IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Jurisdiction

BETWEEN: **FRED MANIAU**

Applicant

AND: **GOVERNOR-GENERAL**

AND: **ATTORNEY-GENERAL** *(representing the Solomon Islands Government and the Minister for Police, National Security and Justice)*

Respondents

At Honiara: 3 September, 6 October 2004

Administrative law-prerogative writs-mandamus-application for leave-principles to be considered when involving prerogative of mercy by Governor-General under the Constitution

Constitution, s. 45
Rules of Court O. 61, 61A

Criminal Law-lawful sentence of life imprisonment for murder- whether sentence unlawful where convict not afforded petition of mercy under Constitution- matters for consideration

Constitution, s. 45
Crown Proceedings Act (cap8)s.15

Administrative law- judicial review of executive act- whether available in relation to a prerogative of the Governor-General- relevant issues for consideration.

Constitution, s.45

Section 45 of the Constitution affords the Governor-General, acting on behalf of the Head of State, a power of mercy acting on advice of a Committee constituted for the purpose. This applicant, an aggrieved convict sentenced to life imprisonment for murder, comes to this court seeking leave to apply for orders of mandamus obliging the Governor-General to consider his petition for mercy which dated from September, 2003. It would seem the petition has not been addressed, and this court is asked to grant an order of mandamus directed to the Governor-General. Whether such orders are available in these circumstances of prerogative, is argued in the negative by the respondents, and the respondents also join issue with the applicants summons seeking this courts finding that such

failure by the Governor-General effectively denies the applicant his Constitutional rights thus invalidating the lawfulness of his sentence of life imprisonment. The facts appear from the judgment.

Held: (1) Whatever the terminology, the document is clearly one for consideration in terms of s.45. The absence of argument on procedural form dealing with petitions of this nature cannot detract from their nature which must enliven the power in s.45.

(2) In the Solomon Islands, the power is not delegated by the Head of State nor derived from common law, but springs from the express provision in the Constitution.

(3) Nowhere is there any evidence that the petition has been acknowledged, received, read, referred to a Committee, or just ignored. For this reason the question of fairness must arise. There is no point in presuming any process or actions on the Governor-Generals part which may give rise to a right of review, however couched, in this case.

(4) By specifically including this prerogative in s. 45 there is a positive obligation on the courts to recognize the continued right in an aggrieved convict to petition.

(5) There is an issue of *locus standi.* This applicant is a person directly affected by this apparent refusal to afford him this right to petition.

(6) It must follow, since there has been no response it would seem, to the petition, that mandamus can hardly lie against a decision maker when it isn't clear he even knows of the fact of the petition.

(7) Mandamus cannot succeed against the Governor-General as the Head of State's representative in the Solomon Island. For it is settled law that mandamus will not lie against an office of the Head of State, when s.45 clearly names the Governor-General as the representative or agent of the Head of State, or Crown.

(8) While the applicant is lawfully serving a sentence for murder, his right to petition in terms of s.45 is unaffected and that right cannot be avoided by mere administrative breakdown as appears here.
(*Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest*)
(When the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable).

(9) The express provision of s. 45 enshrined in the Constitution, gives legitimacy to the expectation that a petition of this nature will be looked at, so to that extent, at least, this court has power to declare obligations resting on the office of the Governor-General without impinging on the extent of the prerogative.

(10) While mandamus will not lie, as a matter of fairness, the alternate declaratory order may be used (Crown Proceedings Act, s. 18).

(11) The fact that he now brings proceedings under the Constitution to claim a supposed right to petition for the exercise of the prerogative of mercy is separate from and independent of the lawful sentence of imprisonment. In those circumstances he cannot be seen different in the sense that the Court of Appeal envisaged, for that at the time of sentence, he was not the subject of differentiation, but fell within the inclusive class of prisoners convicted of murder. It is irrelevant that he now claims to be excluded from that class able to petition the Governor-General for the fact of his sentence related to the offence of murder, not to any supposed right to petition. The failure to address his petition has given rise to his complaint to this court which is a separate issue to the constitutionality of his sentence.

(12) The court should make a declaration that the applicant's petition of the 11 September 2003 be treated as an application in terms of s.45 of the Constitution and accordingly it is appropriate that a Committee be appointed to advise the Governor-General in accordance with law.

(obiter) The most important issue which causes and will cause difficulties on a case by case basis, is identifying matters of a kind with which the court may deal when the prerogative comes for consideration since, just as separation of powers expects a demarcation, so must the prerogative remain with the Governor-General, and not be hedged about by argument over the court's ability to oversee, on *Wednesbury* principles, for instance yet this court has a part to play when constitutional questions arise for elucidation.

Cases cited:

Burt v- The Governor-General (1992) NZLR. 672

- *Kenilored-v-Attorney-General*; HC-CC21 of 1983 dated 11 April 1983
- *In the Application of Andrew Nori* (cc74 of 1989, dated 29 May 1989
- *Council of Civil Service Unions-v-Minister for Civil Service* (1985) 1A.C. 374
- *R-v-Secretary of State for the Home Department, ex parte Bentley* (1994) QB 349
- *de Freitas-v-Benny* (1976) AC 239
- *The King-v-The Governor of the State of South Australia* (1907) HCA 31

- *Gerea-v-Director of Public Prosecutions.* (1984) SILR 161

- *Associated Provincial Picture Houses v- Wednesbury Corporation* (1948) 1 KB 223.

Summons for Declarations and Motion for Leave for Mandamus

Kenneth Averre, the Public Solicitor for the applicant
Nathan Moshinski QC, the Solicitor-General for the respondents.

Brown J. The applicant is a prisoner serving a life sentence for murder, such sentence being mandatory in terms of punishment provided for under s. 200 of the Penal Code. He was sentenced on the 19 March 1987 but departed the prison when the Malaita Eagle Force opened the jail on the 18 June 2000. In September 2003, he was re-arrested and remains in prison serving his lawful sentence. He is aged in his middle 50's and says he is not of good health.

The Application under Rules of Court to oblige the Governor-General to consider a petition for mercy.

The issue here is, on its face, similar to that considered in *Burts case* although the factual circumstances are different. *(Burt v- The Governor-General* (1992) NZLR 672*)* It may simply be stated as to whether a refusal to exercise the prerogative of mercy is reviewable in this court.
The applicant accordingly seeks declarations in relation to the apparent refusal of the Governor-General pursuant to section 47 of the Constitution, to consider a petition for mercy. This may be a mistaken reference for s.47 deals with Composition of Parliament while s.45 speaks of the Prerogative of Mercy. He asks the Court to declare such apparent refusal unlawful and, further, by order of mandamus, oblige the Governor-General to exercise his powers in accordance with the terms of s. 45.
This application is brought pursuant to Order 61 of the High Court Rules, while the power to make declarations given by O27 r.4 is sufficiently wide to include this applicant's claim; he has a real interest in the issue.

Further, the applicant pursues a claim under Order 61A of the rules for a declaration that he is held contrary to his right to liberty as provided for by Ss.3, 5 of the Constitution, in the alternative, a declaration that the provision for mandatory life sentences are contrary to s.7 and a consequential order that he be released.

The Attorney-General's argument

The Solicitor-General who appeared for both the Governor-General and the Minister responsible for Police and Prisons, says leave to entertain the applicants claims should be refused.
In so far as the application for mandamus, to oblige the Governor-General to consider the prisoners' petition for mercy is concerned, that should be refused for mandamus cannot lie against the Head of State's representative (the Governor-General) in the Solomon Islands.

Leave in relation to the alleged breaches of the Constitution should also be refused because the application is brought more than one year from the time of the alleged contravention and there is nothing to explain the delay. Thus, this Court has no jurisdiction in terms of O. 61A(2)(i) of the Rules, to grant leave to bring the claim.

In the alternative, the sentence of imprisonment is authorized under s.200 of the Penal Code, authorized by law and thus cannot comprise a breach of Ss.3, 5 of the Constitution. In any event, a contention that the term imposed, life imprisonment, is a beach of s.7 of the Constitution, cannot be supported.

The respondents argue that mandamus cannot lie in the absence of a clear refusal to act, for no evidence has been led by the applicant that the Governor-General has not considered the Petition dated 11 September 2003. Yet again, mandamus cannot lie because the powers contained in Regulation 121 of the Prison Regulations are merely regulatory and therefore do not impose a duty to exercise a discretion to release a prisoner on licence.

The Facts.

Facts about the applicant are only found in his affidavit in support filed on the 8 July 2004. Annexed to his affidavit were various copy letters, memorandums and a petition by his parents and relatives in terms of a plea for clemency addressed to the Governor-General (the "petition"). There is no material in rebuttal.
The relevant material, however, for my consideration in this application cannot be material going to the issue of clemency or mercy, rather the narrow ones raised by Mr. Averre, ones principally of law
Particulars of the applicant.
Fred Maniau 56 years of age of Gwa'adoe Village, Fataleka District, Malaita Province, convicted on 19 March 1987 of murder contrary s.200 of

the Penal Code and sentenced in accordance with that provision, to imprisonment for life.

The Law in relation to these various applications

Leave in relation to mandamus.
The principle issue is whether or not this applicant is one directly affected by the inaction in this matter, and clearly as the prisoner incarcerated, he is. (See Daly CJ at 73 – *Kenilorea-v-Attorney-General*; HC-CC21 of 1983 dated 11 April 1983) Whether or not he surrendered himself or if he was rearrested, is not clear but is irrelevant for the purposes of these applications. The issue of capture or surrender would be relevant I suggest, for the decision maker on any application for clemency.

In the Application of Andrew Nori (cc74 of 1989, dated 29 May 1989) the former Chief Justice Ward had need to consider the "Royal Prerogative" in terms of the Constitution. The Chief Justice held that the terms of the Constitution defined the powers of the Head of State and consequently the appointment of the Governor-General cannot be considered as an exercise of the Royal Prerogative in common law terms but stems from the Supreme Law (the Constitution).

I must say I agree with the Chief Justice where he says, at 109
"I accept that as good authority that, as the powers of the Head of State in Solomon Islands are defined and covered by the Constitution, they are subject to the Constitution."

As an independent Sovereign State, it would be wrong to allow the continuing existence or belief in implicit prerogatives remaining with Her Majesty, prerogatives to be elicited outside the frame work of the Constitution by reference to conventions, customs and the common law. Since Independence, our law is governed by that Supreme Law, assisted by traditional canons of interpretation but not by uncritically adopting English precedent developing as it does, English common law. For English precedent can take no account of our Supreme Law which came into effect on 7 July 1978. There are no Royal Prerogatives, then remaining, lurking in legal thickets, bar those prerogatives vested in the Governor-General and set forth in the Constitution.

The other issue (apart from that of *locus standi*) considered by Chief Justice Daly in *Kenilorea's case*, was that of the validity or otherwise, of the power purportedly exercised by the Governor-General following advise of a Committee of the Prerogative of Mercy. In that earlier case, the Chief Justice found such Committee was not constituted in

accordance with s.45(2)&(3) of the Constitution and any such advice tainted the acts of the Governor-General to such an extent as to invalidate the Governor-Generals actions in consequence.

But here there is absolute quiet. There is no evidence of any such Committee constituted for these neither purposes, nor consequent act by the Governor-General.

A justiciable issue.
Mr. Averre says such apparent inaction in justiciable just as a refusal to address the petition of mercy is justiciable.

In support of this argument, Mr. Averre relied upon the decision of the Law Lords in *Council of Civil Service Unions-v-Minister for Civil Service* (1985) 1A.C. 374 where the Crown, by its Minister, issued instructions under Order in Council denying the right of particular employees to be unionists. The Lords held, in dismissing the appeal, that "executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law, or prerogative, rather than a Statutory source, and a Minister acting under a prerogative power might, depending on its subject matter be under the same duly to act fairly as in the case of action under a Statutory power." (*ibidem* 375).

The complaint in this case is that there appears to be no executive action and concomitant, no act, whether purportedly by prerogative or deriving from the terms of the Constitution, to review. For clearly this Court has jurisdiction in particular circumstances (as envisaged by the Lord Lords, *ibidem*) to enquire into such acts if they can be shown to affect the rights of any person under the Constitution (Constitution s.83).

While the power of the Minister (in *Council of Civil Service Unions, ibidem*) is apparently derived from a prerogative different from that here, the Lords reasoning, is to an extent, relevant, even though, since Independence, our laws are governed by our Constitution and Offices created afresh, (the Office of the Governor-General) derive their power and authority from the Supreme Law.

The same criticism can be extended to the case of *R-v-Secretary of State for the Home Department, ex parte Bentley* (1994) QB 349; for again Mr. Averre relies on the Divisional Courts findings on the extent of a Crown Prerogative, a prerogative which stems from English common law.

The Constitutional provision affording the Governor-General power is conveniently referred to as "the prerogative of mercy".

In New Zealand the prerogative is to be found in Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225). In England prerogative is;
"....*defined by a learned Constitutional writer as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown. In as much as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed."*
(Lord Dunedin; *In Attorney-General-v-De Keyser's Royal Hotel* (1920) A.C. 508 at 526)

So in those two instances, the prerogative is read and understood from the delegated power in the Letters Patent; in England, the power is a residual common law power deriving from the Sovereign's absolute powers, circumscribed by Parliament in manner addressed by statute.

In the Solomon Islands, the power is not delegated nor derived, but springs from the Constitution.

"Section 45-(1) The Governor-General may, in the name and on behalf of the Head of State –

(a) grant to any person convicted of any offence under the law of Solomon Islands a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or

(d) remit the whole or any part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) There shall be a Committee on the Prerogative of Mercy (in this section referred to as "the committee") which shall consist of the following members –

(a) a Chairman and two other persons, one of whom shall be a qualified medical practitioner and the other of whom shall be a social worker, appointed by the Governor-General in his own deliberate judgment; and

(b) one person nominated –

(i) by the Honiara city council, if the person whose case is being reviewed ordinarily resides in Honiara city; or

(ii) by the provincial assembly of a province, if such a person ordinarily resides in that province.

(3) .....

(4) .....

(5) In the exercise of the powers conferred upon him by sub-section (1) of this section, the Governor-General shall act in accordance with the advice of the Committee.

(6) .....

(7) ....."

There is no need, then for "convention on common law rule" to guide the exercise of the power of mercy found in s.45, rather the Governor-General acts on advice of the Committee in accordance with s.45(5).

The evidence of a petition for mercy

This is the typed document, addressed to the Governor-General darted 11 September 2003, and forms part of the affidavit of the applicant. It is of five typed pages and seeks on page 3 a pardon for this applicant. While there is material going to the issue of the prerogative of mercy after so long in jail, the expression "for pardon" used in the document, reflects the fact of the wish by these relatives for a remission of sentence, rather than a "pardon" for the murder. Whatever the terminology, the document is clearly one for consideration in terms of s.45. The absence of argument

on procedural form dealing with petitions of this nature cannot, in my view detract from their nature which must enliven the power in s.45.

The further argument of the applicant

Mr. Averre says it is clear the Governor-General has done nothing in response to this "petition" and this Court should by mandamus, require consideration of the petition as envisaged by the Constitution for this court is the only proper authority vested with power. He relied on the authority of *Bart-v-Governor-General* (1992) 3NZLR 672, where the NZ Court of Appeal had reason to consider the dismissal of proceedings began against the Governor-General for he had declined to exercise the prerogative. Such proceedings were attacked in two ways, firstly that the exercise of the prerogative of mercy is "not the exercise of statutory power within s.4 of the Judicature Amendment Act 1972" and secondly "the relief sought was not relief to which the plaintiff would be entitled in proceedings for mandamus, prohibition certiorari, declaration or injunction." (ibidem 675).

So to deal firstly with the statutory power aspect, I must say the Governor-General of New Zealand's powers do not reflect those of our Solomon Island Governor-General, for two reasons. The first mentioned Governors' powers are to be found in the NZ Crimes Act, s.406 which reflects a prerogative derived, as I have earlier said, from English common law and which is not particularized as it has been by our Constitution, s.45. The facts of that case, also sufficiently distinguishes it from the matter before me. In that case the Governor-General had declined to exercise his prerogative, and that was the issue which was sought to be made the subject of judicial review.
The NZ Court of Appeal found that the Governor-General's power, in the circumstances, was not that of a statutory power, but purely of prerogative and not then as such to attract the Courts power of administrative review of a statutory power specifically admitted by the Judicature Act 1972.

But that refusal to allow the appeal on the basis of absence of power to review by convention (relying on the strength of the Privy Council Judgment in *de Freitas-v-Benny* (1976) AC 239) and in the absence of a *statutory right of review* did not prevent the Court of Appeal from seeking another test enabling review.

It explored an avenue in a line of cases which addressed whether the subject matter of a decision (involving the prerogative) was justiciable on unsettled principles although not extending as far as *Wednesbury*

unreasonableness. (Associated Provincial Picture Houses v- Wednesbury Corporation (1948) 1 KB 223)

"As is well know, Sir William Wade is of the opinion, and in this he has the support of Lloyd LJ in R v Panel on Take-overseas and Mergers, ex parte Datafin Plc *)1987) QB 815, 848, that leading English cases have used the term prerogative loosely. He concedes, however, that in the case of passports (Everett's case) this has been useful: see the passages in his Administrative Law (6th ed, 1988) beginning at pp 240 and 391 respectively. It seems to us that the point about nomenclature is of no significance in the instant case. The prerogative of mercy is a prerogative power in the strictest sense of that term, for it is peculiar to the Crown and its exercise directly affects the rights of persons. On the other hand it would be inconsistent with the contemporary approach to say that, merely because it is a pure and strict prerogative power, its exercise or non-exercise must be immune from curial challenge. There is nothing heterodox in asserting, as counsel for the appellant do, that the rule of law requires that challenge shall be permitted in so far as issues arise of a kind with which the Courts are competent to deal.*

On the basis of that changed general approach to the prerogative, Mr. Williams presented an argument that to the extent that it is based on justiciable considerations, such as the effect of new evidence, a refusal to exercise the prerogative of mercy is well capable of being reviewed by the Court. He acknowledged that if policy were a factor in a refusal – and it is not difficult to think of cases in which it has been a factor in the grant of a pardon – review would not extend so far. Hence a case-by-case approach would be necessary. He contended for a right in the petitioner to see a departmental or other report made to the Minister and materials collected in the course of the investigations into the petition; and to comment thereon. Despite the width of the allegation in the statement of claim, he was disposed not to contend for a right of review on grounds of unreasonableness or irrelevant considerations." (idibem 678)

Later the NZ Court of Appeal says

"The theme of the argument for the appellant was that the prerogative of mercy is now to be seen in a new perspective. No longer should it be treated purely as a matter of grace or absolute discretion for the sovereign. Instead it has become recognised as a safety net for persons who may have been wrongly convicted. Petitioners have legitimate expectations of fair treatment." (idibem 679)

It is this theme of legitimate expectation of fair treatment which has echoes here.

For while this applicant does not allege he has been wrongly convicted, he does in effect say he has been unfairly treated for his petition has not been afforded any procedural fairness. Nowhere is there any evidence that the petition has been acknowledged, received, read, referred to a Committee, or just ignored. And it is for this reason that the question of fairness must arise. There is no point in presuming any process or actions on the Governor-Generals part which may give rise to a right of review, however couched, in this case.

The NZ court raised pertinent issues. It should be remembered that the doctrine of separation of powers leaves with the courts, administration of justice in the broad sense. The Executive cannot interfere with the conduct of trials or the courts powers on sentence. An aggrieved person has a right of appeal from the sentencing court and that is his avenue of redress. Yet at common law, the Crown retained the right to this prerogative of mercy, a right dating to the time of the omnipotence of the Sovereign derived from God. The NZ court correctly describes the prerogative as peculiar to the Crown for it does run counter to the strict doctrine of separation of powers. There is consequently a necessity to directly address the conflict and our Constitution does so by virtue of s. 45. To ignore this particular prerogative without expressly addressing the issue in the Supreme Law would have given rise to doubt and confusion as to whether a prerogative could be implied in circumstances of Schedule 2 to the Constitution (adopted laws) in the face of the separation of powers doctrine underlying our Supreme Law. By specifically including this prerogative in s. 45 there is a positive obligation on the courts to recognize the continued right in an aggrieved convict to petition.

The next issue apparent in the judgment included above is that of *locus standi.* This applicant is a person directly affected by this apparent refusal to afford him this right to petition.

The most important issue which causes and will cause difficulties on a case by case basis, is identifying matters of a kind with which the court may deal when the prerogative comes for consideration since, just as separation of powers expects a demarcation, so must the prerogative remain with the Governor-General, and not be hedged about by argument over the court's ability to oversee, on *Wednesbury* principles, for instance yet this court may still have a part to play when constitutional questions arise for elucidation. But that argument can be left to another

day, for here I am satisfied, the very complaint or petition has gone no-where.
What is clear to my mind, with the express provision of s. 45 enshrined in the Constitution, is the legitimacy of the expectation that a petition of this nature will be looked at, so to that extent, at least, this court has power to declare obligations resting on the office of the Governor-General without impinging on the extent of the prerogative.

There is no issue, here, whether it be appropriate for this Court to review or not, an exercise or no exercise of prerogative, for on the facts, it hasn't come to that. Nothing appears to have happened in relation to the petition at all.
Tests then, of *justicability* in relation to the prerogative are premature in this case. It is not simply a refusal to exercise the prerogative, for that does not appear to have arisen, rather the applicant complains of no response. Arguments about the law, then are superfluous, although *Burts case* illustrates the relevant law.

The issue, as I see it, is whether this Court should entertain a complaint rooted in administrative morass, (if that be the reason for the deep silence) or at the other extreme, a cavalier dismissal of this petition. I need not make a finding on this scale, but clearly the applicant is aggrieved by the lack of response and equally as clearly from an objective view, it is unfair.

Leave for mandamus

It must follow, since there has been no response it would seem, to the petition, that mandamus can hardly lie against a decision maker when it isn't clear he even knows of the fact of the petition. Again, as the Solicitor-General says, mandamus cannot succeed against the Governor-General as the Head of State's representative in the Solomon Island. For it is settled law that mandamus will not lie against an office of the Head of State, when s.45 clearly names the Governor-General as the representative or agent of the Head of State, or Crown.

(The King-v-The Governor of the State of South Australia (1907) HCA 31)
(de Freitas-v-Benny; idibem)

In so far as the respondent's second argument is concerned, it is not for the applicant to prove a negative in these circumstances (that the Governor-General has not considered the petition) but that assertion begs this Courts intervention as a matter of fairness. For while the applicant is lawfully serving a sentence for murder, his right to petition in terms of s.45 is

unaffected and that right cannot be avoided by mere administrative breakdown as appears here.

(*Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest*)
(When the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable).

To enshrine then, a right to petition in the constitution presupposes an expectation that it will at least be considered, otherwise what use this supposed prerogative. What the Governor-General does in relation to any such petition is entirely a matter for his discretion, on advice of the Committee.

It is appropriate then, to exercise the wide ranging power of the Court to make declarations for pursuant to Order 58, this inherent power in the court should not be circumscribed by form, when the whole argument about the courts powers to review actions or inactions of the Governor-General has been dealt with as it has here. While mandamus will not lie, as a matter of fairness, the alternate declaratory order may be used (Crown Proceedings Act, s. 18).

As best I could make of Mr. Averre's argument about the unconstitutionality of a mandatory life sentence in these circumstances, he appears to base the argument on the fact that no mechanism exists for those serving mandatory life sentences to petition, seeking the prerogative of mercy and consequently, as shown by this case, this applicant has been "excluded" from the generality of this class of convicts, murderers, for others have been and may reasonably expect to be, given the benefit of the prerogative of mercy under the Constitution.

This phraseology was used in *Gerea-v-Director of Public Prosecutions*. (1984) SILR 161 where the court of Appeal held:

> "3. that a mandatory fixed penalty for an offence was not unconstitutional as depriving the appellant a fair hearing <u>"provided that the penalty was general in its application and was directed to all citizens and not just particular</u> or named citizens <u>or a class of citizens."</u>

As I say, this applicant has suffered the lawful punishment common to all for murder, of life imprisonment.

The fact that he now brings proceedings under the Constitution to claim a supposed right to petition for the exercise of the prerogative of mercy is separate from and independent of the lawful sentence of imprisonment. In those circumstances he cannot be seen different in the sense that the Court of Appeal envisaged, for that at the time of sentence, he was not the subject of differentiation, but fell within the inclusive class of prisoners convicted of murder. It is irrelevant that he now claims to be excluded from that class able to petition the Governor-General for the fact of his sentence related to the offence of murder, not to any supposed right to petition. The failure to address his petition has given rise to his complaint to this court which is a separate issue to the constitutionality of his sentence.

Pratt JA said "In the ultimate, therefore, I am forced to the conclusion that there cannot be anything unconstitutional in the prescription by Parliament of mandatory life imprisonment in respect of an offence for which the present appellant has been convicted. The establishment of penalty is essentially a legislative matter and not a judicial one." (*Gerea's case*, per Pratt JA)

Clearly, then mandatory life sentences owe more to Parliament (for that is the source of law to be found in the Penal Code), than a finding perhaps in this court that this applicant has not been afforded fairness with respect to his petition.

This argument has no merit.

<u>The orders of this court are</u>
A declaration that the applicant's petition of the 11 September 2003 be treated as an application in terms of s.45 of the Constitution and accordingly that it is appropriate that a Committee be appointed to advise the Governor-General in accordance with law.
That those declarations sought in the notice of motion of the 8 July 2004 are refused and accordingly the originating summons of the 20 August 2004 is struck out.