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Paul Kelly v. Jamaica, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991).

Communication No. 253/1987 : Jamaica. 10/04/91.
CCPR/C/41/D/253/1987. (Jurisprudence)

Convention Abbreviation: CCPR
Human Rights Committee
Forty-first session

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-first session
concerning

Communication No. 253/1987

Submitted by: Paul Kelly (represented by counsel)

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 15 September 1987

Date of the decision on admissibility: 17 October 1989

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

Meeting on 8 April 1991,

Having concluded its consideration of communication No. 253/1987, submitted to the Committee by Paul
Kelly 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 communications
and by the State party,

Adopts the following:

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

1. The author of the communication (initial submission dated 15 September 1987 and subsequent correspondence) is Paul Kelly, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of articles 6, paragraph 2; 7; 9, paragraphs 3 and 4; 10; and 14, paragraphs 1 and 3 (a)-(e) and (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author was arrested and taken into custody on 20 August 1981. He was detained until 15 September 1981 without formal charges being brought against him. Following a statement to the police given on 15 September 1981, he was charged with having murdered Owen Jamieson on 2 July 1981. He was tried with a co-defendant, Trevor Collins, in the Westmoreland Circuit Court between 9 and 15 February 1983. He and Mr. Collins were found guilty of murder and sentenced to death. On 23 February 1983, the author appealed his conviction: on 28 April 1986, the Jamaican Court of Appeal dismissed his appeal without producing a reasoned judgement. On appeal, author's counsel merely stated that he found no merit in arguing the appeal. Because of the absence of a reasoned judgement of the Court of Appeal, the author has refrained from further petitioning the Judicial Committee of the Privy Council for special leave to appeal.

2.2 The evidence relied on during the trial was that on 1 July 1981 the author and Mr. Collins had sold a cow to Basil Miller and had given him a receipt for the sale. According to the prosecution, the cow had been stolen from Mr. Jamieson, who had visited Mr. Miller's home on the afternoon of 1 July and had identified the cow as his property. The accused had then purportedly killed Mr. Jamieson in the belief that he had obtained the receipt from Mr. Miller implicating them in the theft of the cow.

2.3 During the trial, the prosecution adduced certain evidence against the author and his co-defendant: (a) blood-stained clothing that was found in a latrine at the house where the accused lived; (b) the presence of a motive; and (c) the oral evidence tendered by the sister of the author and the brother of Trevor Collins. In particular, the testimony of the author's sister was important as to the identification of the clothes found in the latrine. According to the prosecution, the author and Mr. Collins had fled the district after the murder. Mr. Collins brother testified that the accused had borrowed a suitcase from him in the early hours of the morning following the murder.

2.4 The author challenged the prosecution's contention that his statement of 15 September 1981 had been a voluntary one. In an unsworn statement from the dock, he claimed to have been beaten by the police, who had tried to force him to confess to the crime. He affirms that the police tried to have him sign a

"blanko" confession, and that he withstood the beatings and refused to sign any papers presented to him. He further maintains that he never made a statement to the police and that he knows nothing about the circumstances of Mr. Jamieson's death.

Complaint

3.1 The author alleges a violation of articles 7 and 14, paragraph 3 (g), of the Covenant on the ground that he was threatened and beaten by the police, who tried to make him give and sign a confession. Although the police sought to dismiss his version during the trial, the author contends that several factors support his claim: his voluntary confession" was not obtained until nearly four weeks after his arrest: no independent witness was present at the time when he purportedly confessed and signed his statement; and there were numerous inconsistencies in the prosecution's evidence relating to the manner in which his statement was obtained.

3.2 The author further notes that 26 days passed between his arrest (20 August 1981) and the filing of formal charges against him (15 September 1981). During this time, he claims, he was not allowed to contact his family nor to consult with a lawyer, in spite of his requests to meet with one. After he was charged, another week elapsed before he was brought before a judge. During this period, his detention was under the sole responsibility of the police, and he was unable to challenge it. This situation, he contends, reveals violations of article 9, paragraphs 3 and 4, in that he was not "brought promptly before a judge or other officer authorized by law to exercise judicial power", and because he was denied the means of challenging the lawfulness of his detention during the first five weeks following his arrest.

3.3 According to the author, the State party violated article 14, paragraph 3 (a), because he was not informed promptly and in detail of the nature of the charges against him. Upon his arrest, he was held for several days at the central lock-up at Kingston, pending "collection" by the Westmoreland police, and merely told that he was wanted in connection with a murder investigation. Further details were not forthcoming even after his transfer to Westmoreland. It was only on 15 September 1981 that he was informed that he was charged with the murder of Owen Jamieson.

3.4 The author submits that article 14, paragraph 3 (b), was violated in his case, since he was denied adequate time and facilities for the preparation of his defence, had no or little opportunity to communicate with counsel representing him at trial and on appeal, both before and during trial and appeal, and because he was unable to defend himself through legal assistance of his own choosing. In this context, he notes that he experienced considerable difficulty in obtaining legal representation. Counsel assigned to him during the trial did not meet with him until the opening day of the trial: moreover, this meeting lasted a mere 15 minutes, during which it was virtually impossible for counsel to Prepare the author's defence in any meaningful way. During the trial, he could not consult with the lawyers for more than a total of seven minutes, which means that preparation of the defence prior to and during the trial was restricted to 22 minutes. He points out that the lack of time for the preparation of the trial was extremely prejudicial to him, in that his lawyer could not prepare proper submissions on his behalf in relation to the admissibility of his

"confession statement", or prepare properly for the cross-examination of witnesses. As to the hearing of the appeal, the author contends that he never met with, or even instructed, his counsel, and that he was not present during the hearing of the appeal.

3.5 The author also alleges that article 14, paragraph 3 (d), was violated. In this connection, he notes that, as he is poor, he had to rely on legal aid lawyers for the judicial proceedings against him. While he concedes that this situation does not in itself reveal a breach of article 14, paragraph 3 (d), he submits that the inadequacy of the Jamaican legal aid system, which resulted in substantial delays in securing suitable legal representation, does amount to a breach of this provision. He further notes that as he did not have an opportunity to discuss his case with the lawyers assigned to his appeal, he could not possibly know that this lawyer intended to withdraw the appeal and thus could not object to his intentions. He adds that had he been apprised of the situation, he would have sought other counsel.

3.6 The author contends that he has been the victim of a violation of article 14, paragraph 3 (c), in that he was not tried without undue delay. Thus, almost 18 months elapsed between his arrest and the start of the trial. During the whole period, he was in police custody. As a result, he was prevented from carrying out his own investigations, which might have assisted him in preparing his defence, given that court-appointed legal assistance was not immediately forthcoming.

3.7 In the author's opinion, he was denied a fair hearing by an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. Firstly, he contends that he was poorly represented by the two legal aid lawyers who were assigned to him for the trial and the appeal. His representative during the trial, for instance, allegedly never was in a position to present his defence constructively; his cross-examination of prosecution witnesses was superficial, and he did not call witnesses on the author's behalf, although the author notes that his aunt, Mrs. Black, could have corroborated his alibi. Furthermore, counsel did not call for the testimony of a woman -the owner of the house where the accused had lived -who had given the police information leading to the author's arrest. This, he submits, constitutes a violation of article 14, paragraph 3 (e). Secondly, the author alleges bias and prejudice on the part of the trial judge. The latter allegedly admitted hearsay evidence presented by Basil Miller and several other witnesses. When author's counsel opened his defence statement, the judge reaffirmed his desire to dispose of the case expeditiously, while he refrained from similar attempts to curtail the presentation of the prosecution's case. He allegedly made disparaging remarks related to the case for the defence, thus undermining the presumption of innocence. Finally, the judge's conduct of the voir dire in connection with the determination of the voluntary character of the author's confession is said to have been "inherently unfair".

3.8 Finally, the author affirms that he is the victim of a violation of article 10 of the Covenant, since the treatment he is subjected to on death row is incompatible with the respect for the inherent dignity of the human person. In this context, he encloses a copy of a report about the conditions of detention on death row at St. Catherine Prison, prepared by a United States non-governmental organization, which describes the deplorable living conditions prevailing on death row. More particularly, the author claims that these conditions put his health at considerable risk, adding that he receives insufficient food, of very low

nutritional value, that he has no access whatsoever to recreational or sporting facilities and that he is locked in his cell virtually 24 hours a day. It is further submitted that the prison authorities do not provide for even basic hygienic facilities, adequate diet, medical or dental care, or any type of educational services. Taken together, these conditions are said to constitute a breach of article 10 of the Covenant. The author refers to the Committee's jurisprudence in this regard.

3.9 In respect of the requirement of exhaustion of domestic remedies, the author maintains that although he has not petitioned the Judicial Committee of the Privy Council, he should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. He notes that pursuant to rule 4 of the Privy Council rules, a written judgement of the Court of Appeal is required if the Judicial Committee is to entertain an appeal.

3.10 The author further points out that he was unaware of the existence of the Note of Oral Judgement until almost three years after the dismissal of his appeal, and counsel adds that the trial transcript obtained in October 1989 is incomplete in material respects, including the summing-up of the judge, which further hampers efforts to prepare properly an appeal to the Privy Council. Subsidiarily, he argues that as almost eight years have already elapsed since his conviction, the pursuit of domestic remedies has been unreasonably prolonged. Finally, he argues that a constitutional motion in the Supreme (Constitutional) Court of Jamaica would inevitably fail, in the light of the precedent set by the Judicial Committee's decisions in *DPP v. Nasralla 2/and Riley et al. v. Attorney General of Jamaica*, where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law.

State party's observations

4.1 The State party contends that the communication is inadmissible because of the author's failure to exhaust domestic remedies, since he retains the right, under section 110 of the Jamaican Constitution, to petition the Judicial Committee of the Privy Council for special leave to appeal. In this context, it points out that the rules of procedure of the Judicial Committee do not make a written judgement of the Court of Appeal a prerequisite for a petition for leave to appeal. While rule 4 provides that any petitioner for special leave to appeal must submit the judgement from which leave to appeal is sought, Rule 1 defines "judgement" as "decree order, sentence or decision of any court, judge or judicial officer". Thus, the State party argues, an order or a decision of the Court of Appeal, as distinct from a reasoned judgement, is a sufficient basis for a petition for special leave to appeal to the Judicial Committee. It adds that the Privy Council has heard petitions on the basis of the order or decision of the Court of Appeal dismissing the appeal.

4.2 With respect to the substance of the author's allegations, the State party affirms that the facts as presented by the author "seek to raise issues of facts and evidence in the case which the Committee does not have the competence to evaluate". The State party refers to the Committee's decisions in communications 290/1988 and 369/1989, in which it had been held that "while article 14 . . . guarantees

the right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case".

Issues and proceedings before the Committee

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. In this respect, the Committee considered that a written judgement of the Court of Appeal of Jamaica was a prerequisite for a petition for special leave to appeal to the Judicial Committee of the Privy Council. It observed that in the circumstances, author's counsel was entitled to assume that any petition for special leave to appeal would inevitably fail because of the lack of a reasoned judgement from the Court of Appeal: it further recalled that domestic remedies need not be exhausted if they objectively have no prospect of success.

5.2 On 17 October 1989, the Human Rights Committee declared the communication admissible.

5.3 The Committee has noted the State party's submissions of 8 May 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. The Committee takes the opportunity to expand on its admissibility findings, in the light of the State party's further observations. The State party has argued that the Judicial Committee of the Privy Council may hear a petition for special leave to appeal even in the absence of a written judgement of the Court of Appeal: it bases itself on its interpretation of rule 4 juncto rule 1 of the Privy Council's Rules of Procedure. It is true that the Privy Council has heard several petitions concerning Jamaica in the absence of a reasoned judgement of the Court of Appeal, but, on the basis of the information available to the Committee, all of these petitions were dismissed because of the absence of a reasoned judgement of the Court of Appeal. There is therefore no reason to revise the Committee's decision on admissibility of 17 October 1989.

5.4 As to the substance of the author's allegations of violations of the Covenant, the Committee notes with concern that several requests for clarifications notwithstanding, the State party has confined itself to the observation that the facts as submitted seek to raise issues of facts and evidence that the Committee is not competent to evaluate; it has not addressed the author's specific allegations under articles 7, 9, 10 and 14, paragraph 3, of the Covenant. 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 sufficiently substantiated.

5.5 As to the claim under articles 7 and 14, paragraph 3 (g), of the Covenant, the Committee notes that the wording of article 14, paragraph 3 (g)-i. e., that no one shall "be compelled to testify against himself or to

confess guilt" -must be understood in terms Of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. In the present case, the author's claim has not been contested by the State party. It is, however, the Committee's duty to ascertain whether the author has sufficiently substantiated his allegation, notwithstanding the State party's failure to address it. After careful consideration of this material, and taking into account that the author's contention was successfully challenged by the prosecution in court, the Committee is unable to conclude that the investigating officers forced the author to confess his guilt, in violation of articles 7 and 14, paragraph 3 (g).

5.6 In respect of the allegations pertaining to article 9, paragraphs 3 and 4, the State party has not contested that the author was detained for some five weeks before he was brought before a judge or judicial officer entitled to decide on the lawfulness of his detention. The delay of over one month violates the requirement, in article 9, paragraph 3, that anyone arrested on a criminal charge shall be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. Committee considers it to be an aggravating circumstance that, throughout this period, the author was denied access to legal representation and any contact with his family. As a result, his right under article 9, paragraph 4, was also violated, since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by the court on the lawfulness of his detention.

5.7 In as much as the author's claim under article 10 is concerned, the Committee reaffirms that the obligation to treat individuals with respect for the inherent dignity of the human person encompasses the provision of, inter alia, adequate medical care during detention. &/The provision of basic sanitary facilities to detained persons equally falls within the ambit of article 10. The .Committee further considers that the provision of inadequate food to detained individuals and the total absence of recreational facilities does not, save under exceptional circumstances, meet the requirements of article 10. In the author's case, the State party has not refuted the author's allegation that he has contracted health problems as a result of a lack of basic medical care, and that he is only allowed out of his cell for 30 minutes each day. As a result, his right under article 10, paragraph 1, of the Covenant has been violated.

5.8 Article 14, paragraph 3 (a), requires that any individual under criminal charges shall be informed promptly and in detail of the nature and the charges against him. The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence. It does not apply to ,those remanded in custody pending the result of police investigations: the latter situation is covered by article 9, paragraph 2, of the Covenant. In the present case, the State party has not denied that the author was not apprised in any detail of the reasons for his arrest for several weeks following his apprehension and that he was not informed about the facts of the crime in connection with which he was detained or about the identity of the victim. The Committee concludes that the requirements of article 9, paragraph 2, were not met.

5.9 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 important aspect of the principle of equality of arms. In cases in which capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. The author also contends that he was unable to obtain the attendance of witnesses. It is to be noted, however, that the material before the Committee does not disclose whether either counsel or author complained to the trial judge that the time or facilities were inadequate. Furthermore, there is no indication that counsel decided not to call witnesses in the exercise of his professional judgement, or that, if a request to call witnesses was made, the trial judge disallowed it. The Committee therefore finds no violation of article 14, paragraph 3 (b) and (e).

5.10 As to the issue of the author's representation, in particular before the Court of Appeal, the Committee recalls that it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings. In the author's case, it is clear that legal assistance was assigned to him for the appeal. What is at issue is whether his counsel had a right to abandon the appeal without prior consultation with the author. The author's application for leave to appeal to the Court of Appeal, dated 23 February 1983, indicates that he did not wish to be present during the hearing of the appeal, but that he wished legal aid to be assigned for this purpose. Subsequently, and without previously consulting with the author, counsel opined that there was no merit in the appeal, thus effectively leaving the author without legal representation. The Committee is of the opinion that while article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.

5.11 With respect to the claim of "undue delay" in the proceedings against the author, two issues arise. The author contends that his right, under article 14, paragraph 3 (c), to be tried without "undue delay" was violated because almost 18 months elapsed between his arrest and the opening of the trial. While the Committee reaffirms, as it did in its general comment on article 14, that all stages of the judicial proceedings should take place without undue delay, it cannot conclude that a lapse of a year and a half between the arrest and the start of the trial constituted "undue delay", as there is no suggestion that pre-trial investigations could have been concluded earlier, or that the author complained in this respect to the authorities.

5.12 However, because of the absence of a written judgement of the Court of Appeal, the author has, for almost five years since the dismissal of his appeal in April 1986, been unable effectively to petition the Judicial Committee of the Privy Council, as shown in paragraph 5.3 above. This, in the Committee's opinion, entails a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and in particular in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of these judicial proceedings may turn out to be.

5.13 Finally, inasmuch as the author's claim of judicial bias is concerned, the Committee reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate the 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 does not have sufficient evidence that the author's trial suffered from such defects.

5.14 The Committee is of the opinion 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 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, while a petition to the Judicial Committee is in theory still available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, for the reasons indicated in paragraph 5.3 above. Accordingly, it may be concluded that the final sentence of death was passed without having met the requirements of article 14, and that as a result the right protected by article 6 of the Covenant has been violated.

6. 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 violations of articles 6, 9, paragraphs 2 to 4, 10 and 14, paragraphs 3 (c) and (d) and 5 of the Covenant.

7. It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. The Committee is of the view that Mr. Paul Kelly, victim of a violation of article 14, paragraphs 3 (c) and (d) and 5 of the Covenant, is entitled to a remedy entailing his release.

8. The Committee would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.