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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

DECISION

Communication No. 1094/2002

Submitted by:	Jesús Herrera Sousa (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 November 2000 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 July 2002 (not issued in document form)
Date of decision:	27 March 2006
Subject matter:	Conviction of the author on insufficient evidence

* Made public by decision of the Human Rights Committee.

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Procedural issues:	Failure to substantiate claims
Substantive issues:	Failure of the court of second instance to reconsider the facts
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2

[ANNEX]

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-sixth session

concerning

Communication No. 1094/2002*

Submitted by: Jesús Herrera Sousa (represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 15 November 2000 (initial submission)

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

Meeting on 27 March 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 15 November 2000, is Jesús Herrera Sousa, a Spanish national, who alleges violation by Spain of articles 14, paragraph 5, and 26 of the Covenant. The author is represented by counsel, José Luis Fernández Pedreira.

Factual background

2.1 The author was convicted by the Burgos Provincial Court of the offences of coercion and sexual assault and sentenced on 27 July 1998 to terms of imprisonment of one and three years respectively. The author states that the sole evidence adduced for the prosecution consisted in the patently contradictory statements of the victim. For example, she first submitted a complaint against a fair-haired individual, whereas in later identification procedures (photographs and

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

parade) she picked out the author, who is dark-haired. Furthermore, she affirmed that she recognized the author "without any doubt", although in the oral proceedings she stated that the offences had taken place at night and that she had not seen the assailant's face. The victim first claimed that the offences consisted in an attempted robbery at knifepoint and a search of her body to look for money, but during oral proceedings she stated that the accused had not intended to search her, but to touch her. Further contradictions concerned the assailant's footwear and the weapon used. The author holds that the above-mentioned contradictions acquire special meaning when it is borne in mind that the later statements, contradicting the first one, were made after the victim had been advised by her uncle, a police officer assigned to the same police station as that conducting the inquiries.

2.2 The application for a judicial review, which the author had lodged with the Supreme Court, was rejected on 31 March 2000. The author asserts that the Court refused to allow a re-evaluation of the evidence and refused to review the assessment of evidence carried out by the trial court, on the grounds that any such assessment was the exclusive prerogative of that court. The author filed an application for *amparo* with the Constitutional Court. The application was rejected on 18 September 2000. The ruling points out in particular that, "This Court has repeatedly stated that it cannot become a court of third instance invading the jurisdiction of the general courts, which is what would certainly happen if it were to embark upon the review of an element which has nothing to do with the right to the presumption of innocence, the latter being a subjective dimension of the assessment of evidence, that is to say, those aspects of the actual hearing conducted by the original court, which depend on the latter's direct perception of the bringing of evidence."

2.3 The author states that this matter had not been submitted to any other procedure of international investigation or settlement.

The complaint

3. The author alleges that the higher courts refused to reconsider the assembled evidence, which was based solely on the patently contradictory statements of the complainant. This constitutes a violation of article 14, paragraph 5, of the Covenant, since it prevented a full review of the conviction and sentence. The author likewise alleges a violation of article 26 of the Covenant, but does not advance any arguments in support thereof.

State party's submissions on admissibility and merits and author's comments

4.1 In its submissions of 10 September 2002, the State party holds that the communication is inadmissible. It refers to the fact that, in the domestic applications for a judicial review by the Supreme Court and the Constitutional Court, the author did not formulate a complaint in relation to articles 14, paragraph 5, and 26 of the Covenant, so violating the principle of the Committee's subsidiarity established in article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party maintains that article 14, paragraph 5, does not establish a right to a complete retrial by a court of second instance, but to the review by a higher court of the trial conducted by the court of first instance, entailing the re-examination of the correct application of the rules which resulted in the findings as to guilt and the imposition of the sentence in a

specific case. In this connection, the State party underlines the disparity between the Human Rights Committee and the European Court of Human Rights with regard to the protection of the right to two stages of jurisdiction embodied in identical wording in the Covenant and the European Convention on Human Rights.

4.3 In his application for a judicial review to the Supreme Court, the author did not allege that there was any contradiction in the evidence but confined himself mainly to:

(a) Trying to replace the assessment of evidence by the sentencing court with his own evaluation. The Supreme Court cannot allow that and, after reconsidering all the evidence, stated: "The sentencing court had at its disposal direct evidence for the prosecution, which had been legally assembled and rationally assessed and which was corroborated by much circumstantial evidence supporting the testimony immediately received by the sentencing court";

(b) Denying lewd intention and sexual intent. To this, the Supreme Court replied: "There can be no doubting the rational nature of the inference drawn by the sentencing court, since the absolute objectivity of the established facts clearly points to the unequivocal sexual intent, to which the victim expressly refers";

(c) Discussing the existence of an independent "sense of compulsion". In this respect, the Supreme Court transcribes part of the sentencing court's decision and states: "As the sentencing court rightly establishes, it is possible to distinguish between two separate acts of the accused, which were also prompted by different motives: first a desire for profit and then lubricity. The initial act, which was completed, although the insignificant amount of cash obtained was subsequently abandoned, is characterized by the sentencing court as abandoned robbery with intimidation. But (…) exemption from criminal responsibility for a person who desists from the execution of an act which has already been initiated does not affect the responsibility that person could incur for the acts performed if they were to constitute a separate offence and, in the instant case, the threat of violence at knifepoint intended to force the victim to move from one place to another against her will constitutes a crime against her freedom and security of sufficient magnitude for it to be classed as a punishable offence (…). Nor can it be held that punishment for sexual assault can encompass that for an assault on freedom and security carried out with a different purpose."

4.4 Before the Constitutional Court, the author pleaded the presumption of innocence on the grounds of lack of evidence. In this respect, the Court stated, inter alia, that, in its function of safeguarding the right to the presumption of innocence, it had to give its opinion as to the existence of sufficient evidence for the prosecution and the rational appraisal of that evidence. That was not, however, the aim of the appellant inasmuch as he considered that his conviction as an offender guilty of coercion and sexual assault, in the instant case with the aggravating circumstance of recidivism, violated his right to the presumption of innocence owing to the lack of proof which would make it possible to establish his participation in the offences for which he had been sentenced. "In particular, he maintains in this connection, that the victim's statement is patently contradictory and that there is insufficient evidence to corroborate such statements. In consequence whereof, this Court cannot but conclude that, under the guise of the presumption of innocence, the applicant is, in reality, seeking to substitute the criterion employed by the earlier courts with his own. Indeed, as the decisions appealed against amply establish, in the instant case there was valid evidence for the prosecution, it being constituted, above all, by the

victim's statements. This evidence was subjected to due adversary procedure during the trial. It was sufficient and it was considered in a perfectly reasonable manner by the sentencing courts which, after due scrutiny, did not find any reason to call into question the credibility of the assaulted woman's consistent and unchanging account when finding that the accused was guilty of the coercion and sexual assault she had suffered. In the opinion of the ordinary courts, these statements were corroborated by the following circumstantial evidence: (a) the clothing worn by the assailant was identical to that worn by the accused at the time of his arrest; (b) the offences were committed with a small knife and the police officers found a small knife in the accused's car, when he was arrested; (c) the accused lives near the site of the offences and ran away in that direction after committing them. Since the existence of an assessment of the evidence in accordance with a rational criterion has been confirmed, it should be remembered that this Court has repeatedly said that it cannot become a court of third instance invading the jurisdiction of the general courts, which is what would certainly happen if it were to embark upon the review of an element which has nothing to do with the right to the presumption of innocence, the latter being a subjective dimension of the assessment of evidence, that is to say, those aspects of the actual hearing conducted by the original court, which depend on the latter's direct perception of the bringing of evidence."

4.5 Before the Committee, the author is alleging the violation of articles 26 and 14, paragraph 5, of the Covenant on the grounds that, in his view, the victim's statements were contradictory. During the domestic applications for a judicial review, the Constitutional Court, having examined that allegation thoroughly and fully, rejected it, stating the detailed reasons therefor, as outlined in the preceding paragraph.

4.6 The State party concludes that the author's communication contains nothing to support an alleged violation of the Covenant and that the communication should be declared inadmissible under article 3 of the Optional Protocol. In a letter dated 23 January 2003, the State party declared, with regard to the merits, that, for the above-mentioned reasons, it considered that there had been no violation of the Covenant in the instant case.

5.1 The author responded to the submissions of the State party on 31 March 2003. In respect of the argument that he did not claim the right to a second hearing before the domestic courts, he replied that he did so by applying for a re-examination of the facts.

5.2 The author repeats that the accusations forming the basis of his conviction were initially directed against a fair-haired person, wearing white shoes and carrying a small knife with a pale-coloured handle with which he intimidated a woman to rob her of money. The author is, however, dark-haired and at the time of his arrest, he was wearing black shoes and carrying a large knife with a dark-coloured handle which he was accused of having used to sexually abuse the victim, whose statement constituted the sole evidence for the prosecution. Despite these patent contradictions, the higher courts expressly refused even to examine the facts said to have been proven by the court of first instance, because that is how the Spanish judicial system operates; it is impermissible to reconsider the facts during a judicial review. A judicial review is not a court of second instance; it is an extraordinary remedy on specific grounds from which the reconsideration of the facts is expressly excluded.

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

6.2 The author alleges the violation of article 14, paragraph 5, of the Covenant on account of the fact that the offences of which he was convicted by the court of first instance were not reconsidered by a higher court, since a judicial review in the Spanish legal system is not an appeal procedure but is admissible solely for specific reasons which expressly exclude the re-examination of the facts.

6.3 From the decisions of the Supreme Court and the Constitutional Court, it emerges that they thoroughly examined the assessment of evidence carried out by the court of first instance and concluded that the victim's statements had been subjected to an adversary procedure during the trial in a manner judged to be reasonable by the trial court and that the inconsistencies mentioned by the author had been borne out by other circumstantial evidence. In the Committee's opinion, the claim regarding article 14, paragraph 5, is insufficiently substantiated for the purposes of admissibility and it concludes that it is inadmissible under article 2 of the Optional Protocol. The author has not set forth the reasons why he considers that article 26 has been violated; for this reason, this part of the communication must also be deemed inadmissible on the grounds that it does not fulfil the requirements of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
