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on Civil
and Political Rights**

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

VIEWS

Communication No. 561/1993

Submitted by: Desmond Williams
[represented by Ms. K. Aston]

Victim: The author

State party: Jamaica

Date of communication: 30 June 1993 (initial submission)

Date of adoption of Views: 8 April 1997

On 8 April 1997, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 561/1993. 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. 561/1993

Submitted by: Desmond Williams
[represented by Ms. K. Aston]

Victim: The author

State party: Jamaica

Date of communication: 30 June 1993 (initial submission)

Date of decision on admissibility: 6 July 1995

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

Meeting on 8 April 1997,

Having concluded its consideration of communication No. 561/1993 submitted to the Human Rights Committee on behalf of Mr. Desmond Williams 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, Prafullachandra N. Bhagwati and Thomas Buergenthal, Mrs. Christine Chanet, Mr. Omran El Shafei, Mrs. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Messrs. Eckart Klein and David Kretzmer, Mrs. Cecilia Medina Quiroga, Mrs. Laure Moghaizel, Messrs. Fausto Pocar, Julio Prado Vallejo, Martin Scheinin, Danilo Türk and Maxwell Yalden.

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

1. The author of the communication is Desmond Williams, 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, paragraphs 1 and 3(a), (b), (c) and (e) of the International Covenant on Civil and Political Rights. He is represented by Ms. K. Aston.

The facts as submitted by the author

2.1 The author was taken into custody in June 1985 in connection with the murder, on 29 May 1985 in the Parish of St. Andrew, of Ernest Hart. On 9 July 1985, after having been identified by the deceased's son and wife, Rafael and Elaine Hart, at an identification parade, he was charged with Mr. Hart's murder. On 5 October 1987, he was found guilty as charged and sentenced to death.

2.2 The Court of Appeal dismissed Mr. Williams' appeal on 21 June 1988. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 23 July 1992. With this, it is submitted, all available domestic remedies have been exhausted. The offence for which the author was convicted has been classified a capital offence under the Offences against the Person (Amendment) Act 1992.

2.3 The prosecution's case rested on identification evidence. The deceased's son testified that on 29 May 1985, at about 2.30 a.m., he was awakened by his mother. Before he could leave his bed, he heard the door of the living room being kicked open, immediately followed by gunshots. He left his room and was confronted by two men, one armed with a knife ("the knifeman"), the other with a gun ("the gunman"). The "knifeman", whom he later identified as the author, ordered him to turn on the light and to hand over all their money. He told the men that the house was not connected to the electricity network and that money was likely to be found under his mother's mattress. Once in his parents' bedroom, he was ordered to lift the mattress; the "knifeman", who was standing next to him, lit a piece of paper with a match and searched for the money. Nothing was found, however, and the knifeman proceeded to search the room with the aid of the light of burning pieces of newspaper. After both men left, he went to the living room where he found his father lying in a pool of blood across the doorway. Rafael Hart further testified that he was with both men for about 13 minutes and that, aided by street lights shining into the living room and by the light of the burning newspaper, he had every opportunity to observe the author's face.

2.4 The deceased's wife testified that, alerted by a noise outside the house, she warned her husband and went to her son's bedroom; she then hid herself under the bed, from where she heard a peculiar voice demanding money from her son. Although she never saw the face of the author, she identified him by his high-pitched voice at the identification parade.

2.5 The post-mortem examination revealed that Mr. Hart had been shot three times with a light weapon, fired from a distance of at least 18 inches. The gunman was never traced by the police.

2.6 The author's defence was based on an alibi. Desmond Williams did not give evidence; his father testified on his behalf, stating that his son had been with him all the time and could not have committed the crime.

2.7 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. Nasralla¹ and Riley et al. v. Attorney General of Jamaica², in which 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 the author 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 remedy to be exhausted, it would not be available to him because of his lack of funds, the absence of legal aid for the purpose and the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis for the purpose.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, as no evidence was submitted that he ever held or fired the gun and that, accordingly, he should have been convicted of murder only if the jury was satisfied that he was a party to a common design in which it was intended to cause death or serious injury. Counsel refers to passages of the judge's summing-up to the jury, and submits that the trial judge failed to provide adequate direction to the jury regarding the degree of violence that must be contemplated by the intruders in order to justify a murder conviction. In that context, it is submitted that it took the jury less than 10 minutes to return its verdict; according to counsel, the short duration of the jury's deliberation indicates that it considered only the issue of whether the author was the knifeman and not whether, if he was the knifeman, he was party to a common design in which it was intended to cause death or serious injury.

3.2 Furthermore, counsel states that the author was not represented by a lawyer at the identification parade, in breach of rule 554A of the Jamaica Constabulary Force (Amendment) Rules 1977, as the police officer in charge of the parade was unaware of that requirement. The Court of Appeal dismissed that ground of appeal, following its earlier judgement, in R. v. Graham and Lewis (SCCA Nos. 158 and 159/81), that rules for the conduct of identification

¹(1967) 2 ALL ER 161.

²(1982) 2 ALL ER 469.

parades are not mandatory but procedural and that failure to observe those rules affect only the weight of evidence and not the validity of the parade. Counsel contests the Court of Appeal's findings and points out that the language used in rule 554A ("an attorney-at-law shall be present") is of an imperative nature; she submits that the identification parade was invalid, and that therefore the identification evidence should not have been admitted in the judicial proceedings against the author.³

3.3 As to violation of article 14, paragraph 3(a), it is submitted that the author was detained for six weeks before being charged with the offence for which he was subsequently convicted.

3.4 The author claims that he did not have adequate time and facilities for the preparation of his defence, in violation of article 14, paragraph 3(b). He states that he met with his legal representative only on the first day of the trial, after having been in custody for more than two years. The attorney advised him not to give evidence at the trial. The author complains that he had no opportunity to reflect upon this advice. He further complains that the attorney did not call his girlfriend, D.O., to testify on his behalf, in spite of his instructions to do so. In that context, he refers to an affidavit, dated 17 February 1993, signed by D.O., wherein she states that she was not called to court even though she was willing to give evidence on the author's behalf. She further states that on 29 May 1985, from 9.45 p.m. onwards, the author was with her at home.⁴ The author claims that the attorney's failure to call D.O. to testify violated his rights under article 14, paragraph 3(e). With regard to the preparation of his appeal, the author claims that he met with counsel for the appeal only once, shortly before the hearing.

3.5 The author points out that he was arrested on 9 July 1985 and tried from 1 to 5 October 1987, i.e., almost 27 months later. It is submitted that the delay in the hearing of the case was prejudicial to the author, in particular since the case against him was solely based on identification evidence. This is said to amount to a violation of article 14, paragraph 3(c), of the Covenant.

The State party's observations and author's comments thereon

4. By its submission of 6 April 1994, the State party argues that the communication is inadmissible because the author has failed to exhaust domestic remedies. It notes that the author may still apply for constitutional

³It appears, however, from the judgment of the Court of Appeal, that prior to the identification parade the author was asked whether he had a lawyer whom he would have wished to be present at the parade and that the author answered in the negative. A justice of the peace and the author's father were present at the parade.

⁴However, it is clear that the crime had occurred in the early morning hours of 29 May 1985.

redress; in that context it observes that the rights invoked by the author and protected by article 14, paragraphs 1 and 3(a), (b), (c) and (e), are coterminous with sections 20(1) and (6)(a), (b) and (d) of the Jamaican Constitution. Pursuant to section 25 of the Constitution, the author may seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In her comments, dated 3 February 1995, author's counsel states that since legal aid is not made available for constitutional motions, a constitutional motion does not constitute an effective remedy in the author's case.

The Committee's admissibility decision

6.1 During its fifty-fourth session, the Committee considered the admissibility of the communication. It noted the State party's argument that a constitutional remedy was still open to the author and recalled that the Supreme Court of Jamaica had allowed some applications for constitutional redress in respect of breaches of fundamental rights after criminal appeals in those cases had been dismissed. The Committee recalled, however, that the State party had indicated that legal aid is not made available for constitutional motions; in the absence of legal aid, a constitutional motion could not be deemed to constitute an available remedy to an indigent convict and need not be exhausted for purposes of the Optional Protocol. Accordingly, article 5, paragraph 2(b), of the Protocol did not bar the Committee from considering the case.

6.2 As to the author's allegations relating to evaluation of evidence and the instructions given by the judge to the jury, the Committee recalled its established jurisprudence, namely that in principle, it is for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence in any given case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that those instructions were clearly arbitrary or amounted to a denial of justice. As no such irregularities were discernible in the author's case, the Committee deemed that part of the case inadmissible under article 3 of the Optional Protocol.

6.3 The Committee considered that the author and his counsel had substantiated the remaining claims, which appeared to raise issues under article 14 of the Covenant. On 6 July 1995, therefore, the communication was declared admissible under article 14 of the Covenant.

State party's observations on the merits

7.1 By its submission dated 18 October 1995, the State party provides observations on the merits of the author's allegations. With respect to the allegation of a breach of article 14, paragraph 3(a), because Mr. Williams was detained for six weeks before he was informed of the charges against him, the

State party promises an investigation. By 1 March 1997, however, the State party had not informed the Committee of the results, if any, of its inquiry.

7.2 The State party refutes the allegation that there was a violation of article 14, paragraphs 3(b) and (e), because the author met with his lawyer only on the first day of the trial and because his representative did not call a potential alibi witness. The State party notes that if counsel met with Mr. Williams only on the opening day of the trial, she could and should have sought an adjournment; there is no evidence that she did so. Her decision not to call D.O. as a witness was a matter of judgement relating to the best conduct of the defence, something for which the State party cannot be held accountable. In this context, it is submitted that once the State party has provided the accused with competent counsel and has not, by act or by omission, obstructed counsel in the discharge of his duties, then the issue of how counsel conducts the defence is not the State party's responsibility. In this respect there is no difference between the State's responsibility for the conduct of privately retained counsel and its responsibility for the conduct of a legal aid representative.

7.3 According to the State party, there can be no question of a violation of article 14, paragraph 3(c), as a result of a delay of more than two years between arrest and trial: a preliminary inquiry was held during that time, and there is no evidence that the delay between arrest and trial prejudiced the author's interests.

8. Author's counsel was provided an opportunity to comment on the State party's observations. No comments have been received.

Examination on the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

9.2 Article 14, paragraph 3(a), gives the right to everyone charged with a criminal offence to be informed "promptly and in detail in a language which he understands of the nature and cause of the charge against him". The author contends that he was detained for six weeks before he was charged with the offence for which he was later convicted. For the purposes of article 14, paragraph 3(a), detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused⁵. While the file does not reveal on what specific date the preliminary hearing in the case took place, it transpires from the material before the Committee that Mr. Williams

⁵See the Committee's General Comment 13[21] of 12 April 1984, paragraph 8.

has been informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started. In the circumstances of the case, the Committee cannot conclude that Mr Williams was not informed of the charges against him promptly and in accordance with the requirements of article 14, paragraph 3(a), of the Covenant.

9.3 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the guarantee of a fair trial and an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defence. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. The author also alleges that he could not obtain the attendance of one alibi witness. The Committee notes, however, that the material before it does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence had been inadequate. If counsel or the author felt inadequately prepared, it was incumbent upon them to request an adjournment. Furthermore, there is no indication that counsel's decision not to call D.O. as a witness was not based on the exercise of her professional judgement or that, if a request to call D.O. to testify had been made, the judge would have disallowed it. In those circumstances, there is no basis for finding a violation of article 14, paragraphs 3(b) and (e).

9.4 The author has claimed a violation of article 14, paragraph 3(c), because of "undue delays" in the criminal proceedings and a delay exceeding two years between arrest and trial. The State party has, in its submission on the merits, simply argued that a preliminary inquiry was held during the period of pre-trial detention, and that there is no evidence that the delay was prejudicial to the author. By rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention. The Committee concludes that in the circumstances of the instant case, there has been a violation of article 14, paragraph 3(c).

10. 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 3(c), of the Covenant.

11. The Committee is of the view that Mr. Desmond Williams is entitled, under article 2, paragraph 3(a), of the Covenant, to an appropriate remedy, including, in any event, the commutation of the death sentence.

12. Bearing in mind that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[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.]