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HUMAN RIGHTS COMMITTEE
Forty-sixth session

DECISIONS

Communication No. 338/1988

Submitted by : Leroy Simmonds
[represented by counsel]

Alleged victim : The author

State party : Jamaica

Date of communication : 22 November 1988 (initial submission)

Documentation references : Prior decisions
- CCPR/C/WG/35/D/338/1988
(Working Group combined rule 86,
rule 91 decision, dated
14 March 1989)
- CCPR/C/38/D/338/1988
(decision on admissibility, dated
15 March 1990)

Date of adoption of Views : 23 October 1992

On 23 October 1992, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 338/1988. The text of the Views is annexed to the present document.

[See annex]

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

DEC338.46 cm

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-sixth session -
concerning
Communication No. 338/1988

Submitted by : Leroy Simmonds
[represented by counsel]

Alleged victim : The author

State party : Jamaica

Date of communication : 22 November 1988

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 23 October 1992,

Having concluded its consideration of communication No. 338/1988, submitted to the Human Rights Committee on behalf of Mr. Leroy Simmonds 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.

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*/ An individual opinion by Committee members Messrs. Julio Prado Vallejo, Waleed Sadi and Bertil Wennergren is appended.

The facts as presented by the author :

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

2.1 The author was charged with the murder, on 15 May 1983 in the Westmoreland area, of one Maurice Forrester; he claims to be innocent of the crime. The prosecution contended that at 4 a.m. on 15 May 1983, the author and another man entered the deceased's house armed with a handgun and a dagger, respectively. They ordered the deceased and his girlfriend, Roselena Brown, out of their bedroom and forced them to board the deceased's rented car, which was driven by a third man. They drove for about half a mile to a rendezvous with another car. An exchange of drivers took place, and a fourth man drove the deceased's car; the other car followed. Upon reaching Spur Tree, the cars turned into a cul-de-sac; there, Mr. Forrester was shot in the head, and Roselena Brown in the mouth. The bodies were placed into the deceased's car, which was doused with petrol and set on fire. Roselena Brown managed to escape in spite of her injuries.

2.2 It was contended that the killing was an act of vengeance, as Mr. Forrester was said to have given information to the police. On 13 November 1986, three and a half years after the crime was committed, the author was detained for two weeks, allegedly in the absence of formal charges. His attorney filed a habeas corpus action on his behalf, but on 27 November 1986, the author was formally charged with murder. No identification parade was held. The author contends that the charges against him were fabricated by the police superintendent in charge of the preliminary investigation. In this context, he observes that throughout the two months of the preliminary investigation, the police was unable to obtain a statement that would have incriminated him, and that it was only when the examining magistrate notified the police that she would have to release the author for lack of evidence that such a statement was produced.

2.3 On 6 November 1987, he was found guilty as charged and sentenced to death. On 25 May 1988, the Court of Appeal dismissed his appeal, treating the hearing of the application for leave to appeal as the appeal itself. On 19 December 1988, the Judicial

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Committee of the Privy Council dismissed the author's petition for special leave to appeal.

2.4 During the trial, Roselena Brown testified as the prosecution's principal witness. She made a dock identification of the author on 5 November 1987, and purported to recognize him on the basis of eight photographs shown to her by the police on the day after the murder, when she was hospitalized recovering from her injuries. She further admitted during the trial that she only knew the author under his "alias" name; the author contends that the same "alias" was used by several individuals. The trial judge admitted her evidence. No witnesses were sought to testify on the author's behalf. The author himself made a statement from the dock, maintaining that he had never been to Westmoreland.

2.5 In respect of the issue of exhaustion of domestic remedies, counsel contends that a constitutional motion would not constitute an available and effective remedy to the author in the circumstances of the case, as no legal aid is made available by the State party for the purpose, and no lawyer has accepted to represent the author for this purpose on a pro bono basis.

The complaint :

3.1 The author claims that he was denied a fair and impartial trial, in that the trial judge failed properly to exercise his discretion to exclude questionable identification evidence, because he did not object to the author's dock identification, and because he misdirected the jury on the issue of identification.

3.2 The author further claims that his conviction was contrary to article 14, paragraph 3(b) and (d), of the Covenant and Sections 14, paragraph 1, and 20, paragraph 6, of the Jamaican Constitution, in that he was not given adequate facilities for the preparation of his trial defence and of his appeal. In this context, he claims that the system of legal aid made available in Jamaica to poor persons, such as himself, violates the Jamaican Constitution.

3.3 More specifically, the author contends that he was not informed about either date or outcome of his appeal until two days after it had been dismissed. On the "notice of appeal", dated 10 November 1987, the author had indicated that he wished to be present during the hearing of the appeal and that he did not wish legal aid to be assigned to him. A legal aid lawyer was assigned to him allegedly without his knowledge; the author

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contends that this lawyer did not even contact him, so that he could not discuss the appeal with him. The same lawyer argued the appeal on the ground of provocation, without referring to the identification issue, on which the author mainly relied.

The State party's admissibility observations :

4. The State party argues that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol. It observes that the author's rights under article 14 of the Covenant are coterminous with the rights granted under Section 20 of the Jamaican Constitution. Under the Constitution, anyone who argues that a fundamental right has been, is being or is likely to be infringed in relation to him may apply to the Constitutional Court for redress. The decision of the Constitutional Court may be appealed to the Court of Appeal and from there to the Judicial Committee of the Privy Council. The State party concludes that since the author failed to pursue his constitutional remedies before the Supreme Court, his communication remains inadmissible.

The Committee's admissibility decision :

5.1 During its 38th session in March 1990, the Committee considered the admissibility of the communication. It took note of the State party's contention that the complaint was inadmissible due to Mr. Simmonds' failure to avail himself of constitutional remedies under the Jamaican Constitution. In the circumstances of the case, the Committee considered that recourse to the Constitutional Court under Section 25 of the Jamaican 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 some of the author's allegations pertained to the issue of adequacy or otherwise of the judge's instructions to the jury, in particular on the issue of the treatment of identification evidence. The Committee reiterated that the review by it of specific instructions 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 clearly 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, the Committee declared the communication admissible in respect of article 14, paragraph 3(b) and (d), of the Covenant.

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The State party's objections to the admissibility decision :

6.1 In a submission dated 6 February 1991, the State party contends that the Committee's admissibility decision reflects a misunderstanding of the operation of Sections 25(1) and 25(2) of the Jamaican Constitution. The right to apply for redress under Section 25(1) is "without prejudice to any other action with respect to the same matter which is lawfully available". The only limitation in Section 25(2) is not applicable to the case in the State party's opinion, since the alleged breach of the right to a fair trial was not an issue in the author's criminal appeals:

"... 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 ... the 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 right to apply for constitutional redress".

6.2 The State party observes that there are judicial precedents which illustrate 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 In respect of the absence of legal aid for the filing of constitutional motions, the State party observes that nothing in the Optional Protocol or customary international law supports the contention that an individual is relieved of the obligation to exhaust domestic remedies on the ground that his indigence has prevented him from resorting to an available remedy. In this context, it is submitted that the Covenant only imposes a duty to provide legal aid in respect of criminal offences (article 14, paragraph 3(d)). Further, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: thus, article 2 of the International Covenant on Economic, Social and Cultural Rights provides for the progressive implementation of economic rights. In the circumstances, the State party argues that it is incorrect to infer from the author's indigence and the absence of legal aid for constitutional motions that the remedy is necessarily non-existent or unavailable. Accordingly, the State

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party requests the Committee to review its decision of
admissibility.

Reconsideration of admissibility issues and examination of the merits:

7.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

7.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case ¹, the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3(d), of the Covenant. In the view of the Committee, this supports the finding, 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. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

8.1 The Committee notes that, several requests for clarifications notwithstanding, the State party has essentially confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith and within the imparted deadlines 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. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

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

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8.2 As indicated in the Committee's decision on admissibility, the Committee must determine whether the fact that the author was not in a position to properly prepare his appeal and that he was represented before the Court of Appeal of Jamaica by an attorney not of his choosing amounts to a violation of article 14, paragraph 3(b) and (d), of the Covenant.

8.3 In this connection, the Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death ². This applies to the trial in the court of first instance as well as to appellate proceedings. In Mr. Simmonds' case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether he should have been notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing of the appeal, and whether he should have been afforded an opportunity to be present during the hearing of the appeal.

8.4 The author's application for leave to appeal to the Court of Appeal, dated 10 November 1987, indicates that he wished to be present during the hearing of the appeal and that he did not wish the Court to assign legal aid to him. The Registry of the Court of Appeal ignored the author's wish, as his application for leave to appeal was heard in his absence and in the presence of a legal aid attorney, B.S., who argued the appeal on a ground that Mr. Simmonds had not wished to pursue. The Committee further notes with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal; this delay jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself. His opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present. In the circumstances, the Committee finds a violation of article 14, paragraph 3(b) and (d).

8.5 The Committee considers that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further

² Communication No. 272/1988 (Alrick Thomas v. Jamaica), Views of 31 March 1992, paragraph 11.4.

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". In the present case, as the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, 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 as found by the Committee disclose a violation of articles 6 and 14, paragraph 3(b) and (d), of the Covenant.

10. The Committee is of the view that Mr. Leroy Simmonds is entitled to a remedy entailing his release. It requests the State party to provide information, within ninety days, on any relevant measures taken in respect of the Committee's Views.

APPENDIX

Individual opinion by Committee members
Messrs. Julio Prado Vallejo, Waleed Sadi and Bertil Wennergren,
pursuant to rule 94, paragraph 3, of the rules of procedure
in respect of the Committee's Views on communication No. 338/1988
(Leroy Simmonds v. Jamaica)

The author's complaint centres on the proposition that the Court of Appeal of Jamaica failed to provide him with a fair trial.

The violations of article 14, paragraph 3(b) and (d), and in consequence of article 6, of the Covenant are well substantiated. Where we differ is in respect of the remedy suggested to the State party by the Committee. The Committee proposes the release of the author; we do not agree with this remedy, in the light of the nature of and the circumstances under which the offence had occurred, and which were neither refuted nor confirmed because of the deficiencies in the judicial proceedings. Accordingly, the most appropriate way of remedying what occurred would be to see to it that the author will be afforded another opportunity to obtain a fair trial. This result can be obtained by assisting the author in pursuing constitutional remedies.

It should be noted in this context that it is correct that constitutional motions have been deemed by the Committee not to provide an available and effective remedy which an author must first exhaust, but that this has been the case only where the authors have had no means of their own and have not been entitled to obtain legal aid from the State party. Therefore, if the author is given such assistance ex gratia in the case, he will be in a position to seek a review of his grievances under the constitutional motions procedure, thereby making this remedy available and effective.

We thus are of the opinion that the author should be afforded the possibility of pursuing a constitutional motion by assigning to him legal aid for the purpose, so as to enable him to seek effective redress for the violations suffered.

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

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