborough Assizes Court on 14 February 1992, and sentenced to

death. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 26 October 1994. On 11 December 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal.

2.2 On trial, the prosecution's case was based on the author's evidence, who did not dispute the attack, and that of several witnesses. The author, in an apparent fit of jealousy, had attacked Josephine Henry, stabbing her 19 times.

2.3 The victim's sister, Charmaine Henry, testified that, on 22 June 1988, at 10:00 she had sent the author out of her house and told him to stay away. She claimed that some time later, she had heard loud calls of distress from her sister. She followed the cries and saw her sister struggling with the author, who was stabbing her. She stressed that her sister had been unarmed. She had implored the author to stop, ran down the road calling for help, then returned to the scene.

2.4 Another prosecution witness Hayden Griffith, testified that he had seen the author, whom he did not know, pass by his house gesticulating; he could not see who was with him. He had then seen the victim go past his window. A third witness, Michelle Quashie, at whose house the victim had been, testified that Ms. Henry had left the house and gone outside to talk to the author.

2.5 A further witness, Elizabeth Baird, who was a neighbour of Charmaine Henry, testified that she had overheard the conversation between the author and Charmaine Henry following which she had heard her calling out to her sister for help. She had seen the author stabbing her in the road; she had shouted to him to stop. Josephine Henry had fallen into the ditch, where the author continued to stab her, despite her pleas that he stop. She claims that the victim had been unarmed.

2.6 The arresting officer gave evidence that when the author had seen him he said "Mr. Joefield I coming with all yut, I am not running". The author was cautioned and taken to the police station. Later the author accompanied various officers to retrieve the bloodstained knife, which was stuck in a mango tree, where the author said that he had tried to commit suicide. The stains were of the same blood group as Josephine Henry.

2.7 The author invoked self defence and, subsidiarily, provocation. He gave evidence from the witness stand and testified that he and the victim had had a relationship, that he gave her money every week, and that they were to be married. On 21 June 1988, he had given her $5,000 dollars he had won gambling, and she had promised to cook him dinner at his house that evening. When he returned home she had not been there. The author states that Josephine also failed to appear at court the following morning with the money as arranged, since he was a expecting a fine for gambling. He went to look for her, first at her father's house where her sister Charmaine told him she was not there, then, at Michelle Quashie's, where he found her. He states that Josephine had come out of the house carrying a cutlass knife, with which she had been peeling a pineapple. The author testified that she told him that she had spent the money on tickets for a holiday for herself and three friends. He told her not to joke and to give him the money, so he could pay his fine and a debt he had with his foreman. He testified that she had abused him by saying: "is stupid $5,000 you getting on so for, my body worth more than that". She then had cut his hand and a struggle ensued, during which he took the knife from her and started to "fire stabs", the next thing he knew was that the victim was in the canal covered with blood. He ran away taking his jumper and shoes off climbing up a mango

tree and trying to hang himself. He went off to his grandmother's where the arresting officer found him. He claims he told the police he had been cut. During cross examination, he admitted he had not told the arresting officer that he had been cut.

The complaint

3.1 Counsel submits that the author is a victim of a violation of articles 7 and 10, paragraph 1, of the covenant, since he has been on death row for over four years and six months. It is argued that the delay in carrying out the execution is unconstitutional. In support of his argument, counsel refers to the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan, 1/ and to a judgement of the European Court of Human Rights. 2/ Counsel further, alleges that the anguish the author suffered during his pre-trial detention, facing the prospect of his execution, should he be convicted, should be relevant in adjudging whether the author has been a victim of inhuman and degrading treatment, in violation of the Covenant.

3.2 The author claims that his prolonged pre-trial detention violated articles 9, paragraph 3, and 14 paragraph 3 (c), of the Covenant, in this respect he states that he was arrested on 22 June 1988 but that his trial only took place on 7 February 1992. This is said to be particularly unjustifiable in a case where there were no great difficulties in obtaining the attendance of witnesses, testimonies or evidence. Counsel argues that 44 months in pre-trial detention is incompatible with the Covenant; reference is made to the Committee's jurisprudence. 3/ Counsel contends that the delay following the trial is equally attributable to the State party; reference is made to the Privy Council's Judgement in Pratt and Morgan.

3.3 The author claims that his trial was unfair. Counsel argues that the trial judge violated his obligation of impartiality by the way in which, during his summing-up, he dealt with the issues of self-defence and provocation. Counsel further claims that the judge gave an inaccurate account and misdirected the jury on the effect of the evidence adduced by the prosecution with regard to the issue of self-defence. He claims that the judge misdirected the jury by imposing an objective, as opposed to a subjective, test for self-defence. Finally, he claims that the judge did not give proper directions on the test of a reasonable man in provocation, thereby denying the author the possibility of being acquitted or convicted of the lesser charge of manslaughter. Moreover, counsel submits that the author has been denied a fair trial in that, the
trial judge should have discharged one of the members of the jury, who it is alleged was related to the victim. 4/ It transpires, however, that this issue was not raised either on trial nor on appeal.

3.4 With regard to the appeal, the author claims that counsel who represented him before the Court of Appeal failed to properly consult with him, because she did not pursue two of the grounds of appeal prepared by a different Counsel, not giving the author any explanations, and denying him the possibility of clarifying the matter.

3.5 Finally, the author invokes a violation of article 6, paragraph 2, of the Covenant, because he was sentenced to death without the requirements of a fair trial having been met.

3.6 Counsel contends that, in practice, constitutional remedies are not available to the author because he is indigent and Trinidad and Tobago does not make legal aid available for the purpose

of constitutional motions. Reference is made to the Human Rights Committee's jurisprudence 5/. Counsel submits that all available domestic remedies have been exhausted for the purpose of the Optional Protocol.

State party's observations and Counsel's comments thereon

4.1 By submission of 5 March 1996, the State party informed the Committee that it would submit its comments on the admissibility of the case by 18 March 1996. In a further submission dated 19 March 1996, the State party does not address the admissibility of the communication but, rather, informs the Committee that, to avoid further delays in the case of Mr. Smart, the State party would stay the author's execution for a period of two months only.

4.2 The State party submits as follows:

"... 1. The Government of Trinidad and Tobago is committed to upholding the rule of law and it would therefore not deny Mr. Smart access to the United Nations Human Rights Committee for the determination of his petition provided that the process is not abused by the condemned prisoner.

2. The Government however has a responsibility to ensure that these petitions are determined quickly so as not to frustrate the application of the law. Any delay or procrastination by the United Nations Human Rights Committee can have the effect of subverting the sentence of the Court and Constitution of Trinidad and Tobago.

3. The Government therefore requests the petition of Smart be heard and determined within two months of the Government of Trinidad and Tobago submitting its response to the application before the said Committee.

4. During the two month period, the Government will not carry out the death sentence. ..."

4.2 On 2 April 1996 the Committee, through its Chairman replied to the State party by letter, reminding it that it had been the State party's own failure to submit comments on the admissibility within the imparted deadline that had caused the delay in deciding on the case. The letter noted that the State party's Note Verbale of 19 March 1996 did not contain any information relating to the admissibility of the case. It further stated that the Committee intended to take up the communication during its 57th Session.

4.3 In a further submission dated 20 May 1996 the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. It submits that the rights which the author invokes in his communication are coterminous with rights protected by the Trinidadian Constitution and refers to sections 4, 5 and 14 of the Constitution and that it is for the author to seek redress in the High Court. The State party further notes that the Legal Aid and Advisory Authority has not received an application for legal aid from Mr. Smart for a Constitutional motion.

5.1 In his comments, dated 14 and 19 June 1996, counsel refutes the State party's contention that

the author can still pursue a constitutional motion, because the courts of Trinidad and Tobago and the Privy Council have ruled that: "[a] person's constitutional rights are not infringed if that person has a trial at which the trial judge possesses the common law rights to prevent an abuse of process". The courts have further held that once there has been a trial with a Judge and jury and person convicted can only take constitutional points relating to the fairness and conduct of the trial in criminal appeals against conviction. 6/ In line with this jurisprudence, the author has exhausted his right of appeal against conviction.

5.2 In respect of the State party's contention that legal aid is made available and that the author simply chose not to request it, counsel confirms that the author did not request legal aid but argues that this was because of the perceived futility of requesting something that has never, to counsel's knowledge, been granted to anyone imprisoned who complained of similar infringements. Counsel claims that the State party does not say that a request for legal aid for a constitutional motion would be successful but simply that it is available. Counsel explains that the legal aid procedure is long and bureaucratic, and recalls that the Judicial Committee has ruled that there must be a period of at least four days between the reading of a warrant of execution and the scheduled date of execution. 7/ Such a delay is activated by the reading of the warrant of execution, after an unreasonable delay between the time of conviction and that of the reading of the warrant. Counsel alleges that given the Trinidadian scheme of legal aid, it is not possible to submit an application in time once a warrant has been read. Counsel alleges that for practical purposes, legal aid to a death row inmate, such as the author, is not available in Trinidad and Tobago; thus, constitutional redress remains a hypothetical remedy.

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 procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances. 8/. The Committee observes that the author has not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.3 The Committee has taken note of the State party's arguments that a constitutional remedy is still open to the author. However, the Committee also notes counsel counter-argument that legal aid has never been made available for this purpose and in this respect the Committee recalls its constant jurisprudence that for purposes of the Optional Protocol, domestic remedies must be both effective and available. The mere affirmation by the State party that a remedy exists is not sufficient for the Committee to consider it an effective remedy which needs to be exhausted for the purposes of the Optional Protocol. In this respect, the Committee therefore finds that it is not precluded by article 5, paragraph 2 (b), from considering the communication.

6.4 As to the claim of undue prolongation in the judicial proceedings in violation of article 14, paragraph 5, of the Covenant, the Committee notes that, on the basis of all the information before it, it is clear that such delays in the appeal proceedings as occurred were essentially attributable to the author. In this respect the Committee notes that the contents of an addendum in the Court of Appeal Judgement which states that: "This appeal has been called up since 1st February of this year. Thereafter it was called up on five further occasions, stretching from then into the month of July. On each occasion the appellant was responsible for the delay since he had been constantly writing letters to the Registrar whenever the matter had been called up to say that his family had been busy seeking to retain private attorney. It was only when this Court decided to act and to appoint attorney by way of legal aid that the appellant, for the first time, retained private attorney. This he did in October of ths year. It was clear to us all that the appellant was attempting by this manoeuvre to beat the Pratt and Morgan deadline as best he could". The Committee concludes that in this respect the author has failed to advance a claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6.5 The Committee considers that the author and his counsel have sufficiently substantiated, for the purposes of admissibility, that the delay, of forty four months, in bringing the author to trial and his continued detention throughout this period may raise issues under articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant, which should be examined on the merits.

6.6 As to the author's allegation that he was inadequately represented during his appeal hearing, the Committee considers that the claim may raise issues under article 14, paragraph 3 (b), of the Covenant.

6.7 With regard to the rest of the author's claims, the Committee notes that these relate primarily to the conduct of the trial by the judge and his summing-up to the jury. It recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of State parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript do not reveal that the conduct of his trial suffered from such defects. In particular, it is not apparent that the judge should have dismissed a juror, who it was alleged was a member of the deceased family, and by not doing so had violated his obligation of impartiality. In this respect the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

7. The Committee considers that the author's claims, regarding the period of pre-trial detention and the inadequate representation on appeal may raise issues under articles 9, paragraph 3 and 14, paragraphs 3 (b) and (c) and, as a consequence, under article 6 of the Covenant, which need to be examined on the merits.

8. The Human Rights Committee therefore decides:

(a) that the communication is admissible in so far as it may raise issues under articles

9, paragraph 3, 14 paragraphs 3 (b) and (c) and consequently of article 6 of the Covenant;

(b) that, 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 transmittal to it of this decision, written explanations of statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that 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 does not imply a determination of the merits of the communication;

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

(e) that this decision shall be communicated to the State party, to the authors and to their counsel.

[Done in English, French and Spanish, the English text being the original version.]

---

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

1/ Pratt and Morgan v. Attorney General of Jamaica et al. (1993), (Privy Council) Appeal No. 10 of 1993, Judgement delivered on 2 November 1993.

2/ Soering v. United Kingdom (1989), 11 EHRR 439.

3/ Communication No. 6/1977 (Sequiera v. Uruguay), Views adopted on 29 July 1980, and Communication No. 203/1986 (Muñoz Hermoza v. Peru), Views adopted 4 November 1988.

4/ From the trial transcript, it appears that two of the jurors who were selected disqualified themselves, because they knew the accused, five of those called had known the accused and family of the deceased.

5/ Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisolm v. Jamaica), Views adopted on 18 July 1994 (51st session).

6/ See Chokolingo v. Attorney General of Trinidad and Tobago 1981 1 WLR 106

7/ See Guerra v. Baptiste [1995] 3 WLR 891.

8/ See Committee's Views on communications Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992; Communication No. 541/1993 (Errol Simms v. Jamaica), declared inadmissible on 3 April 1995.