IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (**Apaniai J/Faukona J**)
COURT FILE NUMBER:	Criminal Appeal Case No. CA. 9/ 2011 & CA.39/2011 – Appeal from High Court Criminal Case No. 43 of 1986)
DATE OF HEARING:	13 March 2012
DATE OF JUDGMENT:	23 March 2012
THE COURT:	Sir Robin Auld, President Sir Gordon Ward, JA Justice Glen Williams, JA
PARTIES:	**MANIORU & BOLAMI** Appellant **-v-** **REGINA** Respondent
ADVOCATES:	
Appellant 1:	Thomas Erego Manioru – (Mr Douglas Hou)
Appellant2	Morris Bolami - (Mr Andrew Nori)
Respondent:	Mr Ricky Iomea
KEY WORDS:	**Constitutionality of the mandatory Life Sentence for Murder.**
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JUDGMENT OF THE COURT

Thomas Erego Manioru & Morris Bolami

-v-

Regina

Introduction

1. These two appeals, each against a mandatory life sentence of imprisonment for murder, raise two common issues, namely whether the legislative imposition of such a sentence, pursuant to section 200 of the *Penal Code* of the Solomon Islands (Cap. 26), is unconstitutional in removing from a judge a discretion to determine the appropriate sentence in the individual circumstances of each case because:

1) section 200 is an unlawful interference with the doctrine of separation of powers enshrined in the Constitution; and/or

2) interferes with the right of a person to a fair hearing as to the appropriate sentence in the circumstances of the case, as provided by section 10(1) of the Constitution.

2. Section 200 of the *Penal Code*, which came into force in its present form in 1966, provides that anyone guilty of murder "shall be sentenced to imprisonment for life". Section 3 of the Penal Code, so far as material, provides that it is to be interpreted in accordance with the principles of legal interpretation obtaining in England.

3. The Constitution, which in its present form, came into being in 1978, and is set out in the Schedule to *The Solomon Islands Independence Order* of that year, provides in section 2 that it "is the supreme law of Solomon Islands and if any law is inconsistent with ... [it] that other law shall, to the extent of the inconsistency, be void". Both the pre-eminence of the Constitution over parliamentary legislation and its contemplation that the latter also has an important role in establishing laws of general and clear application in the public interest are underlined by section 59 of the Constitution, which provides that, subject to its provisions, "Parliament may make laws for the peace, order and good government of" the Islands.

The issues and submissions on the constitutionality of section 200 of the Penal Code

4. The first issue is, therefore, whether and what inconsistency there is between section 200 of the *Penal Code* and provisions of the Constitution. Mr. Douglas Hou

and Mr Andrew Nori for, respectively, Mr Manioru and Mr Bolami, submitted that section 200 is inconsistent with the following Constitutional provisions:

1) Section 10(1), which provides that any person charged with a criminal offence "shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law", which, they submitted, entitles a person convicted of murder to a judicial discretionary determination of his sentence according to the nature and gravity of his offence and his personal circumstances. To allow the *Penal Code's* mandatory life sentence to oust the discretionary sentencing function of the judiciary would, they maintained, be impermissible as a breach of the doctrine of separation of powers enshrined in the Constitution.

2) Section 77(1), which provides for a High Court with "unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or by Parliament", indicates, they submitted, the supremacy of the Judges over Parliament in all forensic proceedings, including sentencing.

3) Section 138, which preserves under the side-heading "Saving for jurisdiction of courts", the jurisdiction of the Judges in relation to any question whether a person or authority exercising constitutional functions has performed them "in accordance with ... [the] Constitution or any other law or should not perform those functions", is another indication, they submitted of the primacy of the Judges over Parliament in, among other matters, sentencing of offenders.

5. Mr Hou maintained that the Court should give effect to those claimed inconsistencies:

1) by declaring section 200 of the *Penal Code* to be void as inconsistent with the Constitution; and/or

2) by recourse to the liberal powers of construction given to the courts by Article 5(1) of the May 1978 Order in Council establishing the current Constitution, which provides that all existing laws at that date should have effect as if they had been made in pursuance of it and construed by the courts "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Solomon Islands Act 1978 and this Order", in short by giving the Judges a complete discretion as to the form and length of sentence for murder; or

3) by construing the provision for a mandatory life sentence in the light of its meaning in English criminal law, as provided by section 3 of the Penal Code, a reference to successive English statutory procedures for early release on licence of convicted murderers serving life sentences, now given expression in the power given to judges to set a "tariff" or minimum term for retribution and deterrence when imposing life sentences for murder, leaving for later determination by way of parole, how much longer, if, at all, should be served to protect the public and for the purpose of rehabilitation.

6. Mr Hou submitted that those issues of construction flow from, and are conditioned by, considerations of high constitutional principle and the right to a fair hearing as part of the Rule of Law, namely:

1) The doctrine of separation of powers in a sovereign democratic state – broadly exemplified here in the Constitution of the Solomon Islands, under which all three branches of government, the legislature, the executive and the judiciary, have separate and mutually exclusive powers and responsibilities, the judiciary alone having power to determine responsibility for, and in its discretion, punishment of, a crime – hence, Mr Hou submitted, section 138 of the Constitution;

2) The fundamental entitlement of those charged with crime to a fair hearing, which in its aspect of sentencing demands an exercise of judicial discretion fashioned to the individual circumstance of each offence and offender so as to avoid disproportionality and inhumane sentencing, a judicial responsibility that cannot be usurped by Parliament, as here, he submitted, by section 200 of the *Penal Code* – hence sections 10(1) and 77(1) of the Constitution.

7. Mr Nori focused his submissions on the supreme entitlement set out in section 10(1) of the Constitution to "a fair hearing by an independent and impartial court". He submitted that a mandatory sentence imposed by the legislative arm of government deprives a convicted person of the right to be heard in mitigation and disables a judge from exercising his discretion to sentence having regard to the individual circumstances of the case. However, as a preface to his further submissions, he accepted propositions in the Irish Supreme Court in *Deaton v AG & Revenue Commissioners* [1963] IR 170, and of this Court in *Gerea & Ors v R* [1984] SILR 161, that a legislative mandatory fixed penalty, provided it is general in application and directed to all citizens, is not an inroad on the independence of judges.

8. Mr Nori maintained nevertheless that such a provision would require liberal construction and, if necessary, modification, adaptation, qualification or exception, as provided by Article 5(1) of the Order in Council establishing the Constitution, to make it conform to the Constitution. Importantly in this context, it would have to conform to section 10(1) in its conferment of a right to a fair hearing on sentence, as well as conviction – an outcome not specifically put to, or considered by, the Court in *Gerea*. Conformity could be achieved, he suggested, by reading the words in section 200 of the *Penal Code*, "shall be sentenced to life imprisonment", as "shall be liable to be sentenced to life imprisonment" or "shall be sentenced to life imprisonment unless the Court considers that the circumstances of the case call for a lesser sentence".

9. So, on Mr Nori's approach, if correct, the Court has two options: 1) declare section 200 of the *Penal Code* unconstitutional for violation of section 10(1) of the Constitution; or 2) declare the mandatory life sentences imposed in the courts below as unconstitutional for depriving the appellants of their right to be heard in mitigation.

10. Mr. Ricky Iomea, for the Crown in both appeals, pointed to the clarity of section 200 of the *Penal Code* in providing that a person who is found guilty of murder "shall be" – not "shall be liable to be" - sentenced to life imprisonment. He challenged the notion that recourse to the general rules of construction in section 3 of the *Penal Code* would require or allow its interpretation in the latter sense or that there were any inconsistencies thrown up by sections 10(1), 77(1) or 138 calling for the Court to resort to the liberal powers of construction and/or adaptation available to it under Article 5(1) of the May 1978 Order in Council.

11. On the broader considerations of separation of power and the right to a fair hearing, Mr Iomea relied upon the judgment and decision of this Court in *Gerea*, adopting and applying the reasoning of Lord Diplock in *Hinds v The Queen* [1977] AC 195, at 226, namely that a mandatory fixed penalty for an offence, provided that it is of general application, does not amount to unconstitutional interference with the independence of the judiciary or deprive a convicted offender of a fair hearing.

Section 200 of the Penal Code as a breach of the Doctrine of Separation of Powers

12. The starting points for consideration of the inter-relationship of the mandatory provision in section 200 of the *Penal Code* and the right to a fair hearing under section 10(1) of the Constitution are sections 59(1), 77(1) and 138 of the Constitution, which provide:

> "59(1) Subject to the provisions of this Constitution, Parliament may make law for the peace, order and good government of Solomon Islands."

"77(1) There shall be a High Court for Solomon Islands which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or by Parliament."

138 "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution *or any other law* should not perform those functions." [the Court's italics]

13. Criminal sentencing policy and legislation implementing it are essentially within the province of Parliament in any democratic society as a means of securing the peace, order and good government of its citizens. The prime function of the criminal law and courts is the prevention or reduction of crime including a legislative sentencing regime for punishment, but also to deter and where necessary to prevent it by incarceration and rehabilitation. It is common for governments and legislatures to determine in the public interest how best, as a generality, to achieve those ends. Rightly or wrongly, governments and legislatures take the view, as here in the Solomon Islands, that very serious offences such as murder require uniformly severe punishment as a very public deterrent to, and hence a safeguard against, the taking of life. That is the prerogative of the people in democratic society acting through a legislature. The formulation and generality of statutory application of such policy is not a matter for judges, nor is emasculation of it on a piecemeal basis by the exercise of discretion based on individual circumstances unless expressly provided by statute.

14. This is a common-place and necessary acknowledgement in jurisdictions following the Westminster constitutional model – and, no doubt, even in Montesqieu's France - that the notion of separation of powers is a metaphysical construct that has to make concessions to the practicalities of give and take by the three arms of government in their shared responsibility for overall good governance. In different and necessarily complementary ways they all intrude on each other's contribution to the administration of justice.

15. Mandatory life sentences are not alone in that respect because most states fashion the entirety of their criminal legislation with statutory fetters on what judges trying and sentencing in criminal cases may and may not do: e.g. as to the admission or exclusion of evidence, service of notices as a pre-conditions of various procedural steps in a trial, statutory defences, or in sentencing; imposition of minimum or maximum sentences, mandatory minimum disqualifications from driving or being

concerned in the management of a public company and so on. All such and many other statutory intrusions on criminal justice are an interference with judicial discretion in the conduct of a trial and sentencing, but are not, on that account, regarded as inconsistent with the right to a fair hearing. So, why should a life sentence be treated any differently because it is a manifestation of legislature's perception at the top end of seriousness of what is required "for the peace, order and good government" of the country? We should note in passing that there is no suggestion, in the context of length of custodial sentence, of violation of human rights protection against cruel, oppressive or inhumane treatment, a feature of so many challenges to capital sentences.

16. Authority and a moment or two's thought demonstrate the common-sense and necessity of Parliament, for the peace, order and good governance of the public, to have power to legislate not only in the creation and definition of offences, but also where it considers necessary, for maximum, minimum and mandatory penalties. Such power is well recognised and exercised in common law jurisdictions following the Westminster model, and more widely, all over the world, and is firmly bound into the jurisprudence of this Court. There is no logical basis for suggesting that the advent in 1974 of the pre-Independence Constitution with entrenched provisions, such as section 10)(1) rehearsing essentially the common law rule of a right to a fair trial should curb that legislative power – and much heavy authority in the rest of the common law world and here against it.

17. None of the above constitutional provisions touches on such legal reality and necessity. Section 59(1) simply establishes the supremacy of Parliament, subject to any contrary provision in the Constitution, to make general provision by statute for the peace, order and good government of the Solomon Islands. Section 77(1) of the Constitution, in declaring the Judiciary's "unlimited jurisdiction to hear and determine civil or criminal" cases conferred on it by the Constitution or by Parliament expressly acknowledges the dual role of the Parliament and of the Judiciary in the administration of the law, the latter deriving its authority from the Constitution and constitutionally compliant parliamentary legislation. Section 138(1) expressly rehearses, for the avoidance of doubt, the Judiciary's power of judicial review over the performance or non performance by persons or authorities of functions assigned to them under the Constitution or *any other law,* including of course parliamentary legislation. Contrary to Mr Hou's submissions, there is nothing in those provisions, taken together or separately, to suggest any change in the established position that Parliament may, if it chooses, establish general mandatory sentences, or that in continuing to do so would, by removing judicial discretion, unlawfully violate some species of the doctrine of separation of powers. It is, therefore, nothing to the point that this Court in *Gerea* may not have considered sections 77(1) or 138 of the Constitution. They were as irrelevant to the issue in that case as they are here,

namely whether the mandatory life sentence for murder imposed by 200 of *Penal Code* is unconstitutional in that it deprives a convicted murderer of the right to a fair hearing on sentence.

Right to a fair hearing

18. Mr Hou's argument that section 200 of the *Penal Code* violates the declaration in section 10(1) of the Constitution of a citizen's right to a fair hearing by an independent and impartial judge has as its premise that its embodiment in a constitutional instrument significantly changed the common law in that respect. Courts have long recognised the practical reality of and need for the executive, legislature and the judiciary to work together in the allocation of responsibilities for and provision of good governance, each ceding to the other certain of their complementary functions where the context requires. Section 10(1) does not materially change the sweep of the right to a fair hearing just because it rehearses in a constitutional instrument an essentially common law rule of fairness. There is no constitutional basis for Mr Hou's and Mr Nori's argument that could require and allow judges to disregard the legislature's undoubted right to set mandatory sentences of general application. For judges to arrogate to themselves a power to ignore constitutionally compliant legislation, would be an unlawful judicial intrusion on the function of Parliament.

19. The following observations by O'Daliagh CJ in the Irish Supreme Court in *Deaton, at 178-9,* though not concerned with a judicial mandatory sentence of general application, make a good start to clear thinking on this issue and have found favour in a number following authorities:

> "... There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. .... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain. ...

20. The contrast drawn by O'Daliagh CJ between a fixed penalty of general application or, as he put it, a "statement of the general rule", and that where a judge has several

specified or unspecified options from which to select is plain. It is clear from his analysis that, in talking of a "general rule of application", he was not talking of a general rule or a norm subject to possible exceptions or the general discretion of the judge in an individual case. His proposition of a general rule calling for unqualified application by the judiciary was expressly approved by Lord Diplock in *Hinds v The Queen* [1977] AC 195, at 226 -227, and by this Court in *Gerea & Ors at 174-5*. Yet Mr Hou, in his submissions to the Court, gave it the latter meaning, characterising it as "only a general rule, the application of which is for the courts ... individualised to the circumstances of a particular case". He went so far as to suggest that Lord Diplock in *Hinds* and this Court in *Gerea* had misconstrued what he called "the Deaton principle". In the Court's view, it is Mr Hou, who has misconstrued O'Daliagh CJ's analysis of the propriety of a legislature in a constitution of the Westminster model legislating mandatory penalties of general application to which the judiciary must give effect in every case.

21. The issue before this Court in *Gerea* was exactly the same as that argued in this appeal. The Court had to consider whether the mandatory life penalty imposed by section 200 of the *Penal Code* for murder was unconstitutional in contravening the section 10(1) right to a fair hearing in criminal trials. The Court held, following the analyses of O'Daliagh CJ in *Deaton* at 181 and of Lord Diplock in *Hinds* at 226 that:

> 1) a mandatory fixed penalty for an offence is not unconstitutional as depriving a convicted person of a "fair hearing" under section 10(1) of the Constitution, provided that it is general in its application and is directed to all citizens; and
>
> 2) such a penalty is within the power of Parliament and, therefore, does not unlawfully interfere with the independence of the judiciary. In so holding, the Court explained that it considered the hearing as an entire judicial process from charge until ultimate disposal on sentence or on appeal.

22. The following passage from the joint judgment of White P and Connolly JA at 169 (with which Pratt JA in a separately reasoned and concurring judgment agreed) deserves repeating:

> "The requirement in section 10(1) is ... fully met if, as is the case in the Solomon Islands, they are subject to no direction by the legislature or the executive government as to the disposition of a particular case and to no form of pressure from outside bodies in the performance of their judicial functions. They are, however, like the courts in all civilised countries subject to the same body of law as is every other citizen. The

courts are not intended by s. 10(1) to be independent of the law but independent within it."

23. If further authority for the reasoning and propositions in *Deaton, Hinds and Gerea* were required, it is to be found in the following observations of Barwick CJ in the High Court of Australia 1970 in *Palling v Corfield* [1970] 123 CLR 52. There the Court considered whether a mandatory sentence flowing from a convicted person's failure to comply with a procedural requirement of the prosecution was contrary to the Australian Constitution in purporting to confer judicial power on the prosecution. Barwick CJ, with whom the other Members of the Court agreed, put it this way, at 58 - 59:

> " .... It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and ... it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded; nor ... is there any judicial power or discretion not to carry out the terms of the statute. ...
>
> ... it is within the competence of Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment. The event or the happening on which a duty arises or for that matter a discretion becomes available to a court in relation to the imposition of penalties or punishments may be objective and necessary to have occurred in fact or it may be the formation of an opinion by the court, or ... by some specified or identifiable person not being a court. The circumstance that on this happening or contingency, the court is given or is denied as the case may be any discretion as to the penalty or punishment to be exacted or imposed will not mean ... that judicial power is attempted to be made exercisable by some person other than a court within the Constitution. ...

See also the following passage in the judgment of Menzies J, at 64:

> "... it cannot be denied that Parliament can, to some extent, validly control the exercise of judicial power. Thus, for instance, it is an exercise of judicial power to impose a sentence of death upon a person convicted of murder, but it is Parliament that requires that that sentence should be imposed,

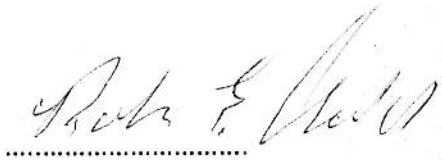
and it does so without any unlawful interference with the exercise of judicial power. Unless the Constitution provides otherwise, a court exercising federal jurisdiction must also act within the framework of the laws made by the Parliament. The doctrine of the separation of powers does not prevent Parliament from making laws relating to the exercise of judicial power by properly constituted courts."

24. For the above reasons and in the light of the powerful reasoning in the authorities cited, the court dismisses both of these appeals.

Afterthought

25. The Solomon Islands now has a statutory system for the release of life prisoners on licence by the Minister on the recommendation of the Parole Board and after consultation with the Chief Justice and the trial judge if available, introduced in its present form by the *Correctional Services Act 2000* and implemented by Regulation 205 of the Correctional Services Regulations 2008. This system is not an integral part of the statutory structure of judicial sentencing for murder as in England and Wales in the form of a judicially imposed "tariff" or minimum punitive term, for which the sentencing judge alone is responsible. The Solomon Islands judge, in imposing a mandatory life sentence for murder has no power to allocate part of that sentence to a punitive or "minimum term, the effluxion of which operates as a threshold for the Minister to exercise his statutory power to grant parole. Nor, in our view, would it be a permissible use of section 3 of the *Penal Code* or Article 5(1) of the Order in Council to introduce such a limitation to the clear and unqualified mandatory life sentence ordained by section 200 of the *Code*.

26. However, some way towards the same outcome as that in England and Wales could be achieved in the Solomon Islands, certainly in that aspect of section 10(1) of the Constitution giving a right to be heard. A judge, before or immediately after passing the mandatory life sentence, could in his discretion, allow defence counsel to address and put material before him in, mitigation, so as to put it on record for the Minister at a later stage if and when he begins to consider the grant of parole. Adoption of any such a practice would be for the Chief Justice and the Solomon Islands Puisne Judges to consider, and not for direction by this Court.



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Sir Robin Auld

President

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Sir Gordon Ward, JA

Member

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Justice Glen Williams, JA

Member