

HUMAN RIGHTS COMMITTEE

F. M. v. Jamaica

Communication No. 729/1996

9 July 1997

CCPR/C/60/D/729/1996 *

ADMISSIBILITY

Submitted by: F. M. (Name deleted) (represented by Simmons and Simmons, a London law firm)

Victim: The author

State party: Jamaica

Date of communication: 2 December 1996 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's combined rule 86/ rule 91 decision, transmitted to the State party on 4 December 1996 (not issued in document form)

Date of present decision: 9 July 1997

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 F. M., a Jamaican citizen currently awaiting execution at St. Catherine District Prison in Spanish Town, Jamaica. He claims to be a victim of violations by Jamaica of articles 2, paragraph 3; 6, paragraphs 4; 14, paragraphs 1, 3(b) and (e) and 5; and 15 of the International Covenant on Civil and Political Rights. He is represented by the law firm of Simmons and Simmons in London.

The facts as presented by the author:

2.1 The author was charged with the murder of a police officer on 23 March 1991 in Kingston, Jamaica. He was tried, convicted and sentenced to death in the Home Circuit Court in Kingston on 7 February 1992. His appeal was dismissed by the Court of Appeal of Jamaica on 3 March 1994.

A further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 12 June 1995. The author then filed a second petition for special leave to appeal on 6 November 1995, on the grounds that the Court of Appeal had failed to observe the correct procedure when classifying the author's case as a capital murder case under the Offences against the Person (Amendment) Act of 1992. After hearing the arguments in a similar case and deciding for the plaintiffs in the other case, the author's own case was referred back to Jamaica, for the correct sentencing procedures to be applied. This process was completed in the second half of 1996, and it is submitted that no other appeal is effectively available to the author.

2.2 The case for the prosecution was that the author murdered R. W., a police officer, in the morning of 23 March 1991. On that morning, three officers including the deceased were sent to a housing scheme in Kingston. Upon arrival, they went into different directions. Constable E. testified that he heard two explosions from the direction in which R. W. had gone. Moving into that direction, he saw R. W. lying on the ground from a distance of 10 or 11 yards. A man was standing over him, a handgun in one hand, an M16 assault rifle in another, and fired two shots at R. W.. Mr. E. called out to the man by his nickname, "Busta", upon which "Busta" fired two shots at E., injuring him and causing him to fall down. E. saw the man's face initially for 5 seconds and later, when lying on the ground, for two to three minutes. At trial, he testified that he had known the author a.k.a. "Busta" for three-four weeks, had seen him on six occasions and spoken to him on one occasion for approximately five minutes.

2.3 The author was not arrested until 5 April 1991. He alleged that he saw Constable E. for the first time during the preliminary hearing in the Gun Court, approximately ten days after Easter. He contended that his first conversation with E. was before the hearing, when E. allegedly intimated to him that he and his friends had killed R. W..

2.4 During the trial, the author presented an alibi defence, arguing that from 8 a.m. to approximately 3:30 to 4:00 p.m., he had been working at the home of one Miss D. as a gardener. Before he left Miss D.'s home, he spoke to a young girl who lived in the house. Under examination, the author could not remember the number of the house or the name of the road, and only indicated that it was "off Red Hills Road", and that he could lead the court to the house in question.

2.5 In spite of the author's instructions, his legal representative for the trial did not investigate the alibi defence and did not ascertain Miss D.'s full name and correct address. According to counsel before the Committee, failure to seek to corroborate the author's alibi defence gave more weight to the identification evidence presented during the trial by Constable E..

2.6 Counsel contends that forensic evidence in the case was insufficient to warrant conviction. A registered medical practitioner and consultant pathologist testified that he had found four gunshot wounds upon examining Mr. R. W.. He could not determine whether Constable E. was standing or lying when shot. When defence counsel sought to cross-examine E. as to why he had not discharged his own firearm when confronted with an armed man who was firing at him while standing over the body of his colleague, he was prevented from doing so by the trial judge (p. 42 of the trial transcript). The Court of Appeal considered, on this issue, that although there was nothing improper in defence counsel's question, a reply by Constable E. would not have been to the benefit of the defendant under any hypothesis.

2.7 During the trial, Mr. F. M. gave sworn evidence that approximately seven days after his arrest, he was beaten at the Central Police Station in Kingston (p. 149 of trial transcript). He claims that he was beaten in the chest, stomach, back and face by six police officers at the Central Police Station. He allegedly was beaten about the body with wooden batons and was struck three times on his head with a large book. His feet became swollen and he applied tea to them, to help reduce the swelling. He complained to a police officer at Central Station and asked to see a doctor, but no medical treatment was given to him. The beatings allegedly aggravated an old gunshot wound, which increased the author's suffering - at St. Catherine District Prison, the author continues to receive weekly medication for body pain and swollen feet. Despite repeated requests from counsel, medical records or a report on the author's state of health has not been provided by the administration of St. Catherine District Prison.

2.8 Counsel points out additional perceived contradictions in the evidence against the author. Thus, the arrest warrant prepared by the investigating officer, one Sgt. T., states that the weapons of Constable E. were stolen, whereas E. testified during the trial that he gave the weapons to a civilian. Mr. G., the third police officer involved in the incident, noted in his witness statement that he was carrying an M16 rifle and a revolver and that E. was carrying an M16 rifle and an Uzi submachine gun, while on trial he testified that he was carrying an M16 rifle only and that E. was carrying an Uzi sub-machine gun and a revolver.

2.9 On 2 December 1996, a warrant was issued for the execution of the author on 12 December. On 4 December 1996, the author petitioned the Human Rights Committee; his communication was registered on the same day, and a request for interim protection under rule 86 addressed to the State party. On 11 December 1996, the State party informed the Committee that a stay of execution had been granted.

The complaint

3.1 It is submitted that Mr. F. M.'s rights under articles 2, paragraph 3; 6, paragraph 4; 14, paragraphs 1, 3(b) and (e) and 5, and 15 have been violated. While the communication does not expressly invoke articles 7 or 10 of the Covenant in relation to the beatings the author claims to have sustained at the Central Police Station, counsel notes, in a summary at the end of her original communication, that "a person entitled not to be ill-treated in custody".

3.2 Counsel argues that the author's conviction was based on "fleeting glance" identification and that a verdict based on such identification was unsafe. He argues that Constable E. could only have identified the person who shot him, and who was then standing over the body of Mr. R. W., for a split second, because when he spotted him, that person fired two shots at R. W. and then at Mr. E. himself. According to counsel, although the events occurred in daylight, "it is unlikely that a person would stop and look into the face of an armed mad from a distance of 10-11 yards when he assumed that that man had just killed or wounded his colleague".

3.3 Counsel further takes issue with the way the trial judge summed up the identification issue. In his opinion, it was not possible to rely on a single individual's identification without corroboration if that individual is in a frightened and nervous state. While corroboration is "not required as a matter of law", it should be required by commonsense and fairness. Moreover, there

were others present who could have been called to give corroborative evidence, such as the man who called the police to the scene, two women who assisted Mr. E. after the shooting, the man who drove E. to hospital, the civilian to whom E. handed his firearm, or the driver of a jeep who helped Mr. G.. As to the failure to hold an identification parade in the case, counsel takes issue with the Court of Appeal's statement that there "is no authority to support the principle that an identification parade is required when the witness recognizes the perpetrator of the act, because of his prior knowledge of that person", as in the author's case.

3.4 It is submitted that the trial judge and the Court of Appeal erred in not allowing defence counsel to pursue what is seen as a critical element of the case - namely why E. did not discharge his own firearm when faced with an armed assailant: since the fundamental aspect of the case is identification, the credibility of the only eyewitness as to identification was vital. To counsel, it was vital for the defence to probe the witness as to why he had not fired at the author.

3.5 Counsel argues that the forensic evidence in the case was fatally flawed, thereby making the verdict and sentence unsafe and the trial unfair. No forensic evidence was presented on trial as to which bullets had been discharged by which gun; nor was it known which bullets from which gun killed Mr. R. W., which left open the theoretical possibility that the fatal shots could have been come from the firearms carried by officers E. and G.. The trial judge dealt with this issue in his summing up but indicated that there was not "one iota, not one scintilla" of evidence to find that the two police officers shot their colleague (p. 199 of the trial transcript).

3.6 Counsel contends that the author was beaten on several occasions during interrogation, during which suggestions were made of the involvement, in the murder, of a second person. According to him, the prosecution should have been asked whether the police was in fact investigating the involvement of a second person. If this was the case, this could have cast doubts on the veracity of the evidence presented by Mr. E..

3.7 It is further alleged that the trial judge constantly refused to allow defence counsel to put his case and to cross-examine witnesses, and that he unfairly accused defence counsel of being "unnecessarily difficult". Furthermore, when the jury returned after approximately two hours of deliberations and told the judge that it had "an evidential problem", the judge did not seek to identify the exact nature of the problem but assumed it had to do with identification. Given that the prosecution case was based solely upon identification evidence of a single witness, that they alibi witnesses were not called by the defence and that the identification evidence was insufficiently tested, the author's rights under article 14, paragraphs 1 and 3(e), are said to have been violated.

3.8 Finally, counsel alleges a violation of article 14, paragraph 3(b), since the author suffered prejudice in the preparation of his defence, as since he could not afford to pay a lawyer to conduct investigations to verify his alibi; it is argued, without further substantiation, that the author was denied the time and facilities to prepare his defence. It is further contended that the author "is now being forced to submit this application by the Governor-General's office whilst further investigations are being carried out as to alibi evidence, which has not been properly investigated hitherto".

State party's observations on admissibility and merits and counsel's comments

4.1 By submission of 3 February 1997, the State party does not challenge the admissibility of the communication and, so as to expedite examination of the complaint, offers comments on the merits. On the alleged violation of article 14, paragraph 1, it argues that the way in which the trial judge conducted the trial and summed up the evidence is a matter which was properly left to the appellate court. In the instant case, it is obvious that the Court of Appeal reviewed the case extensively, and there is nothing in the review by the Court of Appeal which would, in the State party's opinion, bring the case within the Committee's jurisdiction.

4.2 Concerning the alleged breach of article 14, paragraph 3(b), on the ground that the author's legal aid lawyer did not adequately investigate Mr. F. M.'s alibi defence and that the author is now "forced" to submit a communication under the Optional Protocol whilst further investigations about the alibi evidence are carried out, the State party denies that there has been any breach of the Covenant for which it could be held responsible. The verification of the author's alibi was the task of the defence, and if counsel did not put forward the author's alibi defence, this cannot be held against the State party.

4.3 The State party emphatically denies that the Governor-General's office "forces" inmates to lodge communications with the Committee: "Rather, it requires that any remedy being utilized by convicted persons should be invoked with expedition. This is a legal requirement following the decision in Pratt and Morgan v. Attorney-General of Jamaica and is in no way inconsistent with an application to the Committee".

4.4 The State party denies that there was a breach of article 14, paragraph 3(e), because the trial judge did not allow certain questions put by defence counsel to some prosecution witnesses in cross-examination. This was an exercise in judicial discretion in keeping with the judge's functions. Furthermore, the Court of Appeal examined the issue and found that the judge had not exercised his discretion in an unreasonable manner.

4.5 Finally, the State party submits that there was no breach of article 14, paragraph 5: it is evident from the communication that several issues were raised on appeal, all of which were comprehensively dealt with by the Court of Appeal.

5. By letter of 4 April 1997, counsel refuses to consent to the State party's addressing both the admissibility and the merits of the case, and requests the Committee to consider only the admissibility of the case at this stage. By letter of 9 April 1997, the Committee informed counsel that it would decide whether or not to deal jointly with the admissibility and the merits of the case at its 60th session, as is provided for whenever the State party does not challenge the admissibility of a communication and provides information on its merits. But by fax dated 4 July 1997, counsel objects to this course of action. She, firstly and mistakenly, argues that the Committee lacks the power to proceed in this way; secondly, she raises new issues relating inter alia to the State party's explanation of the action of the Governor-General's office and, for the first time, expressly invokes article 10 of the Covenant. In the latter context, counsel points out that the State party has provided no information about the allegations of beatings inflicted on the author at the Central Police Station, thereby implicitly acknowledging a violation of that provision.

Admissibility considerations

6.1 The Committee notes that the State party has, although challenging part of the author's allegations, especially in as much as they relate to article 14, paragraph 1, also provided observations on the merits of the complaint, so as to expedite consideration of the case. This enables the Committee to consider both the admissibility and the merits of the case, pursuant to rule 94, paragraph 1, of the Committee's rules of procedure. The Committee has noted counsel's request that the admissibility of the complaint be dealt with separately. The Committee would be prepared to deal jointly with admissibility and merits, with the exception of the issue referred to in paragraph 6.5 below, on which the State party has not had an opportunity to furnish its observations.

6.2 The author has claimed a violation of article 15 of the Covenant. The Committee notes that, apart from the fact that this claim has not been further substantiated, there is no issue of retroactive application of criminal laws in the present case. Similarly, the claim of a violation of article 14, paragraph 5, has not been further substantiated. These allegations are accordingly inadmissible under article 2 of the Optional Protocol.

6.3 Part of the author's allegations relate to the conduct of the trial by the trial judge, especially the examination of identification evidence (corroboration of evidence given by a single eyewitness, fleeting glance identification) and the adequacy of the judge's instructions to the jury in this respect. The Committee recalls its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. After careful review of the trial transcript and the material before, the Committee concludes that the conduct of the trial in so far as it related to examination of identification evidence, or the instructions of the judge to the jury, did not suffer from such defects. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.4 Counsel alleges a violation of article 14, paragraph 3(b), of the Covenant, as he purports to have been forced to submit a communication to the Committee by the Office for the Governor-General of Jamaica, whilst further investigations into the author's alibi defence are being conducted. The material before the Committee shows that the Secretary to the Governor-General addressed a fax to counsel on 3 December 1996, one day after issue of a warrant of execution against the author, suggesting that a communication be submitted to the Committee as a matter of urgency (underlining in the original), in order to enable the Committee to issue a request under rule 86 of the Committee's rules of procedure to the State party's authorities. Far from interfering with counsel's ability to secure his client's defence, this letter intends to offer the author a lifeline. In the circumstances, the Committee considers this claim an abuse of the right of submission, under article 3 of the Optional Protocol.

6.5 The author's allegation that he was beaten in custody at the Central Police Station was first raised on trial, when the author gave evidence. The defence neither requested the prosecution to call officers from the Central Police Station to testify nor called them on behalf of the defence. Although the author testified (p. 152 of the trial transcript) that he referred to the beatings in the context of his interview with the investigating officer, Sgt. T., at the end of which he was charged with murder, the defence never questioned Sgt. T. about the beatings; nor was the author cross-examined on this

issue. That evidence, therefore, remained unchallenged on trial. The trial judge referred the jury to this part of the evidence without giving it any instructions as to its relevance; in the circumstances, this could only have been left to the jury as one aspect of the author's credibility as a witness, an issue on which the judge did direct the jury (p. 220 of the trial transcript). The judge again directed the jury on an issue after their initial deliberations on the verdict (p. 222); this time, however, his directions centred on identification evidence. The present issue was not raised in the grounds of appeal and was neither addressed nor adjudicated by the Court of Appeal. Nor was it raised in the petition for special leave to appeal to the Judicial Committee of the Privy Council. The Committee lacks information as to whether any complaint about the alleged beatings was ever filed with the State party's judicial authorities or the Parliamentary Ombudsman. Nevertheless, this complaint is sufficiently substantiated, for purposes of admissibility. What is not clear, however, is whether the State party ever had the opportunity to argue whether domestic remedies for the alleged violation of article 10 of the Covenant, first raised expressly in counsel's submission of 4 July 1997, have been exhausted.

6.6 In the light of the above consideration, the Committee is not in position to consider jointly the admissibility and the merits of this claim and accordingly invites the State party to submit its information and observations in respect of the alleged violation of article 10 of the Covenant.

6.7 The Committee finally considers that the remaining allegations, under article 14, paragraph 3(b) (i.e. the issue relating to verification of the author's alibi by counsel) and (e), are admissible.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible in so far as it appears to raise issues under articles 10, paragraph 1, and, in respect of the claims referred to in paragraph 6.7 above, under article 14, paragraph 3(b) and (e), of the Covenant;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party be requested to submit to the Committee written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it. The State party is requested to submit its observations in respect of the claim under article 10 of the Covenant as expeditiously as possible to enable the Committee to determine the merits of the present communication at the earliest opportunity;

(c) that any explanations or statements received from the State party shall be communicated under rule 93, paragraph 3, of the rules of procedure, to author's counsel, with the request that any comments she may wish to make thereon should reach the Human Rights Committee within one month of the date of the transmittal;

(d) that this decision shall be communicated to the State party, to the author and to his 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.