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and Political Rights**

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HUMAN RIGHTS COMMITTEE
Fifty-ninth session
24 March - 11 April 1997

VIEWS

Communication No. 535/1993

Submitted by: Lloydell Richards
[represented by Mr. Saul Lehrfreund]

Victim: The author

State party: Jamaica

Date of communication: 14 January 1993 (initial submission)

Date of adoption of Views: 31 March 1997

On 31 March 1997, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 535/1993. The text of the Views is appended to the present document.

[ANNEX]

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

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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
- Fifty-ninth session -

concerning

Communication No. 535/1993**

Submitted by: Lloydell Richards
[represented by Mr. Saul Lehrfreund]

Victim: The author

State party: Jamaica

Date of communication: 14 January 1993 (initial submission)

Date of decision on admissibility: 17 March 1995

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

Meeting on 31 March 1997,

Having concluded its consideration of communication No. 535/1993 submitted to the Human Rights Committee on behalf of Mr. Lloydell Richards 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 the following:

*The following members of the Committee participated in the examination of the present communication: Messrs. Nisuke Ando and Prafullachandra N. Bhagwati, Mrs. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Mrs. Elizabeth Evatt, Messrs. Eckart Klein, David Kretzmer and Rajsoomer Lallah, Mrs. Cecilia Medina Quiroga, Mrs. Laure Moghaizel, Messrs. Julio Prado Vallejo, Martin Scheinin, Danilo Türk and Maxwell Yalden.

**Two individual opinions (dissenting) by Committee members Nisuke Ando and David Kretzmer are appended to the present document.

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

1. The author of the communication is Lloydell Richards, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, paragraph 2; 7; 14, paragraphs 1, 2, 3(c), (d) and (e), and 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund. The author's death sentence has been commuted.

The facts as presented by the author

2.1 On 15 March 1982, the author was charged with the murder, on 8 or 9 March 1982 in the Parish of Westmoreland, of one S.L. On 26 September 1983, he appeared before the Home Circuit Court of Kingston; on arraignment, he pleaded guilty to manslaughter, a plea accepted by the prosecution. Counsel for the defence then requested an adjournment in order to call character witnesses in mitigation. The hearing was adjourned to 3 October 1983. However, the Director of Public Prosecutions (DPP), who has the authority, pursuant to Section 94, paragraph 3(c), of the Jamaican Constitution, to discontinue any criminal proceedings at any stage before judgement is delivered, considered that the plea of guilty to manslaughter should not have been accepted and decided to discontinue the proceedings in the case in order to charge the author with the murder on a fresh indictment.

2.2 Accordingly, at the hearing of 3 October 1983, a nolle prosequi was entered by the DPP; the new indictment was read out to the author, who pleaded not guilty. On 6 December 1983, the author was tried in the Home Circuit Court of Kingston, then presided over by another judge. On 13 December 1983, he was found guilty of murder and sentenced to death. On appeal, counsel for the author argued that the trial had been unconstitutional, in the light of the earlier acceptance by the prosecution of a plea of manslaughter. The Court of Appeal of Jamaica dismissed his appeal on 10 April 1987. The author subsequently petitioned the Judicial Committee of the Privy Council for special leave to appeal; on 20 February 1991, leave to appeal was granted. On 29 and 30 June 1992, the Privy Council heard the author's appeal and dismissed it on 19 October 1992, recommending that the author's death sentence be commuted. Following the enactment of the Offences Against the Person (Amendment) Act 1992, Jamaica created two categories of murder, capital and non capital, consequently all persons previously convicted of murder had their conviction reviewed and reclassified under the new system. In December 1992, the author's offence was classified as "capital".

2.3 The case for the prosecution was that, on 8 March 1982 at about 8 p.m., the author, who worked as a driver of a minibus, picked up S.L., who was living in Montego Bay. She was stranded in Savanna-la-mar, and although Montego Bay was not on the scheduled route, the author said that he would bring her home, as he had completed the last trip of the day. He first dropped the conductor of the bus at his home. At 9 p.m., the author stopped and had

drinks in a bar. The bar owner saw S.L. coming out of the bus and trying to obtain a lift from cars going in the direction of Montego Bay. When she did not succeed, she re-entered the bus and left with the author. At 1 a.m., a witness who knew the author saw him coming out of a guest house, and pulling S.L. who was crying, into the minibus. Several hours later, the author, covered in mud and blood, appeared at the bus conductor's house. He said that the bus had been hijacked by three armed men and that they had ordered him to drive into the countryside. When the bus became stuck in the mud, he managed to escape; he further said that he feared for S.L.'s life. The author and a few other people, followed by the police, soon found the minibus and the body of S.L. was discovered in a shallow grave nearby. She had died as a result of a head injury; a blood-stained tool was found in the bus. The deceased's body also showed signs of rape.

2.4 The author gave an unsworn statement from the dock. He maintained that the bus had been hijacked, and said that two of the prosecution witnesses were motivated by malice. He further stated that he had been tortured by the police.

The complaint

3.1 The author claims that his trial was unfair. He encloses two articles which appeared in a well-known Jamaican newspaper, and submits that the information given was prejudicial to his case. One of the articles, published on 1 October 1983, informed "that the author had pleaded guilty to manslaughter in the case of the death of S.L., a 17-year-old school girl". It further stated "that some members of the judiciary felt that manslaughter did not arise in a case of that nature", and summarized the prosecution's case. The author points out that this article was published two days before he appeared in court to be sentenced on the basis of his manslaughter plea, and before the prosecution entered the nolle prosequi. The second article, published on 4 October 1983, reported the proceedings of the previous day, and, according to the author, in a way prejudicial to his defence. The author that he had already pleaded guilty to manslaughter, deprived him of the right to a fair trial before an independent and impartial tribunal, contrary to article 14, paragraph 1, of the Covenant.

3.2 The author further claims that the publicity given to the proceedings violated his right to be presumed innocent until proven guilty according to law.

3.3 The author points out that he was arrested on 9 March 1982, tried on 6 December 1983, and that the Court of Appeal dismissed his appeal on 10 April 1987. He submits that a delay of one year and nine months before being tried, and of three years and four months before hearing his appeal, is unreasonable, thus violating his rights under article 14, paragraphs 3(c) and 5, of the Covenant.

3.4 With regard to article 14, paragraph 3(d), the author notes that, on 26 September 1983, when he pleaded guilty to manslaughter, he was represented

by leading counsel, Mr. C.M., who requested an adjournment. At the hearing on 3 October 1983, he was again represented by C.M., who had been notified by the prosecution of its intention to enter a nolle prosequi. Prior to the hearing on 6 December 1983, C.M. applied to withdraw from the case on professional ethical grounds, and requested an adjournment because junior counsel, who would take over the defence, could not attend the hearing. The judge refused both requests, primarily on the ground that the trial had already been postponed several times, and criticized C.M. for not having started his investigations in Westmoreland until 27 November 1983 and for not having informed his client of his position. C.M. then indicated that he would remain for the defence that day. In the circumstances, the author submits, he was not adequately represented by C.M.

3.5 The author further claims that junior counsel was not in a position to effectively represent him, which she herself admitted. In this context, he notes that on 7 December 1983, she, while apologizing to the Court for having been absent on the first day of the trial, said: "But I wish to indicate to the Court that I have no intention of taking or accepting any money from the Government for this case, because I feel that I have not given it my best and in the circumstances I am here this morning to 'fight the good fight with all my might'; but I will not, because I don't feel it is justified and my conscience would not allow me, accept any money in relation to this legal aid assignment, but I am here to protect my client".

3.6 The author points out that on Friday, 9 December 1983, just before the end of the hearing, counsel indicated that an expert witness, a medical doctor, would be called to give evidence on behalf of the defence. On Monday, 12 December 1983, she stated, however, that the witness was not available. No other witnesses were called for the defence. According to the author, this amounts to a violation of article 14, paragraph 3(e), of the Covenant.

3.7 In the light of the above, article 6, paragraph 2, is said to have been violated, since 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 this provision.

3.8 The author submits that, during the interrogation on 9 March 1982, he was tortured by the police. He alleges that the officer who arrested him held him by the shirt in a choking position so that he was unable to reply to any of the questions. Later that day, he was taken to an office where, allegedly, he was "mobbed" by five or six police officers, who sprayed tear-gas in his eyes, ears and nostrils, and hit him with a stick. As a result, he submits, he could not see or hear well for a number of days, and was unable to drink for 17 days. He claims that he was denied medical treatment.

3.9 It is submitted that the execution of the author at this point in time would amount to a violation of article 7, because of the delays in adjudicating the case and the time spent on death row. In support of this

contention, it is submitted that the Privy Council, when dismissing the author's appeal, expressed its concern about the delays in the judicial proceedings in the case, and recommended that the death sentence be commuted. Furthermore, the author is said to have been subjected to cruel, inhuman and degrading treatment and punishment while being held in the death row section of St. Catherine District Prison, where the living conditions are said to be appalling. Finally, the mental anguish and anxiety resulting from prolonged detention on death row, exacerbated by the changing attitudes of the Jamaican authorities in carrying out executions, are said to constitute a separate violation of article 7.

3.10 As to the exhaustion of domestic remedies, the author concedes that he has not applied to the Supreme (Constitutional) Court of Jamaica for redress. He argues that a constitutional motion in the Supreme Court would inevitably fail, in the light of the precedent set by the Judicial Committee's decisions in DPP v. Nasralla [(1967) 2 ALL ER 161] and Riley et al. v. Attorney General of Jamaica [(1982) 2 ALL ER 469], 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. Since he claims unfair treatment under the law, and not that post-constitutional laws are unconstitutional, a constitutional motion would not be an effective remedy in his case. He further argues that even if it were accepted that a constitutional motion is a final remedy to be exhausted, it would not be available to him because of his lack of funds, the absence of legal aid for this purpose and the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis for the purpose.

State party's observations on admissibility and counsel's comments

4. By submission of 23 June 1993, the State party argued that the communication was inadmissible for failure to exhaust domestic remedies. In this context, the State party argued that it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, counsel reiterated that the constitutional motion was not an effective and available domestic remedy in the author's case. In this context, he refers to the Committee's jurisprudence that, in the absence of legal aid, a constitutional motion is not an available remedy. It was stated that the constitutionality of the execution of the death sentence cannot be brought before the Judicial Committee of the Privy Council without first exhausting domestic remedies through the Supreme (Constitutional) Court.

The Committee's decision on admissibility

6.1 At its 53rd session, the Committee considered the admissibility of the communication. It noted the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies. The Committee recalled its constant jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available.

As regards the State party's argument that a constitutional remedy was still open to the author, the Committee noted that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, the Committee also recalled that the State party has indicated on several occasions that no legal aid is made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy which needs to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2(b), from considering the communication.

6.2 The Committee considered that the author and his counsel had sufficiently substantiated for purposes of admissibility the claim that the trial against the author did not fulfil the requirements laid down in article 14 of the Covenant. The Committee found that the entering of nolle prosequi by the prosecution after the author had pleaded guilty to manslaughter and the publicity connected thereto may have affected the presumption of innocence in the author's case. The Committee also found that the judge's refusal to adjourn the trial after counsel had indicated that he was no longer willing to represent him may have affected the author's right to prepare his defence adequately and to obtain the attendance of witnesses on his behalf. Further, the Committee found that the delay in the judicial proceedings might raise issues under article 14, paragraphs 3(c) and 5, of the Covenant. The Committee considered that these issues needed to be examined on the merits.

6.3 The Committee considered that, in the absence of information provided by the State party, the author had sufficiently substantiated, for purposes of admissibility, his claim that he was subjected to ill-treatment upon arrest and subsequently denied medical treatment. This claim might raise issues under articles 7 and 10 of the Covenant, which needed to be examined on the merits.

6.4 The Committee next turned to the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant. While the Committee had taken due note of the judgment of the Privy Council in the case of Earl Pratt and Ivan Morgan (which the author has apparently not invoked in the domestic courts of Jamaica), it reiterated its prior jurisprudence that lengthy detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant. The Committee observed that the author had not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication was therefore deemed inadmissible under article 2 of the Optional Protocol.

Examination on the merits

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the

transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication. The deadline for submission of the State party's information and observations under article 4, paragraph 2, of the Optional Protocol expired on 1 November 1995. No additional information has been received from the State party, in spite of a reminder addressed to it on 2 August 1996. The Committee recalls that in accordance with article 4, paragraph 2, of the Optional Protocol, a State party must examine in good faith all the allegations brought against it, and provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the allegations submitted by the author, to the extent that they have been substantiated.

7.2 The author has claimed that his trial was unfair because the prosecution entered a nolle prosequi plea after the author had pleaded guilty to a charge of manslaughter. The author claims that the extent of media publicity given to his guilty plea negated his right to presumption of innocence and thus denied him the right to a fair trial. The Court of Appeal of Jamaica acknowledged the possibility of disadvantage to author at presenting his defence at the trial, but observed that "nothing shows that the convicting jury was aware of this". The entry of a nolle prosequi was found by the Jamaican courts and the Judicial Committee of the Privy Council to be legally permissible, as under Jamaican law the author had not been finally convicted until sentence was passed. The question for the Committee is not, however, whether it was lawful, but whether its use was compatible with the guarantees of fair trial enshrined in the Covenant in the particular circumstances of the case. Nolle prosequi is a procedure which allows the Director of Public Prosecutions to discontinue a criminal prosecution. The State party has argued that it may be used in the interests of justice and that it was used in the present case to prevent a miscarriage of justice. The Committee observes, however, that the Prosecutor in the instant case was fully aware of the circumstances of Mr. Richards' case and had agreed to accept his manslaughter plea. The nolle prosequi was used not to discontinue proceedings against the author but to enable a fresh prosecution against the author to be initiated immediately, on exactly the same charge in respect of which he had already entered a plea of guilty to manslaughter, a plea which had been accepted. Thus, its purpose and effect were to circumvent the consequences of that plea, which was entered in accordance with the law and practice of Jamaica. In the Committee's opinion, the resort to a nolle prosequi in such circumstances, and the initiation of a further charge against the author, was incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant.

7.3 With regards to the further claims of violations of article 14, paragraphs 3(b), (c) and (e) and 5, in respect of the author's inadequate representation, and undue delay in the proceedings, the Committee expresses its concern with the allegations made. However, the Committee is of the view that in the light of the original flaw in the author's trial as stated above, it need not make a finding on these issues.

7.4 With respect to the author's allegation regarding his ill-treatment upon arrest and the subsequent denial of medical treatment, the Committee notes that this was put before the jury and the jury rejected it, and moreover that the author chose to make an unsworn statement from the dock which prevented his cross-examination on the subject. In the circumstances of the present case, the Committee considers that there has been no violation of articles 7 and 10, paragraph 1, of the Covenant.

7.5 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 possible, 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 of the conviction and sentence by a higher tribunal". In the present case, since the final sentence of death was passed without having observed the requirements of article 14, concerning fair trial and presumption of innocence, it must be concluded that the right protected by article 6 of the Covenant has been violated.

8. 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 it disclose a violation of article 14, paragraph 1, and consequently article 6, of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the author is entitled to an effective remedy. The Committee notes that the State party has commuted the author's death sentence and considers that this constitutes sufficient remedy in this case.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the annual report to the General Assembly.]

A. Individual opinion by Nisuke Ando (dissenting)

I am unable to persuade myself to share the Committee's Views in the present case for the following reasons:

In my opinion, the purpose of a criminal trial is to ascertain what actually took place in the case at issue, that is, to find "true facts" of the case, on which conviction and sentence should be based. Of course, "true facts" as submitted by the defendant may differ from "true facts" as submitted by the prosecution, and since defendants are generally at a disadvantage compared to the prosecution, various procedural guarantees exist to secure a "fair trial". The requirement of equality of arms, rules of evidence, control of the proceedings by independent and impartial judges, deliberation and decision by neutral juries, and the system of appeals are all part of these guarantees.

In the present case, the author initially pleaded guilty to manslaughter, which was accepted by the prosecution. However, the Director of Public Prosecution, who has authority to discontinue any criminal proceedings at any stage before judgment is delivered, considered that the plea of guilty of manslaughter should not have been accepted and decided to discontinue proceedings in the case, in order to charge the author with murder on a fresh indictment (see paragraph 2.1). Consequently, a nolle prosequi was entered by the prosecution to discontinue the proceedings and the new indictment of murder was entered. In the subsequent trial, the author was found guilty of murder and sentenced to death. His appeal to the Court of Appeal of Jamaica was dismissed, and the Judicial Committee of the Privy Council, which granted the author special leave to appeal, heard his appeal and dismissed it (see paragraph 2.2).

In the Committee's view, the resort to a nolle prosequi in the present case, and the initiation of a further charge against the author, were incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant (see paragraph 7.2). However, in my opinion, fairness of the trial in the present case must not be determined solely on the basis of the use of nolle prosequi by the prosecution. Such determination requires careful appreciation of all the relevant circumstances, including the handling of a nolle prosequi by the judges concerned, those at first instance, at the Court of Appeal, and in the Judicial Committee of the Privy Council. It is my understanding that judges need not accept the prosecution's charge entered after its resort to a nolle prosequi. It is also my understanding that the independence and impartiality of judges are well established in Jamaica as well as in the United Kingdom. Considering all these circumstances and the very purpose of a criminal trial as stated above, I am unable to persuade myself to share the Committee's Views that the use of a nolle prosequi by the prosecution at the initial stage made the author's trial in its entirety an unfair one, in violation of article 14, paragraph 1, of the Covenant.

Nisuke Ando [signed]

[Original: English]

B. Individual opinion by David Kretzmer (dissenting)

Like my colleague Nisuke Ando, I am unable to agree with the Committee's view that the State party violated the author's right to a fair trial under article 14, paragraph 1, of the Covenant.

In December 1993, the author was tried for murder by a judge and jury under the regular proceedings of the Jamaican legal system. He was found guilty by the jury which heard and assessed all the evidence against him. The Committee does not point to any departure during this trial from the minimum guarantees specified in article 14, paragraph 3, of the Covenant. It bases its finding of a violation of article 14, paragraph 1, solely on the fact that the trial was held subsequent to nolle prosequi being entered by the Director of Public Prosecutions, after the author had pleaded guilty to a charge of manslaughter in the initial trial on the same charges.

While the lack of co-ordination between the prosecutor in the first trial, who consented to the plea of manslaughter, and the Director of Public Prosecutions, who entered the nolle prosequi, was clearly unfortunate, I cannot agree that this lack of co-ordination inevitably meant that the author was denied a "fair and public hearing by a competent, independent and impartial tribunal established by law" in the second trial. Had the defence in the second trial been of the opinion that the jury could not be independent and impartial since it would be influenced by press reports of the author's guilty plea in the first trial, it could have raised this point at the beginning of the trial, or made an attempt to challenge the jurors. It did neither. Furthermore, in his summing up to the jury, the judge made it quite clear to the jurors that they were to base their verdict solely on the evidence presented to them. There was strong evidence against the author and there is nothing to suggest that the jurors ignored the directions of the judge. I am therefore of the opinion that there is no adequate basis for finding a violation of article 14, paragraph 1, of the Covenant, in the present case.

David Kretzmer [signed]

[Original: English]