B. Communications Nos. 226/1987 and 256/1987, Michael Sawyers and Michael and Desmond McLean v. Jamaica (views adopted on 11 April 1991, forty-first session)

Submitted by:	Michael Sawyers Michael and Desmond McLean (represented by counsel)
Alleged victims:	The authors
State party concerned:	Jamaica
Date of communication:	13 March 1987 and undated communication (received on 28 October 1987)
Date of the decision on admissibility:	7 April 1988

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

Meeting on 11 April 1991,

Having concluded its consideration of communications Nos. 226/1987 and 256/1987, submitted to the Committee by Michael Sawyers and Michael and Desmond McLean 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 authors of the communications and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. Michael Sawyers submitted his communication on 13 March 1987. A similar communication from his co-defendants, Desmond and Michael McLean, was received on 28 October 1987. The communications were joined by a decision of the Committee dated 7 April 1988. The authors are Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They claim to be the victims of a violation by Jamaica of article 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors were arrested in July 1982 and charged with the murder, on 9 July 1982 at about 2.30 a.m., in an area of Kingston known as Waltham Park, of Randolph Ramsay. At the time of his death, the deceased was in the company of his sister, Dawn Ramsay, and Carl Martin, the prosecution's two principal witnesses.

2.2 The authors were tried in the Home Circuit Court of Kingston in November 1983. They challenged the testimony of the prosecution witnesses and stated that none of them had been present at the scene at the time when the murder took place. All three testified that on the night of 9 July 1982 they

had been at home asleep. Two witnesses corroborated the evidence of Michael Sawyers and of Michael McLean. Mr. Sawyers further alleges that he was not placed on an identification parade subsequent to his arrest, as is required in capital cases.

2.3 On 25 November 1983, the authors were convicted of murder and sentenced to death. On 10 March 1986, the Jamaican Court of Appeal dismissed their appeal. They subsequently sought leave to appeal to the Judicial Committee of the Privy Council.

3. By decision of 8 April 1987, the Committee transmitted Mr. Sawyers' communication (No. 226/1987) under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of admissibility. In particular, the State party was asked to clarify whether the Court of Appeal had issued a written judgement dismissing the author's appeal and, if it had not yet done so, when that written judgement was expected to become available, and whether the case had been submitted to the Judicial Committee of the Privy Council.

4. In its submission under rule 91, dated 3 June 1987, the State party explained that the Court of Appeal had given a written judgement in the case on 12 February 1987 and provided the Committee with a copy. It further stated that no hearing before the Judicial Committee of the Privy Council had taken place.

5. By further decision under rule 91, dated 12 November 1987, the Committee transmitted to the State party the communication of Michael and Desmond McLean (No. 256/1987) requesting information and observations relevant to the question of admissibility as well as information relating to the status of the case before the Judicial Committee of the Privy Council.

6. In a further submission under rule 91 concerning communication No. 226/1987, dated 7 December 1987, the State party informed the Committee that the author's petition for leave to appeal had been heard by the Judicial Committee of the Privy Council on 8 October 1987 and dismissed. In its submission under rule 91 concerning communication No. 256/1987, dated 16 February 1988, the State party reiterated the information contained in its submission of 7 December 1987 and forwarded a copy of the order of the Privy Council, which does not give reasons for the dismissal.

7.1 Commenting on the State party's further submission under rule 91, Mr. Sawyers states that, on 5 January 1988, he was told by the coordinator of the Jamaica Council for Human Rights that his petition for leave to appeal to the Judicial Committee of the Privy Council had been dismissed because the Court of Appeal of Jamaica had not issued a written judgement in the case.

7.2 Mr. Sawyers further states that the Jamaica Council for Human Rights has received a number of unsigned statements concerning his case from people in the community where the murder occurred. These statements, inter alia, by the father of the deceased, allegedly would prove that he was innocent. The authors of these statements purportedly explained that they did not do anything to help Mr. Sawyers because they would rather see him executed than see all three go free. The father of the deceased is said to be holding back with his statement in defence of the author because of fear of retribution from his family and his wife.

8. On 7 April 1988, the Human Rights Committee declared both communications admissible under the Optional Protocol. It noted, in particular, that the authors' petitions for leave to appeal had been dismissed by the State party's highest appellate court, the Judicial Committee of the Privy Council, and that it thus appeared that there were no further remedies that the authors could still pursue. Considering that the communications referred to the same events, the Committee further decided, under rule 88, paragraph 2, of its rules of procedure, to deal with them jointly. It requested the State party, under article 4, paragraph 2, of the Optional Protocol, to provide the Committee with specific information relating to the substance of the authors' claims and the circumstances under which their petition for leave to appeal to the Judicial Committee of the Privy Council was heard and dismissed and reiterated its request for interim protection under rule 86 of the rules of procedure.

9.1 In its initial submissions under article 4, paragraph 2, of the Optional Protocol, dated 2 and 16 November 1988, the State party argues that the authors' communications are inadmissible on the ground that they have failed to exhaust all available domestic remedies, since they have not taken any action under the Jamaican Constitution to seek enforcement of their right to a fair trial and legal representation. It requests the Committee to revise its decisions on admissibility pursuant to rule 93, paragraph 4, of the rules of procedure and explains:

> "Section 20 of the Jamaican Constitution guarantees to [the authors] protection of the law. It provides in part:
>
> "20 - (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> "(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
>
> ...
>
> "(6) Every person who is charged with a criminal offence:
>
> "(a) Shall be informed as soon as reasonably practical, in a language which he understands, of the nature of the offence charged;
>
> "(b) Shall be given adequate time and facilities for the preparation of his defence;
>
> "(c) Shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> "(d) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment

of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

"(e) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language."

9.2 The State party further states that:

"Section 25 of the Constitution provides the mechanism for enforcing these rights. It provides as follows:

"25 - (1) ... if any person alleges that any of the provisions of sections 14 to 24 of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

"(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 to the protection of which the person concerned is entitled: provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

9.3 The State party points out that it did not argue the inadmissibility of the communications on the above-mentioned ground because the Committee's rule 91 decisions had focused attention specifically on the status of the authors' appeals before the Privy Council. It adds that it:

"did not make the point that the communications were inadmissible on the ground of non-exhaustion of domestic remedies because it was answering a specific query from the Committee as to the status of [the authors'] appeals to the Privy Council. Although the Committee had made the formal request for the Government to provide comments relevant to the admissibility of the communications, the concentration by the Committee on the specific issue of the status of the applicants' appeals to the Privy Council led the [Government] to believe that after satisfying itself about that issue on the basis of information from the Privy Council, the Committee would have informed the [Government] that it was proceeding to a decision on the admissibility of the communications at which time the [Government] would have raised the <u>in limine</u> objection to admissibility."

9.4 The State party submits that if a communication has been submitted to the Committee by one of its citizens who was convicted of a criminal offence, the fact that he had his case adjudicated by the Privy Council in respect of that offence does not necessarily mean that he has exhausted domestic remedies, and that in most cases he would not have exhausted them for the following reason:

"A communication is only properly before the Committee when it alleges the Government's breach of a right protected by the Covenant; the rights so protected are generally coterminous with the rights set out in chapter III of the Jamaican Constitution, in relation to which an application may be made to the Supreme (Constitutional) Court for redress by any person who alleges that his right has been, is being or is likely to be breached. It follows, therefore, that even after a hearing of the criminal appeal by the Privy Council, an unsuccessful appellant may still exercise his constitutional right to seek redress for an alleged breach of, for instance, his right to a fair trial within a reasonable time. Several constitutional cases have been brought, and continue to be brought, before the Constitutional Court by convicted persons who have been unsuccessful in their criminal appeals to the Privy Council."

10.1 Authors' counsel, in two submissions dated 10 February and 8 May 1989, contests the State party's argument that, as the authors did not avail themselves of their right to seek redress before the Constitutional Court of Jamaica pursuant to section 25 of the Constitution, they did not exhaust domestic remedies. He points out that the protection afforded by section 25, paragraph 1, is designed to prevent the enactment of unconstitutional laws and not to prevent abuses in the application of existing laws, as was confirmed by the Privy Council in its judgement in Riley v. Attorney General. Thus the authors clearly have no remedy under section 25, paragraph 1.

10.2 Counsel further points out that appeals to the Jamaican Court of Appeal and the Privy Council are "adequate means of redress" within the meaning of paragraph 2 of section 25, as long as these tribunals comply with those provisions of the Constitution that guarantee a fair trial. If they did not, it would be open to persons convicted at first instance to by-pass the Court of Appeal or the Privy Council and to appeal directly to the Supreme Court under section 25, paragraph 1. This, it is submitted, cannot have been the intention of the drafters of the Constitution. As long as the Court of Appeal and the Privy Council conduct fair hearings, they provide "adequate means of redress", and the remedy under section 25 is not open to convicted prisoners. In the authors' case, it is not alleged that the hearings conducted by the Court of Appeal and the Privy Council were unfair. Thus, while the remedy pursuant to section 25 of the Constitution is theoretically available, it cannot be considered to be an effective one.

10.3 Furthermore, counsel indicates that any remedy, if it is to be more than theoretical, must be accompanied by means enabling the applicant to avail himself of it. No legal aid is, however, provided by the State party for the pursuit of constitutional motions. Since the authors cannot themselves afford legal representation, they would under no circumstances be able to submit their case to the Supreme Constitutional Court.

10.4 As to the merits of the authors' claims, counsel submits that the State party violated article 14, paragraph 3 (b), of the Covenant because it did not provide them with adequate time and facilities to prepare their defence. Thus, Desmond McLean has stated that he met with his attorney while being held in police custody but that he did not have the time to discuss adequately the case with him. Prior to the trial, he did not see his lawyer and was thus unable to comment on the accusations or to provide the lawyer with a list of names and addresses of witnesses on his behalf. Although instructions were

later provided during the trial, witnesses who would have been helpful for his case were not called. Furthermore, in the absence of comments on the evidence presented by the prosecution, the prosecution witnesses could not be cross-examined effectively. Michael Sawyers met his lawyer on two occasions prior to the trial. He did not comment on the prosecution statements but provided his attorney with a list of witnesses who could have corroborated his account but who were not called. He further stated that evidence that would have enabled an effective cross-examination of Dawn Ramsay was not obtained. Michael McLean met his lawyer on a single occasion prior to the trial; as in the case of his co-defendants, witnesses who in his opinion would have assisted the presentation of his case were neither interviewed nor called. Counsel submits that in view of the gravity of the charge, the preparation of the authors' trial was inadequate: thus, full instructions and comments on the prosecution statements were not obtained, nor were witnesses traced or interviewed. It is alleged that although it has not been possible to establish exactly how much financial aid was available in the case and although the authors' mothers paid some fees to the lawyers, the funds available were clearly inadequate. Unless legal aid is sufficient, however, it is not possible for the legal representative to trace and interview witnesses and secure their attendance in court.

10.5 Counsel further alleges that the authors were not afforded a fair trial, in violation of article 14, paragraph 1, of the Covenant. He submits that although there were reasonable and well-founded suspicions that three members of the jury had been consulting with the prosecution's main witness, the judge failed to order or carry out a full and proper inquiry into the matter. Secondly, it is submitted that the judge wrongly complied with a request from the jury, made after the close of the case, to see the authors standing up together in the dock, without giving counsel the opportunity to comment on any prejudicial inferences that might have arisen. Thirdly, the judge wrongly excluded photographic evidence of the locus in quo, thus depriving the jury of an opportunity to evaluate the testimony of the prosecution's witnesses. Finally, it is submitted that the judge was biased against the authors and erred in law in the summation. In that context, the judge is said to have misdirected the jury (a) on the issue of the burden of proof, failing to indicate that the Crown had to prove the accused guilty beyond reasonable doubt, (b) on the law of common design in stating that it was sufficient for a defendant to be close enough to give assistance to a principal to be part of a common design and (c) on the importance and effect of the unreliability of, or contradictions in, some of the prosecution witnesses' testimony.

11. By interlocutory decision of 24 July 1989, the Human Rights Committee reiterated its request to the State party to furnish explanations or statements relating to the substance of the communications. By further interlocutory decision of 2 November 1989, it requested the State party to clarify whether the Supreme (Constitutional) Court had had occasion to determine, pursuant to section 25, paragraph 2, of the Jamaican Constitution, whether an appeal to the Court of Appeal and to the Judicial Committee of the Privy Council constituted "adequate means of redress" for an individual claiming that his right to a fair trial (sect. 20, para. 1, of the Constitution) had been violated, and whether the Supreme (Constitutional) Court had declined to exercise its powers under section 25, paragraph 2, in respect of such applications, on the ground that "adequate means of redress" were already provided for in law. By the same decision, the Committee urged

the State party to submit its explanations and observations under article 4, paragraph 2, of the Optional Protocol.

12. In a submission dated 25 September 1989, the State party contends that rule 93, paragraph 4, of the Committee's rules of procedure mandates the Committee to address requests for a review of an admissibility decision by separate decision, before considering the merits of the communication. In line with this interpretation, the State party denies the need to forward explanations and observations under article 4, paragraph 2, of the Optional Protocol. By submission of 11 January 1990, it explains that the Supreme (Constitutional) Court has not yet determined whether pursuant to section 25, paragraph 2, of the Constitution, appeals to the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council constitute "adequate means of redress" for individuals claiming that their constitutionally guaranteed right to a fair trial has been violated. With respect to the purported violation of article 14, paragraph 3 (b), of the Covenant, the State party adds that the author's allegations concerning insufficient access to counsel (para. 10.4) "do not indicate [the] Government's responsibility for any inadequacy in the preparation of the defence". As to the alleged violation of article 14, paragraph 1, the State party claims that the authors' contention that they were denied a fair hearing because of the inadequacy of the judge's instructions raises issues of facts and evidence in the case, which the Committee lacks competence to evaluate. It refers in this context to two decisions of the Human Rights Committee holding that it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. a/

13.1 The Human Rights Committee has considered the present communications in the light of the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

13.2 The Committee has taken due note of the State party's contention that with respect to the alleged violations of article 14 of the Covenant, domestic remedies have not been exhausted by the authors, and of its request to review the admissibility decision of 7 April 1988 pursuant to rule 93, paragraph 4, of the rules of procedure. It takes the opportunity to expand upon its admissibility findings.

13.3 The Committee has taken note of the State party's contention that the communications are inadmissible because of the authors' failure to pursue constitutional remedies available to them under the Jamaican Constitution. In this connection, the Committee observes that section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, while section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme (Constitutional) Court may "hear and determine" applications with regard to the alleged non-observance of constitutional guarantees, but limits its jurisdiction to such cases where the applicants have not already been afforded "adequate means of redress for the contraventions alleged" (sect. 25, para. 2, *in fine*). The Committee notes that the State party was requested to clarify, in a number of interlocutory decisions, whether the Supreme (Constitutional) Court has had the opportunity to determine the question pursuant to section 25, paragraph 2, of the Jamaican Constitution, whether an appeal to the Court of Appeal and the Judicial Committee of the Privy Council constitute

"adequate means of redress" within the meaning of section 25, paragraph 2, of the Jamaican Constitution. The State party has replied that the Supreme Court has so far not had said opportunity. Taking into account the State party's clarification, together with the absence of legal aid for filing a motion in the Constitutional Court and the unwillingness of Jamaican counsel to act in this regard without remuneration, the Committee finds that recourse to the Constitutional Court under section 25 of the Jamaican Constitution is not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

13.4 The Committee observes that the wording of rule 93, paragraph 4, of its rules of procedure does not support the State party's contention that a request for the review of an admissibility decision must be addressed prior to, and separately from, consideration of the communication on the merits. b/

13.5 As to the merits, the Committee first addresses the authors' claim that the judge's instructions to the jury were inadequate, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject. The Committee recalls its established jurisprudence c/ that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. It is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The Committee has no evidence that the trial judge's instructions suffered from such defects. Accordingly, the Committee finds no violation of article 14, paragraph 1.

13.6 As to the authors' claims relating to article 14, paragraphs 3 (b) and (e), 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 an emanation of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the circumstances of each case. While it is uncontested that none of the accused met with their lawyers more than twice prior to the trial, the Committee cannot conclude that the lawyers were placed in a situation where they were unable properly to prepare the case for the defence. In particular, the material before the Committee does not reveal that an adjournment of the case was requested on grounds of insufficient time for the preparation of the defence; nor has it been argued that the judge would have denied such an adjournment, had it been requested. The Committee is not in a position either to ascertain whether the alleged failure of the representatives to call witnesses who might have corroborated the authors' testimonies was a matter of professional judgement or of negligence.

13.7 Furthermore, the Committee notes that both Mr. Sawyers and Messrs. McLean were represented by privately retained counsel during trial; on appeal, Messrs. McLean were represented by the same privately retained counsel. Mr. Sawyers was represented by a different counsel, who withdrew before the appeal was concluded (instead, a legal aid lawyer, a Queen's counsel, was appointed). Any shortcomings regarding time for consultation and preparation of the defence cannot, therefore, be attributed to the State party.

13.8 In respect of the authors' claim that they were denied a fair trial on account of a "reasonable and well founded" suspicion that there had been contacts between some jurors and a prosecution witness, the Committee finds that this claim has not been substantiated.

13.9 Accordingly, the Committee finds that there has been no violation of article 14, paragraphs 3 (b) and (e), of the Covenant.

14. 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 do not disclose any violation of the provisions of the Covenant.

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

Notes

a/ See communications Nos. 290/1988 (A.W. v. Jamaica) and 369/1989 (G.S. v. Jamaica), inadmissibility decisions of 8 November 1989, paras. 8.2 and 3.2, respectively.

b/ Rule 93, paragraph 4, reads: "Upon consideration of the merits, the Committee may review a decision that a communication is admissible in the light of any explanation or statements submitted by the State party pursuant to this rule."

c/ See, for example, the Committee's views in communication No. 250/1987 (Carlton Reid v. Jamaica), adopted on 20 July 1990, paras. 10.3 and 10.4.