

**Communication 596/16: Romy Goornah (represented by Dev Hurnam) v. The
Republic of Mauritius**

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a Complaint on 26 January 2016 from Mr. Dev Hurnam (the Complainant), brought on behalf of Mr. Romy Goornah (the Victim). The Complaint is submitted against the Republic of Mauritius (the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
2. The Complainant submits that the Victim is a Mauritian national who settled in South Africa and had business operations in Mauritius and South Africa. The Complainant further submits that on 24 December 2006, the Victim was arrested at the SSR International Airport in Mauritius on a charge of wilfully, unlawfully and knowingly importing 100 grams of cocaine, in a plastic bag wrapped with yellow tape and concealed in his purse, into Mauritius.
3. The Complainant avers that the Victim was brought before the District Magistrate of Grand Port, and he was remanded in custody pending completion of the inquiry. The Complainant further avers that the Victim co-operated fully with the police and gave his statement in which he denied that the purse was his and knowledge of the presence of the drugs.
4. The Complainant submits that, on the day of his arrest, the Victim repeatedly informed the police that the drugs may have been planted in his open and unlocked trolley bag. The Complainant further submits that the Victim invited the inquiring officers to view the CCT cameras at the airport, but the request was not attended to on the alleged ground that the cameras were not functional.
5. The Complainant submits that on 04 March 2007, the Director of Public Prosecutions preferred an indictment before the Supreme Court of Mauritius against the Victim. The Complainant further submits that, on 30 June 2008, the trial started in the Court of Special Assizes sitting with a presiding judge, but without a jury.
6. The Complainant avers that the Victim was brought before the Court of Special Assizes without a preliminary inquiry having been held. The proceedings were concluded on 02 July 2008.
7. The Complainant avers that, on 20 August 2008, the Court handed down the judgement finding the Victim guilty of the charge of wilfully, unlawfully and knowingly importing 100 grams of cocaine into Mauritius. The Complainant further avers that, having regard to the quantity of cocaine secured, the manner in which it

¹ The Republic of Mauritius ratified the African Charter on 19 June 1992

was concealed, the street value which exceeded one million Rupees, and all the circumstances of the case, the Court found the Victim a drug trafficker, in breach of the Dangerous Drugs Act.

8. The Complainant submits that the Court sentenced the Victim to 32 years penal servitude, less the 20 months spent in remand, and concluded that the Victim embarked on a bold enterprise of importing, by air from another country into Mauritius, a relatively substantial amount of cocaine.
9. The Complainant submits that the Victim appealed against the judgment in the Court of Criminal Appeal. On 25 January 2012, the Court of Criminal Appeal dismissed the appeal and ordered that the period spent by the Victim in custody, pending the hearing of the appeal, be deemed as served sentence.
10. The Complainant submits that the Victim then applied for special leave to appeal to the Judicial Committee of the Privy Council. The Complainant submits that the Judicial Committee of the Privy Council, which decides petitions for special leave, denied the application on the ground that there was "no serious risk that a serious miscarriage of justice had occurred in the case." The Complainant further submits that the Judicial Committee of the Privy Council is the final Court of Appeal for the Republic of Mauritius.
11. The Complainant submits that the Victim's right to a fair trial by an independent and impartial tribunal had been breached, as the conduct of the Presiding Judge throughout the trial process presented "an appearance of pre-judgment and premature formation of a concluded view adverse to the defence, exhibited by a perverse instinct of unfairness, bias and an infected mind."
12. The Complainant further submits that the Victim's right to a fair trial was also breached by the repeated judicial interventions of the trial judge, who took over a substantial part of the examination in chief, the cross-examination and even part of the re-examination from the Counsel's hands.
13. The Complainant avers that the breach of the independence and impartiality of the trial Court, presided over by a biased judge, further jeopardized the right to a fair trial.

Articles alleged to have been violated

14. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 6, 7 and other relevant articles of the African Charter.

Prayers

15. The Complainant requests the African Commission on Human and Peoples' Rights (the Commission) to direct the Respondent State to immediately release the Victim

pending determination of the complaint, in accordance with Rule 98 of the Commission's Rules of Procedure.

Procedure

16. The Secretariat received the Complaint on 26 January 2016, and acknowledged receipt on 05 February 2016. The Communication was seized during the 19th Extra-Ordinary Session of the Commission, which was held from 16 to 25 February 2016, in Banjul, The Gambia. However, the Commission did not grant the Complainant's request for provisional measures because the Complainant did not demonstrate an impending danger of irreparable harm to the Victim, as required under Rule 98(1) of the Commission's Rules of Procedure.
17. On 21 March 2016, the Complainant was informed of the Commission's decision to be seized of the matter and was requested to present evidence and arguments on admissibility within two months, while the Respondent State was informed of the seizure through a Note Verbale dated 21 March 2016.
18. On 06 June 2016 the Secretariat received the Complainant's submissions on Admissibility, which were transmitted to the Respondent State on 07 June 2016.
19. On 15 July 2016, the Respondent State's submissions on Admissibility were received by the Secretariat, and duly transmitted to the Complainant on 26 July 2016.
20. On 18 August 2016, the Secretariat received the Complainant's additional observations on admissibility, submitted in accordance with Rule 105(3) of the Commission's Rules of Procedure.
21. Letters were sent to the parties following the 59th and 60th Ordinary Sessions.

Admissibility

The Complainant's Submissions on Admissibility

22. The Complainant submits that the Complaint fulfils all the requirements of Article 56 of the African Charter.
23. Regarding Articles 56(1), (2) and (3), the Complainant states that these requirements have been met in the present Communication. Regarding Article 56(4), the Complainant submits that the Complaint is based on the entire judicial process, accordingly this criteria of Admissibility has been met.
24. With regard to the exhaustion of local remedies, the Complainant notes that appeals from the Court of Appeal and the Supreme Court are submitted to the Judicial Committee of the Privy Council (the Judicial Committee), in any civil or criminal

proceedings. The Complainant further notes that the Judicial Committee is the highest and final Court in the Republic of Mauritius. Accordingly having taken the case to the highest court of the land, the Complainant submits that the requirement in Article 56(5) has been met.

25. The Complainant further avers that the complaint was filed within a reasonable time after the exhaustion of local remedies.

The Respondent State's Submissions on Admissibility

26. The Respondent State submits that the Complainant has failed to comply with Articles 56(2) and (5) of the African Charter.
27. Regarding Article 56(2), the Respondent State submits that compatibility with the African Charter entails that any communication filed should prove prima facie violation of the specified Articles, failing which there is no Communication before the Commission.
28. The Respondent State refers to *Communication 306/05: Samuel T. Muzerengwa and 110 Others v. Zimbabwe*, in which the Commission held that *prima facie* violation of the provisions of the Charter is said to have occurred, "*when the facts presented in the complaint show that a human rights violation has likely occurred. The complaint should be one that compels the conclusion that a human rights violation has occurred is not contradicted or rebutted by the Respondent State.*"
29. The Respondent State submits that the complainant is using the Commission as a platform to re-litigate the matter which came to a rest following the pronouncement of the appellate court of the Supreme Court of Mauritius. The Respondent State further submits that the subject matter of the communication is strikingly similar to that submitted to the appellate court of the Supreme Court, and in its pronouncement the Supreme Court held that there was no merit in the application and the appeal was dismissed. Additionally, the Respondent State notes that the Victim petitioned the Judicial Committee of the Privy Council, however the appeal was refused.
30. Accordingly the Respondent State submits that the communication has failed to comply with the requirements of Article 56(2) of the African Charter.
31. With regards to Article 56(5) on the exhaustion of local remedies, the Respondent State submits that Mauritius enacted the Protection of Human Rights Act in 1998, which established a National Human Rights Commission.
32. The Respondent State submits that the complainant had an avenue under the Act to seek redress for the alleged violations of human rights.

33. The Respondent State further submits that, under section 4A of the Act, the Complainant may forward his grievances to the Human Rights Division of the National Human Rights Commission, which would conduct an enquiry as to whether there exists sufficient fresh and compelling evidence, and if so, the Human Rights Division will refer the matter to the Court of Criminal Appeal on the issue of conviction.
34. The Respondent State argues that the Commission assesses compliance with Article 56(5) as laid down in *Communication 147/95: Jawara v. The Gambia*, in which the Commission held that the local remedy referred to under Article 56(5) must be available, effective and sufficient, and further held that “a remedy is available if the petitioner can pursue it without impediment, deemed effective if it offers a prospect of success and finally sufficient if it is capable of redressing the complaint.”
35. The Respondent State submits that the local remedy available under section 4A of the Act meets all the above mentioned criteria, and given that there is no impediment for the complainant to apply to the Human Rights Division, which could conduct an enquiry and if of the view there exists sufficient evidence, the Human Rights Commission may refer the matter to Court of Criminal Appeal.
36. Accordingly the Respondent State submits that the communication has failed to satisfy Article 56(5) of the African Charter.

The Complainant’s Additional Submissions on Admissibility

37. The Complainant submits that the communication sufficiently and robustly sets out the human rights violations which have occurred, and concludes that there has been complete compliance with Article 56(2).
38. With regards to Article 56(5), the Complainant submits that the relevant section of the Protection of Human Rights Act provides the following: “Notwithstanding this Act, a convicted person, or his representative, may apply to the Human Rights Division, in such form as may be prescribed, for an enquiry to be conducted as to **whether there exists sufficient fresh and compelling evidence** that may satisfy the Human Rights Division that a reference should be made under section 19A(4) of the Criminal Appeal Act.”
39. The Complainant further submits that referral of a case to the National Human Rights Commission is “akin to that of executive remedies which are discretionary and non-judicial.”
40. Additionally, the Complainant submits that the Respondent State did not elaborate on the date when the amended section 4A of the Act came into operation, nor the date when the Members of the Commission were appointed. The Complainant submits that the amendment was introduced in the National Assembly in July 2013, and

“although it obtained Presidential assent in July 2013, it could not be operational as the other members were not timely appointed save in June 2014. (*sic*)”

41. The Complainant further submits that Section 4(A) sets out the “procedural” (*sic*) for a convicted person to apply to the Human Rights Division for an enquiry to be conducted as to whether there exists sufficient fresh and compelling evidence that may satisfy the Human Rights Division that a reference should be made under Section 19A(4) of the Criminal Appeal Act.
42. The Complainant submits that the question of “fresh and compelling evidence does not arise,” and further that all the human rights breaches were properly examined by the Court during the trial process.
43. The Complainant avers that he has exhausted all local remedies, as set out in earlier submissions.

The Commission’s Analysis on Admissibility

44. The Commission recalls that Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be Admissible, which apply conjunctively and cumulatively.²
45. In relation to the requirement in Article 56(1) of the African Charter, which provides that Communications should indicate their authors even if the latter requests anonymity, the Commission notes that the identity and the address of the Complainant has been provided, in addition to the name of the Victim being represented in the Communication. Accordingly the Commission finds that the Communication satisfies Article 56(1) of the African Charter.
46. In accordance with Article 56(2) of the African Charter, the Communication must show a *prima facie* case³ and must be compatible with both the AU Constitutive Act and the African Charter.
47. In this regard, the Commission notes that the essence of Article 56(2) is that the Commission considers communications if they are compatible with the African Charter. Compatibility requires that the alleged violation should relate to: a right recognized in the Charter (*compatibility ratione materiae*); an alleged violation by a State Party to the Charter (*compatibility ratione personae*); and events which occurred within a State Party after the Charter came into force (*compatibility ratione temporis*).⁴

² See Communication 304/2005 - FIDH & Others v Senegal (2006) ACHPR, para 38

³ See Communication 333/06 - Southern Africa Human Rights NGO Network & Others v. Tanzania (2010) ACHPR, para 51

⁴ Solomon T. Eboerah, ‘The Admissibility of Cases before The African Court on Human and Peoples’ Rights: Who Should do What?’ (2009) MLJ Vol.3, Issue 1, Pg.94

48. In the present Communication, the Commission notes that it is alleged that Articles 1, 2, 3, 4, 5, 6, 7 and other relevant articles of the African Charter have been violated. These alleged violations fall within the jurisdiction *rationae materiae* of the Commission. Further, the Respondent State is a State Party to the African Charter, accordingly the Communication falls within the jurisdiction *rationae personae* of the Commission.
49. Given that the Communication is not incompatible with either the AU Constitutive Act or the African Charter, and it indicates a prima facie violation of the African Charter, the Commission accordingly finds that the Communication satisfies Article 56(2) of the African Charter.
50. With respect to Article 56(3) of the African Charter, which provides that Communications shall be considered if they are not written in disparaging or insulting language directed at the State concerned and its institutions or to the Organization of African Unity, the Commission does not find any insulting or disparaging language in the Communication, and accordingly the Commission finds that Article 56(3) of the Charter has been complied with.
51. In relation to Article 56(4) of the African Charter, the Commission notes the Complainant's submission that the Communication includes the transcripts of the judicial process of the Victim's case in the Respondent State. In light of the fact that there is no evidence that any of the information provided is based exclusively on news disseminated through the media, the Commission consequently finds that the requirement of Article 56(4) has been met.
52. Article 56(5) of the African Charter requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.
53. In this regard, the Commission notes that it is a generally accepted principle in international law that before an international body is approached, the applicant must exhaust all available legal domestic remedies.⁵ The Commission further notes that in order to meet the exhaustion requirement, a victim must have obtained a final decision from the highest court to which recourse is available.⁶
54. In the present Communication, the Complainant has submitted that having taken the Victim's case to the highest court of the land, that is the Judicial Committee of the

⁵ Chidi Anselm Odinkalu and Camilla Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures,' Volume 20 Human Rights Quarterly 1998, Pg.256. *See also*, Communications 54/91 - Malawi African Association v. Mauritania; 61/91 - Amnesty International v. Mauritania; 98/93 - Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v. Mauritania; 164/97, 196/97 - Collectif des Veuves et Ayants-droit v. Mauritania; 210/98 Association Mauritanienne des Droits de l'Homme v. Mauritania

⁶ Communication Procedure, Information Sheet No.3, pg.6

Privy Council, the requirement to exhaust local remedies has been met. However, the Respondent State has submitted that the Complainant has not exhausted local remedies given that the Victim's case was not referred to the National Human Rights Commission (NHRC), which could conduct an inquiry and possibly refer the matter to the Court of Criminal Appeal.

55. Therefore, the issues for determination are: whether the Judicial Committee of the Privy Council is the highest court of the land; and whether the remedy available before the NHRC can be considered a judicial remedy?
56. In this regard, the Commission notes that, as provided in Article 81 of the Constitution of the Republic of Mauritius, appeals of decisions of the Court of Appeal or the Supreme Court are referred to the Judicial Committee of the Privy Council (the Judicial Committee).⁷ The Commission notes that Article 81 of the Constitution does not include a provision stating that decisions of the Judicial Committee are final. However the Commission notes that the Complainant submitted that the the Judicial Committee is the highest and final Court in the Republic of Mauritius, and this assertion was not contested by the Respondent State in its submissions on the admissibility of the Communication.
57. From the facts of the case and the information provided, the Commission notes that, following the decision of the Court of Appeal, the Victim appealed to the Judicial Committee; however this appeal was rejected. Accordingly, the facts of the case indicate that the Victim sought remedy from the highest and final Court in the country.
58. Regarding the Respondent State's submission that the Victim did not exhaust all available local remedies because the case was not referred to the NHRC, the Commission has previously held that human rights commissions do not fall under the category of judicial remedies which should be sought by Victims of human rights violations. In *Communication 221/98: Alfred Cudjoe v. Ghana*, the Commission held that "*the internal remedy to which Article 56(5) refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not. From the Commission's point of view, seizing the said Commission can [be] taken as preliminary amicable settlement and should, in principle, considering the employer's failure to react, be followed by an action before the law courts.*"⁸ Therefore local remedies which are essentially non-judicial, such as National Human Rights Commissions, are not the kind envisaged in relation to Article 56(5).⁹

⁷ "Judicial Committee" means the Judicial Committee of the Privy Council established by the Judicial Committee Act 1833 of the United Kingdom as from time to time amended by any Act of Parliament of the United Kingdom;" Article 111, Constitution of the Republic of Mauritius

⁸ Communication 221/98: Alfred B. Cudjoe v. Ghana (1999) ACHPR, para 14. *See also* Communication 313/05: Kenneth Good v. Botswana (2010) ACHPR, para 88

⁹ Henry Onoria, "The African Commission on Human and Peoples' Rights and the exhaustion of exhaustion of local remedies under the African Charter." 3 African Human Rights Law Journal, 2003, Pg.19

59. The Commission notes that, as provided in Article 4A(1) of the Protection of Human Rights Act, “a convicted person, or his representative, may apply to the Human Rights Division for an enquiry to be conducted as to whether there exists sufficient fresh and compelling evidence that may satisfy the Human Rights Division that a reference should be made under section 1 9A(4) of the Criminal Appeal Act.”¹⁰ Further, Article 4A(4) provides that, “On completion of the enquiry, the Human Rights Division may (a) grant the application and refer the conviction to the Court of Criminal Appeal in accordance with section 1 9A(4) of the Criminal Appeal Act; or (b) reject the application.”¹¹
60. From the above provisions, the Commission notes that the type of remedy which the NHRC is empowered to provide, is to conduct an enquiry into the case of a convicted person, and may decide to refer the case to the Court of Criminal Appeal.
61. Accordingly, the Commission observes that recourse to the NHRC would not provide a judicial remedy to the Victim. Rather, the National Human Rights Commission would be an avenue to refer a case to the Court of Criminal Appeal. In this regard, the Commission notes that the Victim had already appealed his case to a court of higher jurisdiction; that is the Judicial Committee.
62. In light of the above, the Commission finds that, by seeking an appeal in the Judicial Committee, which is referred to as the highest and final court in the Respondent State, the Victim fulfilled the requirement of exhausting local remedies, and therefore the criterion under Article 56(5) has been met.
63. Article 56(6) of the African Charter provides that the Commission shall consider Communications which “are submitted within a reasonable period from the time domestic remedies are exhausted or from the date the Commission is seized of the matter.” The Commission has previously noted that the requirement of timeliness in Article 56(6) of the Charter is dependent on the exhaustion of domestic remedies envisaged in Article 56(5) of the African Charter.¹²
64. From the documents submitted by the Complainant, the Commission notes that the Judicial Committee rendered its judgment on 19 November 2012, whereas the Complainant transmitted the complaint to the Commission on 03 January 2016; that is **three years, one month and fifteen days** later.
65. To determine whether the criterion under Article 56(6) has been met, the Commission needs to determine whether the period of ‘**three years, one month and fifteen days**’

¹⁰ The Protection of Human Rights Act, 1998, Act 19/1998, Proclaimed by [Proclamation No. 2 of 1999] 23rd February 1999

¹¹ *Id*

¹² Communication 322/2006 - *Tsikata v Ghana* (2006) ACHPR, para 37

between the exhaustion of local remedies and submission of the Complaint to the Commission qualifies as a reasonable time period.

66. In this regard, the Commission notes that the African Charter does not provide for what constitutes a reasonable period. In its jurisprudence, the Commission has held that; “Going by the practice of similar regional human rights instruments, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit.”¹³
67. In *Communication 310/05: Darfur Relief and Documentation Centre v. Sudan*, which was submitted to the Commission 2 years and 5 months after exhausting local remedies, the Commission reasoned that “there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period, and therefore declared the Communication inadmissible.”¹⁴
68. In the present Communication, the Complainant stated that Article 56(6) had been complied with, as noted in Paragraph 25 above, however did not provide any substantiating evidence for this assertion.
69. Relying on the above jurisprudence, the Commission holds that the period of ‘**three years, one month and fifteen days**’ of delay in the present Communication cannot be considered as a reasonable time period, in light of the fact that no explanation has been given by the Complainant justifying the delay. Accordingly, the Commission finds that the Communication does not fulfill Article 56(6) of the African Charter.
70. In relation to Article 56(7) of the African Charter, neither the Complainant nor the Respondent State provided submissions or evidence on whether the issues and claims in the Communication have been brought before, or settled by another international forum. However, in light of the fact that the Commission does not find evidence which indicates that the issues and claims have been brought before, or settled, by any other international forum. Accordingly, the Commission finds that Article 56(7) of the African Charter has been satisfied.

Decision of the African Commission on Admissibility

71. In view of the above, the African Commission on Human and Peoples’ Rights decides:
- i. To declare the Communication inadmissible for failure to comply with Article 56(6) of the African Charter;

¹³ Communication 308/05 Michael Majuru v. Zimbabwe (2008) ACHPR, para.109

¹⁴ Communication 310/05: Darfur Relief and Documentation Centre v. Sudan (2009) ACHPR, para.76

- ii. To notify its decision to the parties in accordance with Rule 107(3) of its Rules of Procedure.

Done in Dakar, Senegal, during the 22nd Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, from 29 July to 07 August 2017