Beresford Whyte v. Jamaica, Communication No. 732/1997, U.N. Doc. CCPR/C/63/D/732/1997 (1998).

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VIEWS

Communication N 732/1997

Submitted by: Beresford Whyte (represented by Ashurst Morris Crisp of London)

Alleged victim: The author

State party: Jamaica

Date of communication: 23 December 1996 (initial submission)

Date of adoption of Views 27 July 1998

On 27 July 1998, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 732/1997. The text of the Views is appended to the present document.

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

- Sixty-third session -

concerning

Communication N 732/1997**

Submitted by: Beresford Whyte (represented by Ashurst Morris Crisp of London)

Victim: The author

State party: Jamaica

Date of communication: 23 December 1996 (initial submission)

Date of admissibility decision: 5 July 1996

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

Meeting on 27 July 1998,

Having concluded its consideration of communication No.732/1997 submitted to the Human Rights Committee by Beresford Whyte, 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:

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

1. The author of the communication is Beresford Whyte, a Jamaican citizen, born on 24 July 1969,

currently detained on death row in St. Catherine's District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 7, 9, 10 and 14 of the Covenant. He is represented by Ashurst Morris Crisp, a law firm in London, England.

Facts as submitted by the author

2.1 In the night of 27 to 28 November 1990, Roy Cockburn, a shopkeeper, was attacked by two men, wearing masks, who broke into the room where he was sleeping. His twelve year old son Buntin witnessed the murder. One of the men grabbed the son and his mask fell off. The son recognised him as 'Billy'. After a brief exchange, the men took the money the father had brought with him from the store and left. The father died from his injuries later that day. Warrants for the author's arrest were issued on 28 November 1990.

2.2 The author, who is also known as 'Billy', was stopped by the police on 4 January 1992 and formally arrested on 13 January 1992. He was cautioned and informed that there was a warrant for his arrest for burglary, robbery and murder. He was tried before the Home Circuit Court, Kingston, on 16 and 17 February 1995. On 17 February 1995, he was found guilty of capital murder and sentenced to death. His appeal was heard on 26 September 1995, and dismissed by judgement of 23 October 1995. His application for special leave to appeal was dismissed on 14 November 1996. All available domestic remedies are said to have been exhausted, since the author does not have the means to file a constitutional motion, as the State party does not make any legal aid available for that purpose.

2.3 At trial, the author was identified by Buntin, who claimed that he had been able to recognise the author by means of a nearby street light, that he used to live nearby and that he knew him. The Prosecution also relied on an unsworn oral statement made by the author upon arrest, indicating that he got $13,000 and that he did not do it alone.

2.4 At trial, the author gave an unsworn statement in which he denied having been involved with the murder. The defence claimed that the identification by Buntin was mistaken.

The complaint

3.1 The author claims that he did not have a fair trial. In this connection, it is said that the judge during his summing-up introduced an issue which had not been raised during the hearing, namely whether Buntin's account of what happened was reality or the product of his imagination. It is stated that this was not the defence case, which was based on mistaken identity. According to counsel, because of this, the issue became one of credibility, not of accuracy.

3.2 Further, the author claims that he is a victim of a violation of article 14, paragraph 3(b)&(d), because of the way his defence was conducted at trial. It is submitted that at trial, the author was assigned senior and junior counsel. The author states that he never saw this counsel prior to the trial, and that he was represented by two other lawyers at the preliminary hearing. When the trial began on 16 February 1995, senior counsel was not present apparently because he had another hearing. Junior counsel, however, stated that she was prepared for the trial, subject to an hour to take some instructions. After the adjournment, the trial proceeded. The author states that junior counsel only had three and a half years experience, whereas it is usual in Jamaica that the defence of a capital murder case should not be undertaken by someone with less than five years of experience. He points out that the trial was unusually swift. The prosecution's case began at 12.09 am. and was completed at 3.32 pm. The Summing-up followed the next day, and the jury took only seventeen minutes to deliberate. The author claims that he was deprived of effective representation because junior counsel did not have enough experience and because no application was made for an adjournment to seek the services of senior counsel.

3.3 In this context, the author points out to mistakes made by his defence counsel. The author claims that junior counsel refused to request an adjournment in order to receive instructions. She failed to call him to give sworn evidence, and failed to investigate, interview or call defence witnesses who would have supported the author's alibi, in violation of article 14, paragraph 3(e). The author also claims that the cross-examination of witnesses was wholly inadequate, and that Buntin's evidence at trial was inconsistent with his previous statement to the police, with regard to the lighting and the masks, but that counsel failed to deal adequately with these inconsistencies. It is also stated that the dock identification of the author was inappropriate in view of the time lapse between the murder and the trial, and that counsel failed to object. Because of this, it is submitted, the Prosecution's case appeared stronger than it was and counsel failed to redress this by her closing speech, which lasted only seven minutes. It is argued that the cumulative effect of the errors committed by counsel render the conviction unsafe.

3.4 The author further claims that he is a victim of a violation of articles 7 and 10 of the Covenant. He states that he was beaten with a baton and strips of tyre by two police officers after his arrest, in order to make him sign a caution statement, which the author refused. He states that he lost three teeth in the process, but was never taken to a doctor. He states that he complained about this

to the judge at the preliminary hearing, but that nothing was done about it. He further claims that he was kept in a very small cell with seven other men while in pre-trial detention. He was not given a slop bucket and had to sleep on a piece of card board.

3.5 The author further states that he was only taken before a judge to be formally charged three weeks after his arrest. This is said to be in violation of articles 9, paragraphs 2 and 3, and 14, paragraph 3(a). He further states that he had no access to a lawyer for the first year of his pre-trial detention and that only then a lawyer was assigned to him. This is said to be in violation of article 9, paragraph 4.

State party's submission and author's comments

4.1 By submission of 10 March 1997, the State party addresses the merits of the communication, in order to expedite the examination of the case.

4.2 With regard to the author's claim that the judge's instructions to the jury were erroneous, the State party submits that a careful reading of the trial transcript shows that the author's claim is factually incorrect. Moreover, the State party refers to the Committee's jurisprudence that the judge's instructions are best left to the consideration of the Court of Appeal. It is submitted that there are no reasons to depart from this principle in the present case.

4.3 With regard to the conduct of the author's legal aid attorneys, the State party refers the Committee to the trial transcript which shows that the author's allegations are inadequate and that counsel did cross-examine the witnesses adequately. Moreover, the State party submits that the attorney who represented the author at the trial sworn an affidavit in which she denies that the author instructed her to call alibi evidence. The State party thus denies that there has been a breach of the Covenant for which it can be held responsible. It argues that it is the duty of the State to appoint competent counsel to represent the accused and that the manner in which counsel conducts the case is not the responsibility of the State. Furthermore, the State party maintains that counsel did conduct the defence competently.

4.4 With regard to the alleged beatings by the police, the State party notes that the author did not bring this fact to the attention of the Court and of his attorney. In the absence of any evidence to support the author's allegation, the State party denies that this incident occurred.

4.5 The State party denies that the author was not informed of the charges against him. It further submits that the author had legal representation at every stage of the proceedings against him, and that there is thus no substantiation that he was denied access to a lawyer.

4.6 In addition, the State party points out that it would have been open to the author to bring an application to the Governor- General under section 29(1) of the Judicature Act, to request him to use his discretion to refer the case back to the Court of Appeal. It explains that the question of legal aid for these applications is considered on a case by case basis. In the instant case, the author had indicated an intention to make such an application, and he had to do so before 3 January 1997. However, he failed to complete his application despite reminders sent to the Jamaica Council for Human Rights which was acting on his behalf. The State party notes therefore that the author has failed to exhaust domestic remedies, but does not pursue the point in the instant case, without prejudice to any future communications.

4.7 Finally, the State party takes issue with the way in which London counsel for the author questions the competence and integrity of the counsel who represented the author at trial in Jamaica.

5.1 In his comments, counsel for the author maintains that the trial transcript shows major shortcomings in the summing up. With regard to the State party's arguments that this issue is better left to the Court of Appeal, counsel submits that this was done, but that the Court found that this ground was without merit. Counsel argues that it is proper for the Committee to consider the issue in so far as it may constitute a breach of the Covenant.

5.2 With regard to counsel at trial, it is submitted that she was incompetent in that she failed to develop discrepancies that came up in cross- examination, and that she failed to examine the alleged admissions by the author to the police, the underlying robbery and the forensic evidence. With regard to the trial counsel's sworn statement, it is submitted that it shows that she refused to seek an adjournment, because in her opinion, it was not necessary for the preparation of the defence and she saw it as a malingering tactic. According to the author's present counsel, no competent counsel could have refused to ask for an adjournment on behalf of their client. He further challenges the credibility of the sworn statement. Finally, he invites the State party to show how it fulfilled its duty to appoint competent counsel in the instant case. It is reiterated that the practice in Jamaica is not to appoint any counsel in a murder case with less than five years experience and that the author's counsel at trial had no more than three and a half years of

experience.

5.3 With regard to the alleged beatings by the police, it is submitted that the author brought this to the attention of the judge at the preliminary hearing but that no action was taken.

5.4 Counsel reiterates that the author was not informed in detail of the charges against him and that if he was informed at all, that this was insufficient to comply with article 9, paragraph 2, of the Covenant. With regard to access to counsel, it is submitted that the State party has not sufficiently investigated the allegations and that its denial is too general in character.

6.1 In a further submission, dated 22 December 1997, counsel for the author submits that the author has obtained new evidence which, if place before the jury at trial, would have cast significant doubt on the credibility of the prosecution's key witness and the strength of the identification evidence. The evidence consists of two photographs purported to show that no street light was placed outside Cockburn's house at the time of the murder. Counsel recalls that at trial, the street light was established as the only light source by which the witness had identified the author. He adds that the absence of a street light has been confirmed by a member of the author's family. Counsel argues that if he had had sufficient access to his legal representatives before the trial, this evidence could have been investigated and brought before the court. The inability to do so is said to constitute a violation of article 14, paragraph 3(b).

6.2 Counsel further claims that the author is allergic to the dust and the lime paint on the walls of St. Catherine prison, which provokes burning of his eyes and asthma. In May 1997, the author was referred by the prison doctor to a specialist who indicated that his eyes required urgent treatment. However, the author has since not been able to see the specialist for lack of manpower in the prison.

6.3 Counsel further claims that on 5 March 1997, the author was beaten and his belongings burned following an escape attempt by four other death row prisoners. He and other inmates were allegedly beaten for one hour and thirty minutes by warders using clubs. Despite his request, the author was not taken to a hospital afterwards, although he was bruised and had a wound which bled profusely.(1) It is alleged that the prison doctor confirmed that the violence used by the warders was excessive and unnecessary. On 7 March the author was beaten again and punched in the face, after he had pointed out the warder who had burned his belongings. It is submitted that the author now lives in a constant fear of being beaten. In substantiation of his fear, reference is made to other incidents in the prison, such as the riots between 20 and 23 August 1997, during which sixteen

prisoners died.

6.4 Counsel also submits that the conditions of detention are inhumane and degrading. It is submitted that there are no toilet facilities and no real bathroom facilities on death row. In order to wash, prisoners obtain buckets of water. The wash room has no door and the washing can thus be observed by all passers by. The pit in which toilet buckets are being emptied is next to the author's cell. It is foul smelling, infested and unhygienic. The food is said to be almost inedible and provided irregularly. As a result, the author suffers vomiting two or three times a week, sometimes mixed with blood. It is stated that he does not get more than one litre water a day, and that, following the incident of 5 March 1997, he is now limited to twenty to forty five minutes per day outside his cell. It is said that the author's cell is small (9 by 6 feet), dark and badly ventilated.

6.5 Counsel notes that the Governor- General of Jamaica can exercise the prerogative of mercy for anyone sentenced to death. According to counsel, the criteria the Governor- General uses are unclear. In this connection, it is submitted that he always exercises his prerogative of mercy for women condemned to death in Jamaica, whereas mercy has been shown rarely in respect of men. This is said to constitute a violation of article 3 of the Covenant(2).

6.6 Counsel also invokes a violation of article 17 of the Covenant, since during the incident of 5 March 1997, his personal belongings were burned on the instructions of the commissioner. These belongings included his legal documents, his mattress, personal letters, clothes and toiletries. According to counsel, the author was told that he would have to pay a warder in order to send letters.

6.7 Counsel also states that he sent a newset of legal documents to the author via the Jamaica Council for Human Rights. These documents were taken to prison and it was asked that they be passed to the author. According to counsel, this never happened. A second set of documents were then directly sent to prison and were received.

6.8 Finally, counsel claims that no rehabilitation programme has been undertaken in respect of the author or in respect of any other prisoner on death row and that this is in violation of article 10, paragraph 3.

Facts and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that the State party has forwarded comments on the merits of the communication so as to expedite the procedure and that it has not challenged the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met.

7.4 The author has claimed that he was denied access to a lawyer for the first year of his detention, since no lawyer was assigned to represent him. The State party has stated that the author had legal representation at every stage of the proceedings. The Committee notes that it does not appear from the information before it that the author had requested to see a lawyer and that this was refused, nor has the author claimed that he had no legal repesentation at the preliminary hearing. The Committee considers therefore that the author has failed to substantiate his claim, for purposes of admissibility, and that the claim is inadmissible under article 2 of the Optional Protocol.

7.5 The author has claimed that he was beaten by two police officers in order to make him sign a confession statement, which he refused. He states that he mentioned this to the judge at the preliminary hearing, but that no action was taken. The Committee considers that in view of the fact that this claim was raised neither at the trial nor in any other appropriate domestic proceeding, the author has failed to exhaust all domestic remedies available to him. This part of the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.6 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee but for appellate courts of States parties to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions were manifestly arbitrary or

amounted to a denial of justice. The Committee notes that the author's submissions in relation to his claim do not indicate that the trial was manifestly tainted by arbitrariness or amounted to a denial of justice. Accordingly, he has failed to substantiate his claim, for purposes of admissibility, and this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that counsel has failed to substantiate, for purposes of admissibility, his claim under article 26 of the Covenant in respect of the granting of pardon by the Governor-General, his claim under article 17, and his claim under article 10, paragraph 3. These claims are therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee considers that the author's remaining claims are admissible and proceeds, without further delay, to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

9.1 The author has alleged that he was not charged until three weeks after his arrest, when he was first brought before a judge. The Committee notes that the State party has denied that he was not promptly informed of the charges against him, but has not refuted that there was a delay of three weeks in bringing him before a judge. The Committee refers to its General Comment on article 9(3) and its jurisprudence under the Optional Protocol, according to which delays in bringing an arrested person before a judge should not exceed a few days. A delay of three weeks cannot be deemed compatible with the requirements of article 9, paragraph 3. In this context, the Committee also considers that the author's pre-trial detention of three years constitutes, in the absence of adequate explanations from the State party or other justification discernible from the file, a violation of his right under article 9, paragraph 3, to be tried within a reasonable time or to be released and also amounts to a violation of article 14, paragraph 3(c).

9.2 The author has claimed that he was deprived of effective representation at the trial because he was represented by an inexperienced junior counsel who failed to follow his instructions and made mistakes in the presentation of the defence. The Committee notes that counsel was granted an adjournment at the beginning of the trial in order to take instructions from the author and that neither she nor the author requested additional time to prepare the defence. There is further no indication that counsel's decision not to call alibi witnesses nor to request the author to give sworn evidence was not made in the exercise of her professional judgement. In this context, the Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the

Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraphs 3(b), (d) and (e).

9.3 The State party has not contested the author's claim that during his pre-trial detention he was kept in a very small cell with seven other men, and that he had to sleep on a piece of cardboard. In the absence of a reply from the State party, the Committee finds that the conditions of pre-trial detention as described by the author constitute a violation of article 10, paragraph 1, of the Covenant.

9.4 Counsel has claimed that the author is allergic to dust and to the paint used in St. Catherine Prison and that his allergy provokes attacks of asthma and burning eyes, for which he does not receive any treatment. He has also described the conditions of detention on death row as inhumane and degrading. Finally, he has claimed that the author was beaten on 5 March 1997 and again on 7 March 1997, and that he did not receive medical attention for his injuries. The State party has not answered to any of these allegations. In the absence of any information from the State party, due weight must be given to the author's claims. The Committee considers that the treatment to which the author has been subjected and the conditions of detention described by him, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

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 articles 7, 9, paragraph 3, 10, paragraph 1, and 14, paragraph 3(c), of the International Covenant on Civil and Political Rights.

11. The Committee is of the view that the State party is under an obligation, under article 2, paragraph 3(a), of the Covenant, to provide Mr. Beresford Whyte with an effective remedy, including commutation and compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. 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 ninety 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 Committee's annual report to the General Assembly.]

Individual opinion by Ms. Cecilia Medina Quiroga (dissenting)

1. I regret to dissent from the majority decision with regard to paragraph 7.5 of these Views, where the Committee has declared inadmissible the complaint of Mr. Whyte that he was beaten by two police officers in order to make him sign a confession statement, which he refused. The reasons given by the Committee for this decision are that since the "claim was not raised at the trial nor in any other appropriate domestic proceeding", the author has failed to exhaust all domestic remedies available to him. It is clear that the matter was not raised during the trial because the author never signed a confession statement. As to other appropriate domestic remedies, it is my opinion that whenever there is an allegation of ill-treatment, it is for the State party to put in motion the procedure to investigate these types of violations, as has been said so often by this Committee. A further objection to the inadmissibility decision is based on the fact that the requirement of exhaustion of domestic remedies exists for the benefit of the State: international law always gives the State the possibility to deal first with the matter and correct any incompatibilities of any State organ's conduct with the international obligations of the State. This being the case, the State has to invoke the non-exhaustion of remedies when it finds that it should have been given the opportunity of examining the matter at a domestic level. If it does not do this, on the first occasion, it is to be understood that it has waived its right. In the present case, the State party indicated that it would address the merits of the communication in order to expedite consideration of the case (para 4.1), and proceeded to deal with the substance of this particular complaint denying that any incident of beatings had occurred (para 4.4), thereby granting competence to the Committee to deal with the merits of this particular complaint without domestic remedies - if any existed - having been exhausted. In this situation, it is my opinion that the Committee cannot base its inadmissibility decision on the failure to exhaust domestic remedies.

2. I join Mr. Scheinin's dissent with regard to the inadmissibility decision of the author's complaint under article 17 of the Covenant as stated in para 7.7 of these Views.

Cecilia Medina Quiroga (signed)

Individual opinion by Mr. Martin Scheinin (dissenting)

While I agree with the Views of the Committee as to the findings of violation and the remedy, I do believe that the claims referred to in paragraphs 7.4 and 7.5, as well as the claim related to article 17 mentioned in paragraph 7.7 should not have been declared inadmissible. In my opinion, these three claims are admissible and all indicate violations of the Covenant.

Ad para. 7.4. In relation to the author's claim of a violation of article 14 (fair trial) because he was denied access to a lawyer for the first year of his detention, I wish to refer, firstly, to the Committee's earlier case-law on the axiomatic necessity of proper legal representation at all stages of capital punishment cases (see, e.g., Frank Robinson v. Jamaica, Communication No. 233/1987, Carlton Reid v. Jamaica, Communication No. 250/1987, Aston Little v. Jamaica, Communication No. 283/1987, Leroy Simmonds v. Jamaica, Communication No. 338/1987, and Trevor Collins v. Jamaica, Communication No. 233/1987). Secondly, I wish to point out that the period to which the present claim relates is one of unlawful detention under article 9 of the Covenant, as is established in para. 9.1 of the Committee's Views. The violation of article 9 by holding a person in detention under a murder charge for a year before the commencement of the judicial proceedings related to this charge does not justify the failure to secure the assistance of a lawyer to him. As there was no other legitimate reason for the detention of the author during this period of time but the preparation of a trial against him, he should have been secured the assistance of a lawyer in order to prepare his defence.

Ad para. 7.5. As it is uncontested that the author raised at the preliminary hearing the issue of being beaten by the police after his arrest and as the State party has not provided information on any investigation in this matter, this claim should have been declared admissible under article 7. As the author never signed a confession statement, the question whether he was beaten in order to make him sign such a statement was of no material relevance for the actual trial. Consequently, the fact that the incident was not raised at trial should not be held against the author. In the absence of explanations from the State party, a violation of article 7 should have been established.

Ad para. 7.7. It may well be that counsel to the author has sought to prolong the consideration of

the case before the Committee by submitting additional claims at a rather late stage of the proceedings. Procedurally, however, the decision by the Committee to deal jointly with admissibility and merits must allow for new claims after the first submission by the State party as there is no admissibility decision that would define the scope of the case. In substance, the new allegations under article 17, raised in counsel's submission of 23 December 1997 represent an extremely serious matter. They refer to the burning by prison warders of the author's personal belongings and legal documents, including the trial transcript and correspondence with counsel and the Committee, as well as to the failure of the prison authorities to deliver to the author a new set of documents sent to him by counsel. The legitimate aspiration of the Committee to deal with death row cases in an expeditious manner does not justify leaving even the slightest impression that the Committee would take lightly such barbaric action as these allegations describe. If the Committee felt that the failure of the State party to even comment counsel's new submission constituted an obstacle to proceeding to the merits of this new allegation, this part of the submission should have been registered as a new communication instead of declaring it inadmissible.

Martin Scheinin (signed)