Communication No. 237/1987, Denroy Gordon v. Jamaica
(views adopted on 5 November 1992, forty-sixth session)

Submitted by: Denroy Gordon (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 29 May 1987

Date of decision on admissibility: 24 July 1989

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

Meeting on 5 November 1992,

Having concluded its consideration of communication No. 237/1987, submitted to the Human Rights Committee by Mr. Denroy Gordon 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, dated 29 May 1987, is Denroy Gordon, a Jamaican citizen, born in 1961, formerly a police officer. At the time of submission the author was awaiting execution of a death sentence. Following the commutation of sentence in 1991, the author has been serving a sentence of life imprisonment at Gun Court Rehabilitation Centre, Jamaica. He claims to be the victim of a violation by Jamaica of article 14, paragraphs 1 and 3 (b), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was arrested on 3 October 1981 on suspicion of having murdered, on the same day, Ernest Millwood. In January 1983, he was put on trial before the Manchester Circuit Court. As the jury failed to arrive at a unanimous verdict - 11 jurors were in favour of acquittal, only one supported a "guilty" verdict - the presiding judge ordered a retrial. In May 1983, at the conclusion of the retrial before the same court, the author was convicted of murder and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 22 November 1985 and issued a written judgment in the case on 16 January 1986. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. On 19 February 1991, the Governor-General of Jamaica commuted the author's death sentence to life imprisonment.

2.2 The prosecution's case was that for some time there had been friction between the author and the wife of the deceased, who was employed as a cleaner at Kendal Police Station in the Manchester District to which the author was attached as a young police constable. On the day of the crime, he was on duty and therefore armed with his service revolver. He went up to Mr. Millwood who was cutting grass with a machete, nearby the police station. An argument developed between them, following which the author set out to arrest Mr. Millwood for using indecent language. The latter ran away and the author followed him trying to effect the arrest. In the course of the chase the author shot in the air, but Mr. Millwood did not stop. Subsequently the author caught up with Mr. Millwood, who allegedly chopped at him with the machete. The author, in what he claims was lawful self-defence, fired a shot aimed at the left shoulder of the man, so as to disarm him. The shot, however, proved to be fatal. Immediately thereafter Corporal Afflick arrived on the scene. The author gave him his service revolver and Mr. Millwood's machete, explaining that he had pursued Mr. Millwood and warned him to drop the machete and that he shot Mr. Millwood when he resisted. The author returned to the police station and was formally arrested several hours later, after a preliminary investigation had been conducted.

Complaint

3.1 The author claims to be innocent and maintains that he was denied a fair trial by an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. Firstly, he alleges that the members of the jury at the retrial were biased against him. He indicates that most of them were chosen from areas close to the community where the crime had occurred and surmises that, for that reason, they had already formed their opinion in the case, in particular on hearsay, before the start of the trial. Moreover, the jurors were allegedly sympathetic to the deceased and his relatives and, as a result, did not base their verdict on the facts of the case. In this connection, the author claims that, in spite of numerous requests for a change of venue on the ground that the jurors had displayed bias against the author, the Court refused to change the venue.

3.2 Furthermore, it is claimed that the judge abused his discretion in ruling inadmissible the author's statement to Corporal Afflick immediately after the shooting. The author contends that the statement was admissible as part of the res gestae and that it confirmed that his trial defence was not a later concoction.

3.3 As to the issue of self-defence the author submits that the judge should have directed the jury that the prosecution had to prove that the violence used was unlawful and that if the accused honestly believed that the circumstances warranted the use of force, he should be acquitted of murder, since the intent to act unlawfully would be negated by his belief, however mistaken or unreasonable. This the trial judge did not do.

3.4 The author further claims that the trial judge misdirected the jury by withdrawing from it the issue of manslaughter. According to the author,

although the case was based on self-defence, the jury, if properly directed, could have arrived at a verdict of manslaughter on the basis of the evidence of some of the Crown's witnesses. The judge, however, in his summation, instructed the jury as follows: "I tell you this as a matter of law that provocation does not apply in this case. I tell you this as a matter of law again that manslaughter does not arise in this case ... It is my responsibility to decide what verdicts I leave to you, and I take the responsibility of telling you that there are only two verdicts open to you on the evidence: 1. guilty of murder; 2. not guilty of murder, ...". According to Jamaican law a murder conviction carries a mandatory death sentence.

3.5 In the author's opinion article 14, paragraph 3 (b), of the Covenant was also violated in his case. While acknowledging that he was assisted by a lawyer in the preparation of his defence and during the trial, he alleges that he was not given sufficient time to consult with his lawyer prior to and during the trial. In this context, the lawyer is further said to have failed to employ the requisite emphasis in requesting a change of venue.

3.6 The author further alleges a violation of article 14, paragraph 3 (d), of the Covenant, since he was not present during the hearing of his appeal before the Jamaican Court of Appeal. In this connection, he claims that the issue of self-defence on which the case was factually based, was not adequately dealt with. Moreover, the Court of Appeal allegedly erred in not admitting into evidence a statement made by police Corporal Afflick.

3.7 Finally, the author submits that he has been a victim of a violation of article 14, paragraph 3 (e), of the Covenant in that no witnesses allegedly testified on his behalf, although, he claims, one would have been readily available. He indicates that the witnesses against him were cross-examined and that his lawyer sought, on several occasions, to test the credibility of the Crown's witnesses; in particular, since his trial was actually a retrial, the lawyer sought to point out contradictions in what the witnesses had testified during the preliminary inquiry, during the first trial and the retrial. The trial judge, however, allegedly intervened and instructed the lawyer to confine his questions to the retrial only.

3.8 In respect of the requirement of exhaustion of domestic remedies, the author argues that he should be deemed to have complied with this requirement, since his petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. Moreover, he submits that, taking into account the length of time between the hearings in his case and the span of time actually spent on death row, the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

3.9 The author is aware of the possibility of filing a constitutional motion under Sections 20 and 25 of the Jamaican Constitution, but contends that such a motion is not an effective remedy available to him, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He argues that because of his lack of financial means to retain counsel and the unavailability of legal aid for purposes of filing a constitutional motion before the Supreme

(Constitutional) Court of Jamaica, he is effectively barred from exercising his constitutional rights.

State party's observations

4.1 The State party contends that the fact that the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed does not necessarily imply that all available domestic remedies have been exhausted. It argues that the communication remains inadmissible because of the author's failure to seek redress under Sections 20 and 25 of the Jamaican Constitution for the alleged violation of his right to a fair trial.

4.2 In addressing the author's contention that the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, the State party submits that the delays encountered are partly attributable to the author himself.

4.3 With respect to the substance of the author's allegation that he did not receive a fair trial, the State party submits that the facts as presented by the author seek to raise issues of facts and evidence, which the Committee does not have the competence to evaluate. The State party refers to the Committee's decision in communication No. 369/1989, in which it had been held that "while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties to the Covenant to evaluate facts and evidence in a particular case". a/

Decision on admissibility and review thereof

5.1 On the basis of the information before it, the Human Rights Committee concluded that the conditions for declaring the communication admissible had been met, including the requirement of exhaustion of domestic remedies. Accordingly, on 24 July 1989, the Human Rights Committee declared the communication admissible.

5.2 The Committee has noted the State party's submissions of 10 January and 4 September 1990, made after the decision on admissibility, in which it reaffirms its position that the communication is inadmissible on the ground of non-exhaustion of domestic remedies.

5.3 On 24 July 1991, the Committee adopted an interlocutory decision requesting the State party to furnish detailed information on the availability of legal aid or free legal representation for the purpose of constitutional motions, as well as examples of such cases in which legal aid may have been granted or free legal representation may have been procured by the applicant. The State party was further requested to submit to the Committee written explanations or statements relating to the substance of the author's allegations.

5.4 On 14 January 1992, the State party reiterates its position that the communication is inadmissible for non-exhaustion of domestic remedies and

requests the Committee to revise its decision on admissibility. It submits that there is no provision for legal aid or free legal representation in constitutional motions. With regard to the Committee's decision that the communication is admissible in so far as it may raise issues under article 14 of the Covenant, the State party demurs that article 14 has seven paragraphs and that it is not clear to what particular paragraph the finding of admissibility relates. "The Committee should indicate the specific provisions of article 14 or indeed of any of the articles to which its findings of admissibility relate, and in relation to which, therefore, Government is being asked to reply; additionally, the Committee must indicate the allegation made by the applicant which has given rise to the finding of admissibility in relation to a particular paragraph of article 14 or any other article. Failure by the Committee to provide this indication will leave the Government in the dark as to the precise allegation and breach to which it must respond in commenting on the merits. For it could not be the case that the Committee expects a reply on each and every allegation made by the applicant, since some of these are patently unmeritorious."

5.5 With regard to the State party's objection that the Committee's decision on admissibility was too broad, the Committee notes that the author's allegations were sufficiently precise and substantiated so as to allow the State party to address them. As to the merits of the author's allegations, it is for the Committee to consider them after declaring the communication admissible, in light of all the information provided by both parties.

5.6 With regard to the State party's arguments on admissibility, especially in respect of the availability of constitutional remedies which the author may still pursue, the Committee 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.

5.7 However, the Committee notes that by submission of 14 January 1992, the State party indicated that legal aid is not provided for constitutional motions; it also recalls that the State party has argued, by submission of 10 October 1991 concerning another case b/ 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 the 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 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.

5.8 The Committee further notes that the author was arrested in 1981, tried and convicted in 1983, and that his appeal was dismissed in 1985. 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 24 July 1989.

Examination of the merits

6.1 In so far as the author's claims under article 14 are concerned, the Committee notes that the State party has not addressed these allegations. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, in general terms, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of the author's claim of a violation of article 14, paragraph 3 (b) and (d), the Committee notes 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. On the basis of the material before it, however, the Committee cannot conclude that the author's two lawyers were unable to properly prepare the case for the defence, nor that they displayed lack of professional judgment or negligence in the conduct of the defence. The author also claims that he was not present at the hearing of his appeal before the Court of Appeal. However, the written judgment of the Court of Appeal reveals that the author was indeed represented before the Court by three lawyers, and there is no evidence that author's counsel acted negligently in the conduct of the appeal. The Committee therefore finds no violation of article 14, paragraph 3 (b) and (d).

6.3 As to the author's allegation that he was unable to have witnesses testify on his behalf, although one, Corporal Afflick, would have been readily available, it is to be noted that the Court of Appeal, as is shown in its written judgment, considered that the trial judge rightly refused to admit Corporal Afflick's evidence, since it was not part of the res gestae. The Committee observes that article 14, paragraph 3 (e), does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel. It is not apparent from the information before the Committee that the court's refusal to hear Corporal Afflick was such as to infringe the equality of arms between the prosecution and the defence. In the circumstances, the Committee is unable to conclude that article 14, paragraph 3 (e), has been violated.

6.4 There remains one final issue to be determined by the Committee: whether the directions to the jury by the trial judge were arbitrary or manifestly unfair, in violation of article 14, paragraph 1, of the Covenant. The Committee recalls that the judge denied the jury the possibility to

arrive at a verdict of manslaughter, by instructing it that the issue of provocation did not arise in the case, thereby only leaving open the verdicts of "guilty of murder" or "not guilty of murder". It further observes that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts as well as the instructions by the jury. It is not in principle for the Committee to review the evidence and the judge's instructions, unless it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality.

6.5 The Committee has carefully examined whether the judge acted arbitrarily by withdrawing the possibility of a manslaughter verdict from the jury. It observes that this matter was put before, and dismissed by, the Court of Appeal of Jamaica. The Court of Appeal, it is true, did not examine the question of whether a verdict of manslaughter should, as a matter of Jamaican law, have been left open to the jury. The Committee considers, however, that it would have been incumbent upon author's counsel to raise this matter on appeal. In the circumstances, the Committee makes no finding of a violation of article 14, paragraph 1, of the Covenant.

7. 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 disclose no violation of any of the articles of the Covenant.

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

Notes

a/ Decision of 8 November 1989 (G. S. v. Jamaica), para. 3.2.

b/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.