

Communication No. 334/1988, Michael Bailey v. Jamaica
(views adopted on 31 March 1993, forty-seventh
session)*

Submitted by: Michael Bailey (represented by
counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 22 February 1988 (initial submission)

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

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 334/1988,
submitted to the Human Rights Committee by Mr. Michael Bailey 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 author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Michael Bailey, a Jamaican citizen
born in September 1963, currently awaiting execution at St. Catherine
District Prison, Jamaica. He claims to be a victim of violations by Jamaica
of articles 7 and 14, paragraph 1, of the International Covenant on Civil and
Political Rights. He is represented by counsel.

Facts as submitted

2.1 Michael Bailey was arrested on 27 August 1984 and charged with the
murder, on 21 June 1984, of Maxine Gordon, a 19-year-old woman. He was tried
in the Home Circuit Court of Kingston, found guilty as charged and sentenced
to death on 30 July 1985. The Court of Appeal dismissed his appeal on 30
July 1986, issuing its written judgement on 13 November 1986. The Judicial
Committee of the Privy Council denied special leave to appeal on 24 March
1988. With this, it is submitted, available and effective domestic remedies
have been exhausted.

2.2 During the trial, the prosecution relied primarily upon a written
deposition made shortly after the murder by Pauline Ellis, the mother of
Maxine Gordon; Mrs. Ellis herself died before the beginning of the trial, but
the judge admitted her written deposition as evidence, according to which
Maxine and her mother had been in the latter's bedroom at approximately 8
p.m. on 21 June 1984. Upon hearing noises, Maxine looked out of the window

and walked out on the verandah of the house. Mrs. Ellis then heard two shots, upon which

* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

her daughter rushed back into the bedroom and hid beneath the bed. Michael Bailey followed her, armed with a gun, broke into the bedroom and fired several shots under the bed, despite Mrs. Ellis' attempts to intervene.

2.3 The prosecution further contended that upon his arrest and after being cautioned, the author admitted having shot Maxine Gordon, invoking as motive a long-standing argument with her. During the trial, in an unsworn statement from the dock, the author denied any involvement in the crime; he affirmed that at the time in question he had been at home with his brother and sister. In this connection, he submits that when cross-examined by defence counsel during the trial, the arresting officer admitted that the diary in which he had recorded the author's alleged confession was not in his possession anymore, and that he could not remember what he had done with it.

Complaint

3.1 The author contends that he was denied a fair trial, in violation of article 14, paragraph 1, of the Covenant; he explains that after the summing up of the case by the judge and after consideration of the verdict by the jury, the foreman of the jury told the judge that no unanimous verdict had been reached and that he wished to raise a particular issue. The judge inquired as to whether this concerned an issue of fact or of law; as it referred to a matter extraneous to the conduct of the case, the judge refused to allow the question and directed the jury to retire and to reconsider their verdict without further delay. After another 45 minutes, the jury returned a guilty verdict.

3.2 It is submitted that the judge should have allowed the foreman's question and that he failed to properly instruct the jury. The author further contends that the judge exerted undue pressure on the jurors to return a verdict without delay, which is deemed to be contrary to the principles laid down by the Court of Appeal in the case of McKenna. In this context, counsel submits that in the circumstances, it was particularly important to let the jury consider its verdict freely and carefully, as the evidence against the author was based primarily upon the deposition by a witness whose veracity could not be tested by cross-examination.

3.3 The author affirms, without giving further details, that his legal representation was inadequate, that his court-appointed lawyer was inexperienced and that the judge unjustly objected to several questions asked and points raised by this lawyer.

3.4 The author further claims to have been beaten and ill-treated during detention on death row, in violation of article 7 of the Covenant. He states that, on 29 May 1990, several prison warders took him out of his cell; two warders, whom he names, began to beat him all over his body with batons, an iron pipe and with clubs, in the presence of an overseer. When he implored the overseer to stop the warders, the overseer allegedly told him to keep quiet. The author complains that he suffered bruises, slashes and cuts, and that he was so severely injured that he had to crawl back into his cell. In a letter dated 14 March 1991, which was confirmed by counsel on 25 September 1991, he notes that in spite of injuries to his head and his hands, he has not been seen by a prison doctor, in spite of repeated requests. He contends that it would not be possible now to obtain a report on his injuries from the prison's Pharmaceutical Department.

3.5 Concerning the requirement of exhaustion of domestic remedies, the author submits, with respect to his claim under article 7, that he wrote to the Parliamentary Ombudsman, asking that someone visit him in the prison to take a statement from him. Following this request, he was allegedly threatened by prison warders and now has to fear for his life.

3.6 As to the claims under article 14 of the Covenant, the author contends that a constitutional motion would not be an effective remedy within the meaning of the Optional Protocol. He notes that he cannot afford to privately retain counsel for the purpose and adds that the State party does not provide legal aid for constitutional motions. Counsel in London observes that there is no tradition in Jamaica for lawyers to offer free legal services and points out that there has been only one instance in which Jamaican lawyers agreed to act on a pro bono basis for purposes of a constitutional motion, i.e. in the cases of Pratt and Morgan. a/ Even if counsel in London were to accept to appear on such a basis on the author's behalf, he would have no locus standi before the Constitutional Court.

State party's comments and observations on admissibility

4.1 In a submission dated 7 July 1989, the State party contends that the communication is inadmissible on the grounds of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal. Although the author's petition to the Judicial Committee had been dismissed on 24 March 1988, no further comments were received from the State party in this respect prior to the consideration of the admissibility of the communication.

4.2 The State party did not provide information in respect of the admissibility of the author's claims under article 7, in spite of two specific requests addressed to it on 8 May and 20 August 1991.

Committee's decision on admissibility

5.1 During its forty-third session, the Committee considered the admissibility of the communication. It noted that the State party had failed

to provide detailed information in respect of the admissibility of the author's claims under articles 7 and 14 of the Covenant and decided, on the basis of the information before it, that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee further noted that part of the author's allegations concerned the judge's conduct of the trial. It reaffirmed its jurisprudence that it is not in principle for the Committee to review specific instructions to the jury by the judge or the judge's reluctance to entertain a question posed by the foreman of the jury, unless it can be ascertained that the instructions to the jury or the judge's conduct are clearly arbitrary or amount to a denial of justice. As the Committee lacked evidence that the judge's instructions suffered from such defects, it concluded that the author's claims under article 14 of the Covenant were inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.3 On 18 October 1991, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7 and 10 of the Covenant.

State party's objections to the decision on admissibility and counsel's further comments

6.1 In a submission dated 30 April 1992, the State party contends that the communication remains inadmissible because the author has failed to avail himself of constitutional remedies. Thus, Section 17, paragraph 1, of the Constitution prohibits inhuman and degrading treatment, and where a breach of this right is alleged, Section 25 of the Constitution provides for an application to the Supreme (Constitutional) Court for redress.

6.2 In addition, the State party contends, the author would have other remedies in respect of ill-treatment by prison officials. Apart from complaining to the Ombudsman, he could complain to the Department of Corrections. Moreover, he could file an action for damages for assault in respect of the alleged breaches.

6.3 The State party notes that "investigations are in fact being undertaken by the Inspectorate of the Ministry of Justice in respect of the applicant's complaint and a report on the matter is pending. In the circumstances, it would be improper for the Committee to make a finding on the merits of the case".

7.1 In his comments, counsel reaffirms that a constitutional motion would not be an effective remedy for Mr. Bailey, due to the unavailability of legal aid for the purpose. With respect to the possibility of filing complaints with the Ombudsman and the Inspectorate of the Department of Corrections, counsel notes that the author did notify the Ombudsman of his grievances and that, as a result, he was subjected to threats and intimidation by prison warders. It is submitted that in the circumstances, such a complaint is unlikely to yield concrete results; furthermore, counsel notes that the State party has failed to point out how an inquiry by the Department of Corrections would be conducted, what its powers would be, what the author's rights in such an inquiry would be, and what type of redress or remedy could be ordered upon conclusion of such an inquiry. Counsel dismisses the suggestion that an "official report could compensate Mr. Bailey for the injuries sustained or in any way supply him with an adequate remedy".

7.2 Counsel dismisses the possibility of a civil action for damages for assault as "wholly unpractical and unrealistic" in the circumstances of the case described above. Furthermore, he notes that Mr. Bailey would once again depend on legal aid for the purpose, and the State party has not suggested that legal aid would be available for a civil action for damages.

Post-admissibility proceedings and examination of merits

8.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may pursue, as well as of counsel's further comments on this issue. It recalls 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.

8.2 However, the Committee also recalls that by submission of 10 October 1991 in a different case, b/ the State party indicated 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 that a constitutional motion is not an available and effective remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his 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. Similarly, in the circumstances of the case, a complaint to the Department of Corrections is not a remedy which the author is required to exhaust for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 18 October 1991.

9.1 The Committee notes that the State party has confined itself essentially to issues of admissibility and that it considers it "improper" for the Committee to make a finding on the merits of the author's allegations while investigations into his alleged ill-treatment on death row are said to be pending. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it and against its judicial authorities, and to make available to the Committee all the information at its disposal.

9.2 The author has alleged that he suffered beatings and injuries at the hand of prison officers during an incident on 29 May 1990. This claim has not been refuted by the State party, which has confined itself to the mere statement that the claim is being investigated and that, in the circumstances, it would be inappropriate for the Committee to make a finding on the merits.

9.3 The Committee is unable to share the State party's reasoning. Firstly, the author's claim that he was threatened by warders when he sought to pursue his complaint with the Ombudsman has remained uncontested. Secondly, the Committee has not been notified whether the investigation into the author's allegations have been concluded some 35 months after the event or whether, indeed, they are proceeding. In the circumstances, it is fully within the Committee's competence to proceed with the examination of the author's claim, and in the absence of any further information on such investigations, due weight must be given to the author's allegations, to the extent that they have been substantiated. The Committee considers that his claims have been substantiated. In the Committee's opinion, the fact that Mr. Bailey was beaten repeatedly with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and hands, amounts to

cruel and inhuman treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

10. 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 it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

11.1 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by Mr. Bailey, including the award of appropriate compensation, and to ensure that similar violations do not occur in the future. In this context, the Committee observes that in other cases, similar uncontested allegations have been the basis of findings, by the Committee, of violations of the Covenant.

11.2 The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's views.

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

Notes

a/ Communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989.

b/ See communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991, para. 7.3.