HUMAN RIGHTS COMMITTEE

Fifty-third session

DECISIONS

Communication No. 541/1993

Submitted by: Errol Simms [represented by counsel]

Alleged victim: The author

State party: Jamaica

Date of communication: 7 December 1992 (initial submission)

Documentation references:

Prior decisions

- Special Rapporteur's combined rule 86/91 decision, transmitted on 13 May 1993 (not issued in document form)

Date of present decision: 3 April 1995

[**Annex**]

Annex

Decision of the Human Rights Committee under the Optional

Protocol to the International Covenant on Civil and

Political Rights - fifty-third session

concerning

Communication No. 541/1993

Submitted by: Errol Simms [represented by counsel]

Alleged victim: The author

State party: Jamaica

Date of communication: 7 December 1992 (initial submission)

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

Meeting on 3 April 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Errol Simms, a Jamaican citizen, currently awaiting execution at the St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, paragraph 2; 7; and 14, paragraphs 1 and 3 (b), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 17 May 1987, the author was charged with the murder, on 12 April 1987, of one Michael Demercado. He was convicted and sentenced to death in the Kingston Home Circuit Court on 16 November 1988. On 24 September 1990, the Court of Appeal of Jamaica dismissed his appeal. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal on 6 June 1991. With this, it is submitted, domestic remedies have been exhausted. The murder for which the author stands convicted has been classified as capital murder under the Offences against the Person (Amendment) Act, 1992.

2.2 The case for the prosecution was that, on 12 April 1987, at approximately 3 a.m., the author together with two other men followed one Carmen Hanson, who returned from a party, into her house. They demanded money, threatened her and hit her. In the course of the robbery, Carmen Hanson's son, Owen Wiggan, together with Michael Demercado and another man, arrived at the house and calledher. The author and his companions left the house and were confronted by the three men; Michael Demercado was then shot dead by the author.

2.3 The prosecution's case rested on the identification evidence of Carmen Hanson's common law husband, Tyrone Wiggan, and their son, Owen. Carmen Hanson testified that the assailants had been masked; she could not identify the author.

2.4 Tyrone Wiggan testified that, during the robbery, he was in his bedroom, opposite to the room where his wife was assaulted; the light in the latter room was turned on. He stated that he could observe the author, who was masked, through a one foot space at the bottom of the bedroom door; although the author had his back turned towards him for most of the time, he recognized the author, whom he had known for two or three years, from the slight hunch in his back and from certain other features. He further testified that, when the author left the room, he was able to see him from the front for two seconds.

2.5 Owen Wiggan testified that he faced the author, whom he knew since childhood, from a distance of 10 feet, for about three minutes. He stated that he was able to recognize the author as the street light in front of the house illuminated the entrance where the three men were standing, and that he saw the author firing at Michael Demercado. He further stated that he had seen the author earlier that evening at the party, where he had been involved in an argument with the deceased.

2.6 The defence was based on alibi. The author gave sworn evidence in which he denied having been at the party and testified that he had been at home with his girlfriend, going to bed at 8 p.m. and awaking at 6 a.m. the following morning. This evidence was corroborated by his girlfriend.

Complaint

3.1 Counsel submits that there were serious weaknesses in the identification evidence, namely, that identification occurred at night, that Tyrone Wiggan had a limited opportunity to obtain a front view of the assailant and that he partly identified the author because of his nose and mouth despite the fact that the assailant was masked. Counsel further submits that it appears from Owen Wiggan's statement to the police that he did not identify the author, whereas at the trial he stated to the police that the author was the assailant.

3.2 Counsel notes that the author was not placed on an identification parade; he submits that in a case in which the prosecution relies solely on identification evidence, an identification parade must be held.

3.3 As to the trial, counsel submits that the trial judge failed to direct the jury properly about the dangers of convicting the accused on identification evidence alone. Counsel submits that the judge's misdirections on the issue of identification constituted the

main ground of appeal and that the Court of Appeal, having found no fault with them, dismissed the appeal. Similarly, the petition for special leave to appeal to the Judicial Committee of the Privy Council was based on the issue of identification. As to the refusal to give leave to appeal, counsel argues that, in view of the fact that the Privy Councillimits the hearing of appeals in criminal cases to cases where, in its opinion, some matter of constitutional importance has arisen or where a "substantial injustice" has occurred, its jurisdiction is far more restricted than that of the Human Rights Committee.

3.4 It is submitted that during the preliminary inquiry the author was represented by a privately retained lawyer, who only took a short statement from him. The lawyer resigned, because he was not satisfied with the fees he was paid, while the proceedings in the Gun Court were still pending. The author was then assigned a legal aid lawyer. The author alleges that he first met with his lawyer just before the trial started, and complains that the lawyer did not adequately represent him, which, according to the author, is due to the fact that legal aid lawyers are paid "little or no money". As to the appeal, it is submitted that the author probably had no choice as to his lawyer, nor the opportunity to communicate with him prior to the hearing. In this context, it is submitted that counsel for the appeal informed counsel in London that he could not recall when he had visited the author and for how long he had spoken to him, and that he was paid the "princely sum of about 3 pounds to argue the appeal".

3.5 It is argued that the facts mentioned above constitute a violation of article 14, paragraphs 1 and 3 (b), of the Covenant. In view of the above, it is also submitted that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been violated constitutes a violation of article 6, paragraph 2, of the Covenant.

3.6 The author claims that he was beaten by the police upon his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant.

3.7 Counsel argues that in view of the fact that the author was sentenced to death on 16 November 1988, the execution of the sentence at this point in time would amount to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. Counsel asserts that the time spent on death row already constitutes such cruel, inhuman and degrading treatment. To support this claim, counsel refers to a report on the conditions in St. Catherine District Prison prepared by a nongovernmental organization in May 1990.

3.8 It is stated that the matter has not been submitted to any other instance of international investigation or settlement.

State party's observations and counsel's comments thereon

4. The State party, by submission of 5 August 1993, argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of constitutional motion.

5. In his comments, counsel submits that, although a constitutional remedy exists in theory, it is unavailable to the author in practice, because of his lack of funds and the State party's failure to provide legal aid for constitutional motions.

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

6.2 The Committee notes that part of the author's allegations relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee refers to 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. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.3 The author has further claimed that he had not sufficient time to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant. The Committee notes that the lawyer who represented the author at his trial has stated that, in fact, he did have sufficient time to prepare the defence and to call witnesses. With regard to the appeal, the Committee notes that the appeal judgement shows that the author was represented by counsel who argued the grounds for the appeal and that the author and his present counsel have not specified their complaint. In these circumstances the Committee considers that the allegation has not been substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 As regards the author's claim that he was beaten by the police upon arrest, the Committee notes that this claim was never brought to the attention of the Jamaican

authorities, neither in the author's sworn evidence at the trial, nor on appeal, or in any other way. The Committee refers to its standard jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies.

6.5 The Committee next turns to the author's claim that his prolonged detention on death row amounts to a violation of article 7 of the Covenant. Although some national courts of last resort have held that prolonged detention on death row for a period of five years or more violates their constitutions or laws, **1**/ the jurisprudence of this Committee remains that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances. **2**/ The Committee observes that the author has not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) 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.]

Footnotes:

1/ See, **inter alia**, the judgement of the Judicial Committee of the Privy Council, dated 2 November 1993 (**Pratt and Morgan v. Jamaica**).

2/ See the Committee's views on communications Nos. 210/1986 and 225/1987 (**Earl Pratt and Ivan Morgan v. Jamaica**), adopted on 6 April 1989, paragraph 12.6. See also, **inter alia**, the Committee's views on communications Nos. 270/1988 and 171/1988 (**Randolph Barrett and Clyde Sutcliffe v. Jamaica**), adopted on 30 March 1992, and No. 470/1991 (**Kindler v. Canada**), adopted on 30 July 1993.