

HUMAN RIGHTS COMMITTEE

Gentles et al. v. Jamaica

Communication No. 352/1989

19 October 1993

CCPR/C/49/D/352/1989*

VIEWS

Submitted by: Dennis Douglas, Errol Gentles and Lorenzo Kerr

Alleged victims: The authors

State party: Jamaica

Date of communication: 9 March 1989 (initial submission)

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

Meeting on 19 October 1993,

Having concluded its consideration of communication No. 352/1989, submitted to the Human Rights Committee by Messrs. Dennis Douglas, Errol Gentles and Lorenzo Kerr 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 authors of the communication, their counsel and the State party,

Adopts its

Views under article 5, paragraph 4, of the Optional Protocol

The facts as submitted by the authors:

1. The authors of the communication are Errol Gentles, Lorenzo Kerr and Dennis Douglas, three Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of violations 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 in the Parish of Clarendon, of one Howard Campbell. They were tried in the Clarendon District Court, found guilty as charged and sentenced to death on 10 April 1981. On 14 April 1983, the Jamaican Court of Appeal dismissed their appeal. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 6 October 1988.

2.2 According to the authors, Howard Campbell 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 denied having taken part in the raid and testified that they had been elsewhere when the crime occurred. In particular, Mr. Gentles' uncle supported his alibi defence, testifying that he had been home with him at the time in question. The authors 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 judge, in his summing up to the jury, misdirected the jurors on the issue of identification evidence and permissibility of dock identification, and that he erred in not pointing out the dangers inherent in such method of identification. Moreover, they argued that the 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 The Court of Appeal, when dealing with the issue of identification evidence, rejected the authors' argument 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 contend that the dangers inherent in dock identification are recognized by the courts in most Commonwealth countries.

2.5 For Mr. Dennis Douglas, it is claimed that the 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.

2.6 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 their court-appointed lawyers.

The complaint:

3. Although the authors do not invoke any of the provisions of the International Covenant on Civil and Political Rights, it appears from their submissions that they claim to be victims of a violation by Jamaica of article 14 of the Covenant.

4.1 Counsel's submission of 10 February 1993 contains several fresh allegations which the Human Rights Committee is precluded from considering, since they were formulated after the Committee, on 15 March 1990, declared the communication admissible in so far as it appeared to raise issues under article 14, paragraphs 3(b) and (d) and 5, of the Covenant.

4.2 With regard to a violation of article 14, paragraphs 3(b) and (d), counsel submits that each author was denied adequate legal representation for their trial in that: all three were represented by the same junior counsel, Mr. J.H., and leading counsel, Mr. N.E. QC; junior counsel was also representing the fourth codefendant in the same trial; until the first day of the trial N.E. and J.H., together with another attorney, were also representing the fifth codefendant. Only prior to the empanelling of the jury, this codefendant requested to be solely represented by the other attorney.

4.3 Furthermore, the amount of time allocated to each of the authors for the preparation of the trial is said to have been insufficient for them and their representatives to prepare the defence in any meaningful way. Sufficient time was particularly important as the trial involved the preparation of complex cross-examination on the issue of identification. Moreover, the preparation of the authors' defence is said to have been prejudiced by the State party's failure to provide them or their legal representatives with the prosecution statements at a sufficiently early stage before the trial, or at all.

Thus, with regard to Dennis Douglas' case, it is submitted that he only met with junior counsel on two occasions prior to the trial. During the first meeting in prison, the author was allegedly denied privacy and therefore could not adequately instruct counsel. Leading counsel attended only the second meeting which took place immediately prior to the preliminary hearing on 16 October 1989, and which lasted 20 minutes. The only other opportunity to give instructions and discuss the case with his legal representatives took place at the court for 5 minutes each day during the trial, before the hearing started. It is further submitted that Mr. Douglas was first made aware of the prosecution case against him during the preliminary enquiry, some 5 months after his arrest, and that it is not clear whether he was ever shown or asked to comment on the prosecution statements prior to the trial.

Lorenzo Kerr submits that, although counsel promised to try to obtain the prosecution statements, he was never shown or asked to comment on them prior to the trial.

As to Errol Gentles' case, it is submitted that he first met with counsel at the preliminary enquiry, for a brief interview, and that he then first learned of the prosecution case against him. He had no further meetings with either leading or junior counsel prior to the trial. It is further submitted that it is unclear whether he was ever shown or asked to comment on the prosecution statements prior to the trial.

4.4 Counsel concludes that the fact that one leading and one junior counsel (who initially represented five codefendants) were assigned to represent all three authors prejudiced their case, since their instructions could not be adequately taken prior to and during the trial, nor could their cases be adequately presented.

4.5 As to the preparation of the appeal to the Jamaican Court of Appeal, it is submitted that the authors were not granted any privacy when consulting their legal representatives, and that the consultations were limited to 20 minutes.

4.6 Finally, counsel submits that the State party's failure to make legal aid available to the authors to pursue a constitutional motion under Sections 20 and 25 of the Jamaican Constitution, amounts to a violation of article 14, paragraph 5, of the Covenant. In this context, reference is made to para. 8.4 of the Committee's Views in Raphael Henry (Communication No. 230/1987), where the Committee found that the words "according to law" in article 14, paragraph 5, mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.

The State party's admissibility observations and the authors' comments thereon:

5.1 In its submission of 20 July 1989, the State party contends that the communication is 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 have been dismissed, the authors could still avail themselves of constitutional remedies.

5.2 In his comments, counsel denies that constitutional remedies remain open to his clients and submits that the authors cannot afford to retain a lawyer for the purposes of a constitutional motion. Furthermore, there is no provision in the Poor Prisoners' Defence Act for legal aid for that particular purpose; the Jamaica Council for Human Rights had made considerable but unsuccessful efforts to retain lawyers on a pro bono basis. Counsel contends that if a constitutional remedy is theoretically available to the authors, in practice this is not the case.

The Committee's admissibility decision:

6.1 During its 38th session in March 1990, the Committee considered the admissibility of the communication. It took note of the State party's contention that the communication was inadmissible because of the authors' failure to pursue constitutional remedies. In the circumstances of the case, the Committee considered that recourse to the Constitutional Court under Section 25 of the Jamaican Constitution was not a remedy available to the authors within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

6.2 The Committee further considered that some of the authors' allegations pertained to the issue of the adequacy of the judge's instructions to the jury, in particular to the issue of the treatment of identification evidence and the possibility of a manslaughter verdict. The Committee reiterated that it is, in principle, beyond its competence to review specific

instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality. In the circumstances, the Committee found that the judge's instructions did not suffer from such defects.

6.3 On 15 March 1990, the Committee declared the communication admissible in respect of article 14, paragraphs 3(b) and (d) and 5, of the Covenant.

The State party's objections to the admissibility decision and counsel's comments thereon:

7.1 In a submission of 6 February 1991, the State party requests the Committee to review its decision on admissibility.

7.2 The State party submits that nothing in the Optional Protocol or in customary international law supports the contention that an individual is relieved of the obligation to exhaust domestic remedies on the mere ground that there is no provision for legal aid and that his indigence has prevented him from resorting to an available remedy. It is submitted that the Covenant only imposes a duty to provide legal aid in respect of criminal offences (article 14, paragraph 3(d)). Moreover, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: article 2 of the International Covenant on Economic, Social and Cultural Rights provides for the progressive realization of economic rights and relates to the "capacity of implementation of States". In the circumstances, the State party argues that it is incorrect to infer from the authors' indigence and the absence of legal aid for constitutional motions that the remedy is necessarily nonexistent or unavailable.

8.1 In his submission of 10 February 1993, counsel comments on the State party's request for review of the admissibility decision, pointing out that the authors were arrested in 1980, tried and convicted in 1981, and that the Jamaican Court of Appeal dismissed their appeal in 1983. It is submitted that a further appeal to the Supreme (Constitutional) Court would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies.

8.2 Counsel further submits that a constitutional motion in the Supreme (Constitutional) Court of Jamaica would fail, in the light of the precedent set by the Judicial Committee's decisions in DPP v. Nasaralla¹, where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law.

8.3 As to the State party's contention that nothing in the Optional Protocol or in customary international law supports the contention that a person is relieved of the obligation to exhaust local remedies on the ground that there is no provision for legal aid and that his indigence has prevented him from utilising an available remedy, it is submitted that such requirement must be deemed to exist:

(a) particularly in countries where indigence and poverty are common, and where those who

can afford legal representation are few and far between;

(b) to do otherwise would make the provisions relating to the exhaustion of domestic remedies empty and meaningless. It cannot have been the intention of those who drafted the Optional Protocol that a State party can claim nonexhaustion where such is mainly attributable to that State party's failure to provide the author with the financial means to do so;

(c) to decide otherwise would make article 2 of the Covenant meaningless. Pursuant to that article, State parties undertake to guarantee the rights in the Covenant "without distinction of any kind, such as ... property ... or another status". To effectively limit the constitutional remedies to those who can afford the legal fees would be incompatible with the wording of the provision and the rights which the Covenant seeks to secure "without distinction of any kind";

Reconsideration of admissibility issues and examination of the merits:

9.1 The Committee has taken note of the State party's request to review its decision on admissibility, as well as its criticism of the reasoning leading to the decision of 15 March 1990. It takes the opportunity to explain its admissibility findings.

9.2 The Committee notes that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, it also notes that, in the instant case as well as in other cases², the State party indicates that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3(d), of the Covenant. In the view of the Committee, this supports the finding, made in its decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the authors do not claim that they are absolved from pursuing constitutional remedies because of their indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. As to the State party's argument that international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights, the Committee observes that the question of whether remedies remain available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol is entirely distinct from and has no bearing on the issue of progressive realization of economic, social and cultural rights.

9.3 The Committee further observes that the authors were arrested in 1980, tried and convicted in 1981, and that their appeal was dismissed in 1983. The Committee deems that for purposes of article 5, paragraph 2(b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to

revise the decision on admissibility of 15 March 1990.

10.1 The Committee notes with regret the absence of cooperation from the State party, which has not made any submission on the substance of the matters under consideration. It is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party make available to the Committee all the information at its disposal; this is so even where the State party objects to the admissibility of the communication and requests the Committee to review its admissibility decision, as requests for a review of admissibility are examined by the Committee in the context of the consideration of the merits of a case, pursuant to rule 93, paragraph 4, of the rules of procedure.

10.2 The Committee takes the opportunity to also express concern about the fact that counsel, in spite of two reminders, submitted his comments on the State party's submission two years after its receipt and only substantiated the claims almost three years after the adoption of the decision on admissibility. Paragraph 8(d) of the Committee's decision on admissibility in the case provides that: "Any explanations or statements received from the State party shall be communicated [...] to the authors and their counsel [...] with the request that any comments that they may wish to submit thereon should reach the Human Rights Committee [...] within six weeks of the date of the transmittal". While the submission of any comments is left to the discretion of the authors and their counsel, the Committee considers that any author or counsel who wishes to substantiate his/her claims or wishes to comment on a State party's submission, should do so in a timely manner so as to enable the Committee to conclude its examination in an appropriately expeditious way.

11.1 In respect of the authors' claims under article 14, paragraphs 3(b) and (d), the Committee reiterates that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. The material before the Committee discloses that neither leading or junior counsel, nor the authors complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. The Committee notes that if the authors or counsel had felt that they were improperly prepared, it would have been incumbent upon them to request an adjournment of the trial. Moreover, the Committee cannot conclude, on the basis of the available material, that the authors' representatives were unable to adequately represent them, nor that they displayed lack of professional judgment in the conduct of the defence of their clients. The same is true for the appeal. The written judgment of the Court of Appeal reveals that each of the authors was represented before the Court by different counsel, and there is no evidence that their lawyers were unable to properly prepare the cases for the appeal. The Committee therefore finds no violation of article 14, paragraphs 3(b) and (d).

11.2 It remains for the Committee to decide whether the failure of the State party to make legal aid available to the authors for purposes of a constitutional motion violated their rights under article 14, paragraph 5, of the Covenant. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the authors claim that, because of the nonavailability of

legal aid, they are denied effective access to the Supreme (Constitutional) Court of Jamaica. In its previous jurisprudence³, the Committee had examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. It observed that the Covenant does not require States parties to provide for several instances of appeal. It found, however, that the words "according to law" in article 14, paragraph 5, must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them. The Committee observes that, in the instant case, the State party provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. It further observes that Jamaican law also provides for the possibility of recourse to the Constitutional Court, which is not, as such, a part of the criminal appeal process. Thus, the Committee finds that the availability of legal aid for constitutional motions is not required under article 14, paragraph 5, of the Covenant. Accordingly, the Committee concludes that the authors' rights under this provision were not violated.

12. 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 the Committee do not disclose any violation of the provisions of the Covenant.

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

Footnotes

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

1/ [1967] 2 ALL ER 161.] and Riley *et al.* v. Attorney General of Jamaica [[1982] 3 AL ER 469.

2/ See e.g. Committee's Views in communication No. 283/1988 (Aston Little v. Jamaica), adopted on 1 November 1991, at its 43th session.

3/ Communication No. 230/1987, para. 8.4.