HTB v Canada, Admissibility, UN Doc CCPR/C/49/D/534/1993, IHRL 2310 (UNHRC 1993), 19th October 1993, Human Rights Committee [UNHRC]

Date: 19 October 1993
Content type: International Court Decisions
Jurisdiction: United Nations Human Rights Committee [UNHRC]

Citation(s): UN Doc CCPR/C/49/D/534/1993 (Official Case No)
IHRL 2310 (UNHRC 1993) (OUP reference)
Product: Oxford Reports on International Law [ORIL]
Module: International Human Rights Law [IHRL]

Parties: HTB (Canada [ca])
Canada

Judges/Arbitrators: Francisco José Aguilar Urbina; Nisuke Ando; Marco Tulio Bruni Celli; Christine Chanet; Vojin Dimitrijevic; Omran El Shafei; Elizabeth Evatt; Laurel B Francis; Kurt Herndl; Rosalyn Higgins; Rajsoomer Lallah; Andreas V Mavrommatis; Birame Ndiaye; Fausto Pocar; Julio Prado Vallejo; Waleed Sadi; Bertil Wennergren

Procedural Stage: Admissibility

Subject(s):

Right to fair trial — International courts and tribunals, admissibility — International courts and tribunals, admissibility of claims

Core Issue(s):

Whether a person was entitled to introduce new evidence at an appeal which he chose not to introduce at the initial trial, under the right to appeal in Article 14(5) of the International Covenant on Civil and Political Rights.

Facts

F1 On 13 February 1986, HTB was tried and convicted of murder and sentenced to 25 years' imprisonment without the possibility of parole. His appeals failed.

F2 During the proceedings before the Court of Appeal, his new lawyer was not permitted to introduce new evidence attesting to HTB's alleged fragile mental state.

F3 HTB argued that under Section 16(1) of the Criminal Code (Canada), an individual could not be held liable for any criminal offence if committed while that person was insane. He submitted that the failure by the appellate courts to consider his complaint of insanity resulted in his unlawful detention in violation of Article 9 of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR'), and denied his right to a fair trial under Article 14 of the ICCPR.

Held

H1 The defence of insanity was available to HTB in his initial trial, but it was not used. (paragraph 4.3)

H2 Canadian law prohibited the introduction of new evidence on appeal which was available at first instance. (paragraph 4.3)

H3 The communication was inadmissible under Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976. (paragraph 5)

Date of Report: 30 November 2009

Reporter(s): Alexander Pung; Castan Centre for Human Rights Law

Analysis

A1 The right to appeal one's criminal sentence in Article 14(5) of the ICCPR does not entitle one to an entirely new trial, or a hearing *de novo*. One is only entitled to have the facts and law from the first trial reviewed (see, eg, *Domukovsky and ors v Georgia*, UN Doc CCPR/C/62/D/623-624/1995; UN Doc CCPR/C/62/D/626-627/1995). One is not entitled to introduce fresh evidence, which one chose not to introduce at first instance. See also *Berry v Jamaica*, UN Doc CCPR/C/50/D/330/1988.

Date of Analysis: 18 February 2010
Analysis by: Sarah Joseph; Castan Centre for Human Rights Law

Instruments cited in the full text of this decision:

International

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 9, 14

Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 2, 3

Rules of Procedure, UN Doc CCPR/C/3/Rev.2, Human Rights Committee, 1989, Rule 87

Domestic

Criminal Code (Canada), Section 16(1)

Decision - full text

Decision on admissibility

1 . The author of the communication, dated 5 January 1993, is H.T.B., a citizen of Canada, born in 1939 in Labiau, East Prussia, currently serving a sentence of 25 years' imprisonment in Kingston penitentiary. He claims to be a victim of a violation of articles 9 and 14 of the International Covenant on Civil and Political Rights by Canada. He is represented by counsel.

The facts as presented by the author:

2.1 The author was convicted by jury on 13 February 1986 in the court in the city of St. Catherines and sentenced to 25 years of imprisonment without chance of parole for the first degree murder of his wife Hanna. His appeal before the Court of Appeal for Ontario was dismissed on 13 April 1989 and his application for leave to appeal to the Supreme Court of Canada was dismissed on 5 October 1989. On 2 March 1990, the author applied to the Minister of Justice seeking the mercy of the Crown for a direction for a new trial. The application was denied on 19 December 1991. It is submitted that domestic remedies have been exhausted herewith. Counsel states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

2.2 During the trial, the prosecution claimed that the murder of the author's wife was originally planned for the morning of 5 July 1984, and that on that morning, the author, en route to Toronto and accompanied by his wife, stopped behind a parked blue Nova on the shoulder of Highway 402. Two men, P.A. and T.A., were positioned near the car, while a third, G.F., remained out of sight. Shortly after the author stopped, a police officer pulled over to the scene and the plan could not be executed. In the early evening of 5 July 1984, the author, returning from Toronto with his wife and nephew, again stopped his car at the side of the road on Highway 402 and parked behind the aforementioned blue Nova. Immediately after stopping, G.F. approached from a ditch, put a gun to Hanna B.'s head and forced her out of the car, demanding money and jewelry. She was dragged over the guardrail and shot.

2.3 The case for the prosecution was that the author paid money to one B. for the murder of his wife, was involved in the planning of her murder and delivered her to the place where she was killed pursuant to the arrangement. The author, however, testified that he and his wife only stopped by chance at the place where she was subsequently murdered. His defence at the trial, which lasted over 75 days, was that he was not involved in any arrangement to murder his wife.

2.4 The defence of insanity was not raised during the trial, although the author's privately retained counsel adduced substantial evidence of psychiatric impairment. Expert testimony was led as to the victim's state of mind at the time during which the murder was planned and executed, but the expert witnesses were not called upon to render an opinion as to whether the author was legally insane at the time of the murder. In fact, the defence of insanity was expressly disavowed by trial counsel, so that the question of the author qualifying as insane under the terms of the Canadian Criminal Code was not considered by the jury. The trial defence was led on the grounds that the witnesses for the prosecution were not reliable and had their own motives to kill Hanna B., and that the author's testimony was reliable and should have left the jury with a reasonable doubt as to his guilt.

2.5 In the Court of Appeal for Ontario, new counsel not only upheld the author's original defence, but also brought a motion to adduce fresh evidence on the issue of insanity. Included with the Motion papers were the affidavits of seven mental health professionals which, according to counsel, clearly make a **prima facie** case for the issue of insanity. The author was diagnosed as suffering from a psychiatric condition known as Organic Personality Disorder, the essential feature being a marked change in a person's personality, due to a specific organic factor, in the author's

case, frontal brain damage resulting from a stroke in 1982. According to the experts' affidavits, the disorder made the author **inter alia** incapable of appreciating the nature and consequences of his words and actions.

2.6 The Court of Appeal for Ontario dismissed the application to adduce fresh evidence. It considered that the author should not be permitted to raise this evidence on appeal, since it had already been available to his counsel during the trial. It further found that relying on insanity as an alternative defence was not acceptable, since it led to a position completely inconsistent with that taken before the jury. The Court of Appeal concluded that it would not be in the interest of justice to admit the evidence, since, having regard to all the evidence led at trial, it was unlikely that the jury would have given effect to this alternative defence, taking into account that it would have been vigorously challenged.

The complaint:

3.1 The author claims that the failure by the Court of Appeal for Ontario, and subsequently by the Supreme Court of Canada, to consider the evidence of insanity by refusing to hear any argument that referred to that evidence resulted in the deprivation of his liberty without recognition of the procedures established by law, in violation of article 9 of the Covenant. In this context, the author refers to section 16(1) of the Canadian Criminal Code, which states that "No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane"; he contends that said article was violated in his case.

3.2 The author further claims that the failure of the Court of Appeal for Ontario to allow him to adduce fresh evidence with regard to his insanity violates his right to a fair trial and his right to have his conviction and sentence reviewed.

Issues and proceedings before the Committee:

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

4.2 As regards the author's claim under article 9 of the Covenant, the Committee notes that the author was arrested and detained upon a charge for murder and that he was consequently convicted and sentenced to imprisonment in accordance with Canadian law. The Committee considers that neither the facts of the case nor the author's allegations raise issues under article 9 of the Covenant. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

4.3 As regards the author's claim that his right to fair trial has been violated, because he was not allowed to produce evidence with regard to his defence of insanity before the Court of Appeal of Ontario, the Committee notes that this defence had already been available to the author during trial at first instance, but that he made a conscious decision not to use it. The Committee further notes that the author's conviction and sentence was reviewed by the Court of Appeal of Ontario, and that the Court decided not to admit the evidence relating to the defence of insanity, in accordance with Canadian law which prescribes that fresh evidence will generally not be admitted if it could have been adduced at trial. The Committee recalls thatit is in principle for the courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee has no evidence that the proceedings before the courts suffered from these defects. In the circumstances of the instant case, the Committee concludes that this part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

5 . The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 3 of the Optional Protocol;

(b) that this decision shall be communicated to the author and to his counsel, and, for information, to the State party.

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