Distr.
RESTRICTED */

CCPR/C/43/D/230/l987
19 November 1991

ORIGINAL: ENGLISH

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HUMAN RIGHTS COMMITTEE
Forty-third session

DECISIONS

Communication No. 230/l987

Submitted by : Raphael Henry (represented by counsel)

Alleged victim : The author

State party : Jamaica

Date of communication : 29 May 1987 (initial submission)

Documentation references : Prior decisions - CCPR/C/30/D/230/1987 (combined rule 86, rule 91 decision, dated 21 July 1987)
- CCPR/C/WG/32/D/230/1987 (further Working Group combined rule 86, rule 91 decision, dated 22 March 1988)
- CCPR/C/38/D/230/1987 (decision on admissibility, dated 15 March 1990)
- CCPR/C/42/D/230/1987 (interlocutory decision, dated 24 July 1991)

Date of adoption of Views under article 5, paragraph 4, of the Optional Protocol : 1 November 1991

On 1 November 1991, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, concerning communication No. 230/1987. The text of the Views is

annexed to the present document.

[Annex]

*/ Made public by decision of the Human Rights Committee.
DEC230.43

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Forty-third session -

concerning

Communication No. 230/1987

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| Submitted by : | Raphael Henry (represented by counsel) |
| Alleged victim : | The author |
| State party : | Jamaica |
| Date of communication : | 29 May 1987 (initial submission) |
| Date of decision on admissibility : | 15 March 1990 |

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

Meeting on 1 November 1991,

Having considered communication No. 230/1987, submitted to the Committee by Mr. Raphael Henry 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 and by the State party,

Adopts the following Views under article 5, paragraph 4, of the Optional Protocol.

The facts as submitted by the author :

1. The author of the communication is Raphael Henry, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of his rights under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author was arrested in August 1984 and charged with the murder, on 12 August 1984 in the parish of Portland, Jamaica, of one Leroy Anderson. He was tried in the Portland Circuit Court in March 1985, found guilty as charged and sentenced to death on 7 March 1985. The Jamaican Court of Appeal dismissed his appeal on 28 January 1986, and the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal in February 1987.

2.2 It is stated that on 12 August 1984, the author was walking from his home to the fields along railroad tracks when he was approached and suddenly attacked by Mr. Anderson. He sought to defend himself with a machete, and in the ensuing struggle, Mr. Anderson was fatally wounded.

2.3 With respect to the circumstances of the appeal, the author states that he was not present when it was heard and dismissed. Furthermore, the legal aid lawyer assigned to represent him before the Portland Circuit Court and who was familiar with his file, did not himself argue the appeal but assigned substitute counsel to the hearing of the appeal; the author adds that the attorney who replaced his previous counsel was totally unprepared for the task. Still in the context of the appeal, the author indicates that he has experienced great difficulties in obtaining the court documents in his case; he states that by letter dated 3 September 1987 from the Registrar of the Court of Appeal, he was informed that the Court of Appeal had only delivered an oral judgment in the case.

2.4 The London law firm which represented the author before the Judicial Committee of the Privy Council observes that his petition was dismissed because of the absence of a written judgment from the Court of Appeal. In this context, it is indicated that three other Jamaican capital cases were heard and dismissed by the Judicial Committee in January 1987, all of which raised the issue of the absence of a written judgment of the Court of Appeal. In this context, counsel explains that the dismissal of the author's petition was due to his failure to meet the Judicial Committee's Rules of Procedure, namely, to explain the grounds on which he was seeking special leave to appeal, and to provide the Judicial Committee with copies of the decisions of the lower courts. Counsel refers, in particular, to Sections 3(1)(b) and 4(a) of the Judicial Committee (General Appellate Jurisdiction) Rules Order (1982 Statutory Instrument No.1676).

2.5 Counsel recalls that before the Judicial Committee the author's representative requested the members of the Judicial Committee to (a) allow the petition on the ground that the failure of the Court of Appeal to provide a written judgment in a capital case was such a violation of the principles of natural justice that leave to appeal should be granted and (b) remit the case to Jamaica with a direction, under Section 10 of the Judicial Committee Act of 1844, that the Court of Appeal be required to provide written reasons.

2.6 At the time, counsel advised that a constitutional motion should be filed in the Supreme Court of Jamaica. Counsel indicates that she has been exploring the possibility of filing a constitutional motion on the author's behalf; in mid-1989, the author's file was transmitted to a new counsel in London, who subsequently confirmed that in spite of all her efforts to this effect, no Jamaican lawyer agreed to represent the author, on a no-fee basis, in any constitutional motion which it may be possible to bring before the Supreme (Constitutional) Court.

The complaint :

3.1 The author claims that he was denied a fair trial and, in particular, that the preliminary investigations in the case were biased; thus, the arresting officers allegedly threatened him so as to induce him to confess the crime. It is further submitted

that the prosecution witnesses were wholly unreliable, as they could not realistically have witnessed the course of events from the point where they claimed to have been standing. Finally, the trial judge is said to have failed to properly direct the jury on the issue of manslaughter and legitimate self-defence, and the issue of provocation allegedly was not put to the jury.

3.2 The author concedes that he was represented by a legal aid attorney during the trial but submits that the preparation of his defence was totally inadequate, due to minimal opportunities to consult with his lawyer prior to the trial. In particular, the author contends that his defence was prepared on the first day of the trial. Furthermore, he claims that witnesses against him were not thoroughly cross-examined. Two witnesses were called on his behalf - they were not, however, eyewitnesses, and in the author's opinion were not given the opportunity to testify under the same conditions as the witnesses against him. This was because the prosecutor allegedly ridiculed and intimidated the defence witnesses, thereby producing an incoherent testimony which undermined the credibility of the witnesses in the eyes of the jury.

3.3 The author contends that the absence of a written judgment of the Court of Appeal of Jamaica constitutes a violation of his constitutional rights, and resulted in the dismissal of his petition for special leave to appeal to the Judicial Committee. In this way, he claims, he was denied a fair review of his case, in violation of article 14, paragraph 5, of the Covenant.

3.4 It is submitted that the Court of Appeal was under a duty to provide the written reasons for its decision of 28 January 1986, especially since the Court's reasoned judgment was necessary in order to pursue a further appeal, and that failure to provide written reasons would frustrate a prospective appellant's right to exercise his right of appeal. According to counsel, there is ample support, in British and Commonwealth jurisprudence, [1] for the proposition that there is a judicial duty to give reasons for a decision, the rationale being that written reasons afford an

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[1] See Eagle Trust Ltd. v. Pigot-Brown [1985] 3 All ER 119; Norton Tools Co. Ltd v. Tewson [1973], 2 WLR 45; R. v. Immigration Appeal Tribunal, Ex Parte Khan (Mahmud), [1983], 2 WLR 759.

insight into the legal or factual bases for the judgment and afford the complainant the opportunity to exercise any available right of appeal in a timely and informed manner.

3.5 Counsel further submits that the failure of the Judicial Committee to direct the Court of Appeal to produce a written judgment and to admit his petition left Mr. Henry with no available remedy and amounted to a denial of his right of appeal against conviction and sentence, in violation of article 14, paragraph 5. By failing to exercise the powers conferred upon it by the Judicial Committee Act, the Privy Council is said to have "abdicated" its supervisory jurisdiction, conferred by Section 110, paragraph 3, of the Jamaican Constitution, to ensure that the decisions of the lower courts were not deficient.

3.6 In counsel's opinion, a recent decision of the House of Lords[2] underscores the importance of the supervisory function of courts. In this judgment it was stated that the courts are entitled, within limits, "...to subject an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. ...When an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision under challenge must surely call for the most anxious scrutiny." Although this reasoning was applied in the context of an administrative decision, counsel submits that it is applicable to the author's case. The "special responsibility" rests with the Judicial Committee in view of the very real threat of execution facing the author; in counsel's opinion, the Judicial Committee did not exercise the "anxious scrutiny " required by the particular circumstances of the author's case.

The State party's observations :

4. The State party, by submission of 26 October 1988, concedes that the Court of Appeal of Jamaica did not issue a written judgment in the case; the Court confined itself to an oral

[2] Bugdaycay v. Secretary of State for the Home Department [1987] 1 All ER 940.

judgment when refusing Mr. Henry's application for leave to appeal. By further submission of 26 January 1989, the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, since the author failed to take action under the Jamaican Constitution to seek enforcement of his right, under Section 20 of the Constitution, to a fair trial and legal representation. In this context, it submits that the fact that an appellant has not been afforded redress by the Judicial Committee of the Privy Council does not mean that he has exhausted domestic remedies, since even after a hearing of a criminal appeal by the Privy Council, an appellant may still exercise his constitutional rights to seek redress in the Jamaican courts.

The Committee's admissibility considerations and decision:

5.1 At its 38th session, the Committee considered the admissibility of the communication. It took note of the State party's contention that the communication was inadmissible because of the author's failure to pursue constitutional remedies available to him under the Jamaican Constitution. In the circumstances of the case, the Committee found that recourse to the Constitutional Court under Section 25 of the Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

5.2 The Committee noted that part of the author's allegations related to claims of bias on the part of the trial judge, particularly in respect of the adequacy or otherwise of the judge's instructions to the jury. The Committee reiterated that the review by it of specific instructions by the judge to the jury is beyond the scope of application of article 14 of the Covenant, 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. In the circumstances, the Committee found that the judge's instructions did not suffer from such defects.

5.3 On 15 March 1990, accordingly, the Committee declared the communication admissible in respect of article 14, paragraphs 3(b), (d), (e), and 5 of the Covenant.

The State party's objections to the admissibility decision and the Committee's request for further clarifications:

6.1 The State party, in a submission of 6 February 1991, rejects the Committee's findings on admissibility and challenges the reasoning described in paragraph 5.1 above. It argues, in particular, that the Committee's reasoning reflects a misunderstanding of the relevant Jamaican law, especially the operation of Sections 25(1) and (2) of the Jamaican Constitution. The right to apply for redress under Section 25(1) is, in the terms of the provision itself, "without prejudice to any other action with respect to the same matter which is lawfully available." The only limitation is contained in Section 25(2) which, in the State party's opinion, is not applicable in the case, since the alleged breach of the right to a fair trial was not at issue in the criminal law appeal to the Court of Appeal and to the Judicial Committee:

> "... If the contravention alleged was not the subject of the criminal law appeals, ex hypothesi, those appeals could hardly constitute an adequate remedy for that contravention. The decision of the Committee would render meaningless and nugatory the hard earned constitutional rights of Jamaicans and persons in Jamaica, by its failure to distinguish between the right to appeal against the verdict and sentence of the court in a criminal case, and the "brand new right" to apply for constitutional redress granted in 1962."

6.2 The State party submits that the admissibility decision attaches undue significance to the fact that the Jamaican courts have not yet had occasion to rule on the application of the proviso to Section 25(2) of the Constitution in circumstances where the applicant has already exhausted his criminal law appellate remedies. It notes that in the case of Noel Riley v. The Queen [A.G. (1982) 3 AER 469], Mr. Riley was able to apply, after the dismissal of his criminal appeal by the Court of Appeal and the Privy Council, to the Constitutional Court for redress and thereafter to the Court of Appeal and the Privy Council, although unsuccessfully. In the State party's opinion, this precedent illustrates that recourse to criminal law appellate remedies does not render the proviso of Section 25(2) applicable in situations where, following criminal law appeals, an individual files for constitutional redress.

6.3 Furthermore, the State party challenges the Committee's interpretation of the relationship between Section 25(2) and a fundamental human right protected by Chapter Three of the Jamaican Constitution: even if Chapter Three of the Constitution grants a specific right such as protection from arbitrary arrest or detention (Section 15), the Committee would test the applicability of Section 25(2) in relation to the Supreme Court's powers regarding the right of an individual to seek enforcement and protection of such a right; since that specific question had not been the subject of judicial determination by the domestic courts, the Committee would be able to conclude that the remedy does not exist and is not available. In the State party's opinion, this approach has the result that the Committee would conclude that many of the rights set forth in the Jamaican and Westminster Model Constitutions are not existent or not available, on the ground that the issue of the applicability of Section 25(2) had not been subject to judicial determination by the courts.

6.4 In respect of the absence of legal aid for the filing of constitutional motions, the State party submits that nothing in the Optional Protocol or in customary international law would support the contention that an individual is relieved of the obligation to exhaust domestic remedies on the grounds that there is no provision for legal aid and that his indigence has prevented him from resorting to an available remedy. In this connection, the State party observes that the Covenant only imposes a duty to provide legal aid in respect of criminal offenses (article 14, paragraph 3(d)). Furthermore, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: article 2 of the International Covenant on Economic, Social and Cultural Rights, for instance, provides for the progressive realization of economic rights and relates to the "capacity of implementation" of States. In the circumstances, the State party argues that it is incorrect to infer from the author's indigence and the absence of legal aid in respect of the right to apply for constitutional redress that the remedy is necessarily non-existent or unavailable. Accordingly, the State party requests the Committee to review its decision on admissibility.

6.5 In June 1991, counsel informed the Committee that the Supreme (Constitutional) Court had rendered its judgment in the cases of Earl Pratt and Ivan Morgan, on whose behalf

constitutional motions had been filed earlier in 1991. [3] In the light of this judgment and in order better to appreciate whether recourse to the Supreme (Constitutional) Court was a remedy which the author had to exhaust for purposes of the Optional Protocol, the Committee adopted an interlocutory decision during its 42nd session, on 24 July 1991. In this decision, the State party was requested to provide 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 might have been granted or free legal representation might have been procured by applicants. The State party did not forward this information within the deadline set by the Committee, that is, 26 September 1991. By submission of 10 October 1991 concerning another case, it replied that no provision for legal aid in respect of constitutional motions is made under Jamaican law, and that the Covenant does not require States parties to provide legal aid for this purpose.

6.6 In the above interlocutory decision, as well as the decision on admissibility, the State party was requested to also provide information and observations in respect of the substance of the author's allegations. In the interlocutory decision of 24 July 1991, the Committee added that should no comments be forthcoming from the State party on the merits of the author's allegations, it might decide to give due consideration to these allegations. In spite of the Committee's requests, the State party did not provide any information and observations in respect of the substance of the author's allegations.

Post-admissibility proceedings and examination of merits:

7.1 In the light of the above, the Committee decides to proceed with its consideration of the communication. It has taken note of the State party's request that it review its decision on admissibility, in the light of the arguments outlined in paragraphs 6.1 to 6.4 above.

7.2 The State party argues that the proviso to Section 25(2) of the Jamaican Constitution cannot apply in the case, as the alleged breach of the right to a fair trial was not the subject

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[3] On 6 April 1989, the Human Rights Committee had adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of these cases: see CCPR/C/35/D/210/1986 and 225/1987.

matter of the appeals to the Court of Appeal and the Judicial Committee. Based on the material placed before the Committee by the author, this statement would appear to be incorrect. The author's notice of appeal, dated 11 March 1985, clearly refers to "unfair trial" as one of the grounds of appeal. If the Court of Appeal did not examine this ground - and there is no means of ascertaining whether it did, since it only delivered an oral judgment - the responsibility does not lie with the author, and it cannot be argued that he did not attempt to exhaust local remedies in respect of this issue. Furthermore, the issue of whether or not a particular claim was the subject of a criminal appeal should not necessarily depend upon the semantic expression given to a claim, but on its underlying reasons. Looked at from this broader perspective, Mr. Henry was in fact also complaining to the Judicial Committee of the Privy Council that his trial had been unfair, in violation of Section 20 of the Jamaican Constitution. Furthermore, the courts of every State party should ex officio test whether the lower court proceedings observed all the guarantees of a fair trial, a fortiori in capital punishment cases.

7.3 The Committee recalls that by submission of 10 October 1991 in a different case, the State party indicated that legal aid is not provided for constitutional motions. In the view of the Committee, this supports the finding made in its decision on admissibility, that a constitutional motion is not an available remedy which must be exhausted for purposes of the Optional Protocol. In this context, the Committee observes that it is not the author's indigence which absolves him from pursuing constitutional remedies, but the State party's unwillingness or inability to provide legal aid for this purpose.

7.4 The State party claims that it has no obligation under the Covenant to make legal aid available in respect of constitutional motions, as such motions do not involve the determination of a criminal charge, as required by article 14, paragraph 3(d), of the Covenant. But the issue before the Committee has not been raised in the context of article 14, paragraph 3(d), but only in the context of whether domestic remedies have been exhausted.

7.5 Moreover, the Committee notes that the author was arrested in 1984, tried and convicted in 1985 and that his appeal was dismissed in 1986. The Committee deems that for purposes of article 5, paragraph 2(b), of the Optional Protocol, a further

appeal to the Supreme (Constitutional) Court would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies.

7.6 For the above reasons, the Committee maintains that a constitutional motion does not constitute a remedy which is both available and effective within the meaning of article 5, paragraph 2(b), of the Optional Protocol. Accordingly, there is no reason to reverse the decision on admissibility of 15 March 1990.

8.1 With respect to the alleged violation of article 14 of the Covenant, four issues are before the Committee: (a) whether the author had adequate time for the preparation of his defence; (b) whether he could have witnesses on his behalf examined under the same conditions as the witnesses against him; (c) whether the author's legal representation before the Court of Appeal was in conformity with that required under article 14, paragraph 3(d); and (d) whether any violation of the Covenant ensued from the Court of Appeal's failure to issue a written judgment after dismissing his appeal.

8.2 In respect of the first claim, the State party has not denied the author's claim that he did not have adequate time for the preparation of his defence, that his opportunities to consult with counsel prior to the trial were minimal, and that his defence actually was prepared on the first day of the trial. The Committee cannot ascertain, however, whether the court actually denied counsel adequate time for the preparation of the defence. Similarly, the Committee cannot ascertain whether the prosecution witnesses were not properly cross-examined because of objections on the part of the court or because of a professional judgment made by author's counsel. In the circumstances, the material before the Committee does not suffice for a finding of a violation of article 14, paragraphs 3(b) and (e).

8.3 As to Mr. Henry's representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance must be available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings. In Mr. Henry's case, it is uncontested that legal counsel was available to him for the appeal: the appeal form, dated 11 March 1985, reveals that the author did not

wish to be represented before the Court of Appeal by a court-appointed lawyer, but by counsel of his own choice, whose services he had the means to secure, and that he wished to attend the hearing of the appeal. What is at issue is whether the author had the right to be present during the appeal although he was represented by legal counsel, albeit by substitute counsel. The Committee considers that once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing and not to arrange for the author to be present, cannot be attributed to the State party but instead lies within the author's responsibility; in the circumstances, the latter cannot claim that the fact that he was absent during the hearing of the appeal constituted a violation of the Covenant. Accordingly, the Committee concludes that article 14, paragraph 3(d), has not been violated.

8.4 It remains for the Committee to decide whether the failure of the Court of Appeal of Jamaica to issue a written judgment violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the author has claimed that, because of the non-availability of the written judgment, he was denied the possibility of effectively appealing to the Judicial Committee of the Privy Council, which allegedly routinely dismisses petitions which are not accompanied by the written judgment of the lower court. In this connection, the Committee has examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. The Committee observes that the Covenant does not require States parties to provide for several instances of appeal. However, the words "according to law" in article 14, paragraph 5, are to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them. Moreover, in order to enjoy the effective use of this right, the convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal. Thus, while Mr. Henry did exercise a right to appeal to "a higher tribunal" by having the judgment of the Portland Circuit Court reviewed by the Jamaican Court of Appeal, he still has a right to a higher appeal protected by article 14, paragraph 5, of the Covenant, because article 110 of the Jamaican Constitution

provides for the possibility of appealing from a decision of the Jamaican Court of Appeal to the Judicial Committee of the Privy Council in London. The Committee therefore finds that Mr. Henry's right under article 14, paragraph 5, was violated by the failure of the Court of Appeal to issue a written judgment.

8.5 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". [4] In the present case, since the final sentence of death was passed and an important requirement set forth in article 14 was not met, it must be concluded that the right protected by article 6 of the Covenant has been violated.

9. 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 a violation of article 14, paragraph 5, and consequently of article 6 of the Covenant.

10. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Raphael Henry, a victim of a violation of article 14, paragraph 5, and consequently of article 6, is entitled, according to article 2, paragraph 3(a), of the Covenant, to an effective remedy, in this case entailing his release; the State party is under an obligation to take measures to ensure that similar violations do not occur in the future.

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[4] See CCPR/C/21/Rev.1, page 7, paragraph 7.

11. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's Views.

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

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