C.A. Judicature (Appellate Jurisdiction) Act s.29(1)(b) - Reference by G-G to Ct of Appeal — applicants having no audience — whether Constitutional rights infringed by failure to allow applicants to see and make submissions and applicants not having audience.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 53/85 & 54/85

BEFORE: The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	LOUIS COOPER AND ELIJAH KERR	APPELLANTS
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT
AND	THE ATTORNEY GENERAL	SECOND RESPONDENT

F.M.G. Phipps, Q.C., and Miss Satterswaite for the Applicants

Ian Forte, Q.C., Director of Public Prosecutions & Gart McBean for First Respondent

R.S. Langrin, Q.C., and David Henry for Second Respondent

3rd December, 1986 & 15th January, 1987

WHITE, J.A.:

By this appeal each of the applicants has sought to set aside the decision of the Full Court "in holding that on a reference by the Governor-General to the Court of Appeal under section 29(1)(b) of the Judicature (Appellate Jurisdiction) Act the Court was correct when they considered such reference in private and certified their opinion to the Governor-General in private without the applicants having audience."

In the premises each prayed -

> "That an order be granted by this Honourable Court declaring: that the appellants constitutional rights had been infringed by the failure of the Court under s 29(1)(b) of the Judicature (Appellate Jurisdiction)Act, on a reference by the Governor-General to the Court to consider the matter in public, and to certify their opinion in public without right of audience to the Applicants."

The reference by the Governor-General was consequent on the Petition by each appellant seeking reprieve from the sentence of death. We were not afforded the opportunity to see the actual reference to the Court, but it must be material to any consideration of the present poser to read the words of section 29(1)(b) in its entirety and thereby to appreciate the scope of the authority of the Governor-General. The words of the section are here set out:

> "(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either -
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon."

At the first reading it is undeniable that by virtue of the reference under section 29(1)(a) the Court of Appeal is sitting in its normal jurisdiction of sitting in public, and hearing arguments in public, presented by right of audience on behalf of the appellants. Constitutionally, therefore, appellants on that reference would have their case heard and determined as in the case of an appeal by a person convicted. A prominent feature of this type of hearing on reference by the Governor-General is likely to be the presentation of fresh evidence from those who purport to be able to shed new light on the evidence which was heard hitherto at the trial and which was reviewed by the Court of Appeal. They are allowed to present such fresh evidence in open court on the principle that it was not available at the time of the trial. Also, that, had it been available and presented then, it would have resulted favourably for the appellant. This is what I describe as the judicial approach.

The wording of Subclause (1)(b) is noticeably different from that of sub-clause (a). This makes it evident that the legislature contemplated two different approaches to the exercise by the Governor-General upon a Petition for the exercise of Her Majesty's mercy. Section 29 (1)(b) introduces what I will describe as the advisory or executive approach in that this arises, when the Governor-General desires the assistance of the Court on any point arising in the case with a view to the determination of the petition. It may be that the point upon which the assistance of the Court is sought, is not a legal question. It does not have to be a legal question such as is determinable in a Court of law. Suffice it to say, that the two

subclauses could not conceivably be intended to require the Court to deal with all references by the same method i.e., by a hearing in public. I say this because under sub-clause (b) the referring of the point to the Court is "for their opinion, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon." This must mean that the opinion should not be divulged; a condition to which all opinions and advice to the Privy Council are subject.

In addition to the foregoing analysis, there is the fact that subclauses (a) and (b) are separated by a semi-colon; subclause (b) being introduced by the conjunction 'or', thus showing that the procedures suggested are alternative, and therefore the subclause could not have been intended to be the subject of a public hearing.

Mr. Phipps did not see the matter that way. He said that when the Governor-General referred the matter under section 29 (1)(b) it was to the Court of Appeal which is a creature of Stature. Therefore, when the Court of Appeal purported to sit other than in public it breached section 20 (3) of the Constitution, which question was never answered by the Constitutional Court when it was raised before that Court. Instead, that Court, he said, dealt with the concept of "proceedings" mentioned in section 20 (3) of Chapter 3 of the Constitution which states:

> "All proceedings of every Court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any Court or other Authority, including the announcement of the decision of the Court or other authority, shall be held in public."

From the written judgment of the Court (Malcolm, Orr & Ellis, JJ) which was delivered by Malcolm J., it appears that Mr. Phipps -

> "submitted that the reference to and the consideration by the Court of Appeal are 'proceedings' as contemplated by Section 23 of the Constitution. To support this contention he invited the Court to consider the definition of the word 'proceedings' to be found in the Fourth Edition of Stroud's Judicial Dictionary, p. 21241 to 8, No. 44, and submitted that 'proceedings' as defined therein means any process or step in the performance of a function by a Court. He further submitted that 'opinion' in 29 (1)(b) is interchangeable with 'decision'. Mr. Phipps, having contended for an interpretation that the reference and certification are proceedings, submitted that both under the Common Law and the Constitution they ought to have been held in public. They could only have been properly held in private by express statutory provision."

The argument addressed to us was posed by the question, What is the Court? Mr. Phipps said that this question is more to the point than the question of, What is the function of the Court? He submitted that according to the Constitution, the Court cannot be constituted otherwise than by three judges. For the matter under discussion there is no discretion for the Court to sit otherwise than so constituted, and therefore it must sit in public and not in private. He submitted that there is no function of the Court of Appeal, whether it sits in public or private, which does not attract the right of representation. The upshot of his argument is that the hearing in private should be unfavourably regarded to the extent argued for by him. He compared the position in Jamaica with that in England, where although the wording of section 19 of the Criminal Appeal Act, 1907 is the same as section 29(1)(b) of the Judicature (Appellate Jurisdiction) Act 1907, yet in England the matter has been made clear beyond a peradventure by the Criminal

Appeal Rules (Forms), r 51, providing -

> "Where the Secretary of State refers a point to the Court of Criminal Appeal under s 19(b) of the Act, such Court shall , unless they otherwise determine consider such point in private."

He argued therefore, that there being no such provision in Jamaican Law, the hearing should be in public.

On the other hand, Mr. Forte, the Director of Public Prosecutions, submitted that the matter at issue here is the exercise of the prerogative of mercy which by virtue of s 90 of the Constitution of Jamaica, the Governor-General exercised in Her Majesty's name and on Her Majesty's behalf. Let it be noted that by s 90(2) of the Constitution "In the exercise of the powers conferred on him by this section, the Governor-General shall act on the recommendation of the Privy Council", which wording is not dissimilar to s 29(2) of the Judicature (Appellate Jurisdiction) Act whereby -

> "In the exercise of the powers conferred on him by this section the Governor-General shall act -
>
> (a) on the recommendation of the Privy Council; or
>
> (b) where in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

In respect of the granting of pardon in capital cases by s 91(2) of the Constitution of Jamaica, the Governor-General may require information to be forwarded to him "so that the Privy Council may advise him in accordance with the provisions of s 90 of this Constitution." It must also be remembered that by s 32 of the Constitution, when the Governor-General asks for the advice of any person

or authority not only is he not bound to act thereon, but the question whether he has so exercised that function shall not be enquired into by any court. Section 32(6) provides:

> "Any reference in this Constitution to the functions of the Governor-General shall be construed as a reference to his powers and duties in the exercise of the executive authority of Jamaica and to any other powers and duties conferred or imposed on him as Governor-General by or under this Constitution or any other law."

The interposing of those constitutional provisions do show that the argument by Mr. Phipps is limited in its relevance, even though the discussions are not about the actual exercise of his powers by the Governor-General himself, but is really about the preliminary to that exercise, viz., how should that advice or opinion be given.

As Mr. Forte pointed out what is here asked for is the opinion of the Court which is to be furnished to the Privy Council. The exercise does not, therefore, require any formal hearing in Court.

In his contribution to the debate, Mr. Langrin submitted that (1) the manner in which the opinion by the Court of Appeal pursuant to the reference by the Governor-General under s 29(1)(b) of the Judicature (Appellate Jurisdiction) Act is given, is not in conflict with s 20(3) of the Constitution. (2) Section 29(1)(b) does not confer any jurisdiction on the Court of Appeal to give any decision in public as regards a civil right or obligation. (3) Because the decision is the exercise of the prerogative of mercy, which is that of the Governor-General and not of the Court of Appeal, which has its jurisdiction confirmed to Appellate matters, it follows that a request for an opinion under

s 29(1)(b) could not involve a decision of the Court of Appeal, and accordingly, there could be no necessity for the Court to sit in public to hear any right of the petitioner. (4) Taking s 20(3) in conjunction with s 20(4) of the Constitution, the observation is made that there is in fact an absence of parties in the reference under s 29(1)(b) and there can be no legal necessity to the opinion requested to be determined in public with the right of audience in the appellant. (5) Section 20(3) of the Constitution requires that the proceedings in Court must be concerned with the determination of the existence and extent of a person's civil rights and obligations, and where the reference as in this case is not concerned with such rights or obligations, the opinion requested need not be determined in public and accordingly is not in breach of s 20(3). In addition, he referred to the definition of proceedings in Stroud's Judicial Dictionary, nowhere in which is that word defined with reference to a Court as giving an opinion advising an authority in exercise of the prerogative of mercy.

Mr. Langrin drew our attention to the remarks of Lord Diplock when he delivered the report of their Lordships of the Judicial Committee of the Privy Council in the appeal from Trinidad and Tobago of de Freitas v. Benny (1976) A.C. 239. The particular reference there was whether there is a right to have the report of the Advisory Committee on the exercise of the Prerogative of Mercy disclosed to a condemned prisoner. The Advisory Committee was established by statute, and it was sought to give its deliberations a quasi-judicial character, on which basis it was argued, the principles of natural justice required that the report of the Advisory Committee should

have been made available to the appellant, but this was denied him. This was rejected in the report of the Judicial Committee in the following words at page 247F-248F:

> "Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by a constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end . A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives.
>
> Section 70(1) of the Constitution makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England. It is exercised by the Governor-General but 'in Her Majesty's name and on Her Majesty's behalf.' By section 70(2) the Governor-General is required to exercise this prerogative on the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister. This provision does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the

> "Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice. The only novel feature is the provision in section 72(1) and (2) that the Minister before tendering his advice must, in a case where an offender has been sentenced to death, and may, in other cases, consult with the Advisory Committee established under section 71, of which the Minister himself is chairman; but section 72(3) expressly provides that he is not obliged in any case to act in accordance with their advice. In capital cases the Advisory Committee too must see the judge's report and any other information that the Minister has required to be obtained in connection with the case, but it still remains a purely consultative body without any decision-making power.
>
> In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in any sense quasi-judicial. This being so the appellant has no legal right to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under sections 70 to 72 of the Constitution."

If it is pointed out that there is an obvious difference between a Court per se and an advisory body per se, it must nevertheless, be said that/in this context both bodies are performing the same function, notwithstanding the different formulation of the advisory entity. If advice is the aim, it seems to me the judicial function is excluded, and I repeat that on the construction of the legislation they are two mutually exclusive exercises which the Governor General may at any time see fit to seek, and to act upon as he, in his discretion, thinks fit.

The direct approach whether an appeal lies from the opinion of the Court of Appeal on the Governor General's

reference is amply and appropriately illustrated and supported by the decision of the Judicial Committee of the Privy Council upon petition from New Zealand in the case of Thomas v. The Queen [1980] A.C. 125 (which was concerned with an identically worded provision as our local section which is the subject of this discussion). The headnote reads:

"Section 406 of the Crimes Act 1961 provides:

'Prerogative of mercy—Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either ... or (b) If he desires the assistance of the Court of Appeal on any point, arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon and the court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.'

The defendant was convicted of two murders. The Court of Appeal dismissed his application for leave to appeal. He applied to the Governor-General to quash the convictions. The Governor-General referred the application to the Court of Appeal under section 406(b) of the Crimes Act 1961. The Court of Appeal furnished an opinion to the Governor-General adverse to the defendant.

On the defendant's petition to the Judicial Committee for special leave to appeal from the opinion of the Court of Appeal:-

Held, dismissing the petition, that the wording of section 406(b) showed that the legislature had not intended that an opinion of the Court of Appeal furnished on a reference to it under paragraph (b) should be appealable to the Judicial Committee and further that since such an opinion did not bind the Governor-General or impinge on any legal right of the defendant it was not a 'decision' within the ambit of section 3 of the Judicial Committee Act 1833 and that,

> "accordingly, the Judicial Committee had no jurisdiction to entertain the appeal.
>
> Theberge v. Laudry (1876) 2 App.Cas. 102, P.C. applied. Oteri v. The Queen [1976] 1 W.L.R. 1272, P.C. distinguished."

Both Mr. Phipps and Mr. Forte depended on this case. Mr. Forte for the statements of law contained therein, while Mr. Phipps saw the real ratio in the case as what was the effect of s 3 of the Judicial Committee Act. The respondent had there disputed that the Judicial Committee had jurisdiction to hear the appeal from the Court of Appeal of New Zealand. The fact of the matter is that the Judicial Committee had to examine the nature of the proceedings before the Court of Appeal. In the event Lord Edmund Davies in stating the reasons for the report of their Lordships that they had no jurisdiction to grant special leave to appeal, said this at page 133 A-F:

> "The submission was that the instant reference had resulted in a determination by the Court of Appeal, and that determination was appealable. Regarding that submission the following comments are called for. 1. The present reference was expressly made pursuant to section 406(b), and not to section 406(a), and there are important differences in the wording of the two paragraphs. 2. Paragraph (a) requires the question referred to 'be heard and determined by the court ... as in the case of an appeal', and it will be recalled that, when the case was first referred by the Governor-General back in August 1972 to the Court of Appeal, that is precisely what happened, the court itself ordering a new trial in February 1973, and that new trial promptly taking place in the following month. 3. The wording of paragraph (b) makes clear that the reference to the Court of Appeal is simply to obtain its 'assistance ... with a view to the determination of the application.' The application in question relates to the exercise of the prerogative of mercy, and no-one but the Governor-General himself has the ultimate power to deal with such an application. Its exercise by any other person or body being unconstitutional, the reference of 'any point

> "'in the case' to the Court of Appeal is merely in order to obtain its 'opinion' thereon. When its labours are over the Court of Appeal is required to furnish that opinion to the Governor-General so that he, and he alone, may determine whether the application for the exercise of the prerogative of mercy is to be granted or refused. 4. Finally, the wording of the reference itself (earlier quoted, ante, p. 131c-d) makes clear that the Court of Appeal were free to conduct their 'inquiry' in such a manner and in accordance with such procedure as they thought fit and were not obliged to conform to the rules governing criminal appeals.
>
> Pausing there, it has accordingly to be said that the language of section 406(b) itself seemed, in the judgment of their Lordships, wholly inconsistent with the notion that the 'opinion' formed by the New Zealand Court of Appeal in a reference thereunder is appealable to this Board. But, had their Lordships entertained any doubts on the matter, they would have been finally dispersed by the reply of the Solicitor-General in a speech the effectiveness of which, if their Lordships may say so, was in direct ratio to its admirable brevity. He made two submissions, and these must be considered in turn."

Those submissions shortly repeated were (1) The Court of Appeal was called upon by the Governor General to perform statutory functions in relation to which no appeal was intended to lie. (2) The opinion of the Court of Appeal was not appealable under the relevant statutes. At page 136 B-D their Lordships found:

> "The wording of section 406(b) of the Crimes Act 1961 is such that no power or duty of determination binding upon the Governor-General was entrusted to the Court of Appeal. The opinion they expressed impinged upon no legal right of the defendant, nor did it place any fetter upon the exercise by the Governor-General of the royal prerogative of mercy. For these reasons, their Lordships were of the opinion that they had no jurisdiction to entertain the petition and humbly advised Her Majesty that it should be dismissed."

In all the points raised and considered, I come to the same conclusion as the Full Court that there is no obligation on the Court of Appeal to sit in public, and there is no right of audience to the applicants or their legal representatives when the Governor General makes a reference to the Court of Appeal under s 29(1)(b) of the Judicature (Appellate Jurisdiction) Act. No fundamental rights of the applicant were thereby breached.

Accordingly, I would dismiss the appeal.

WRIGHT, J.A.:

At the point in time when a convicted person petitions the Governor-General for clemency he has already exhausted all rights allowed him by the laws of the land and is then seeking to drink of the fountain of mercy which flows from the throne and is administered by the Governor-General as the representative of the Crown. He has then to await the exercise of the Governor-General's discretion. Section 29(1) of the Judicature (Appellate Jurisdiction) Act refers to the exercise of his discretion by the Governor-General in language which makes it plain that it is not exhaustive of the subject-matter.

It reads:

> "29(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in sub-section (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either -
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon."

It is manifest from these provisions that in considering the plea for mercy the Governor-General, in his discretion, may invoke the aid of the Court of Appeal in the manner prescribed. But it is obvious that these provisions only amplify what the Governor-General may do. If he chooses to involve the Court of Appeal he may do so in a manner which will give the petitioner an opportunity to return to the Court and be heard as in the case of an appeal. This is provided for in section 29(1)(a). If the Governor-General adopts this method he is bound by the judgment of the Court because the provision is that:

> "the case shall then be heard and determined as in the case of an appeal by a person convicted." [Emphasis supplied]

Such hearing and determination must be by the Court sitting as an appellate tribunal with all its powers including the power to allow fresh evidence to be heard.

To my mind it is beyond the shadow of a doubt that the procedure under section 29(1)(b) is fundamentally different from that under section 29(1)(a). Obvious differences are:

1. Under 29(1)(a) the Court is enabled to dispose of the case in such manner as it determines; but under 29(1)(b) it is obvious that the Governor-General retains the right of disposal and only seeks the aid of the Court in deciding what he may do.

2. Under 29(1)(b), unlike 29(1)(a), the area of involvement of the Court is restricted by the Governor-General.

3. Under 29(1)(b) only an opinion may issue from the Court of Appeal.

4. The Governor-General cannot ignore the judgment of the Court resulting from a reference under 29(1)(a) but under 29(1)(b) he is at liberty not to be influenced by the opinion expressed.

These differences speak eloquently as to the nature of the tribunal with which the Governor-General is dealing. When he is dealing with the Court of Appeal as an appellate tribunal, and he makes the choice, he thereby affords the convicted person another chance to have a re-hearing of his case with such consequences as flow from the determination of an appeal including an appeal to the Privy Council in England. But when he chooses to deal with the Court of Appeal as an advisory body he has by deliberate choice determined that the nature of the outcome shall not be the same as when the Court sits as an appellate body. In the one instance the Court must sit in public but if in the other case it was also obliged to do likewise what good reason would there be for the difference in the way that the options are expressed in the Act? To my mind what is involved under 29(1)(b) is, if I may so term it, the "private" opinion of the Court alone.

The applicants who were convicted of murder and sentenced to death had exhausted their rights of appeal right up to the Privy Council in England but were unsuccessful in having their convictions overturned. In identical petitions to the Governor-General in Privy Council each applicant pray:

> "(i) .....
>
> (ii) that his case may be referred to the Court of Appeal in Jamaica for further legal argument and advice from the Court of Appeal and advice from the Court of Appeal as to the correctness and desirability of the conviction and sentence;
>
> (iii) such further or other relief as your Excellency the Governor-General in Privy Council deems just.
>
> And your Petitioner will ever pray."

In his discretion the Governor-General made a reference to the Court of Appeal under section 29(1)(b) and the reference was duly dealt with in private and the Governor-General advised without the involvement of the applicants who subsequently brought Motions before a Full Court (Malcolm, Orr, Ellis JJ.) pursuant to section 3(1) of the Judicature (Constitutional Redress) Rules (No. 1) 1963 for a declaration:

> That their rights under section 20(3) of the Constitution were contravened.

Before the Full Court the burthen of Mr. Phipps' submission was that the reference to and the consideration by the Court of Appeal are "proceedings" as contemplated by section 20(3) of the Constitution and as such must be dealt with in public. Section 20(3) (supra) provides:

> 'All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public.'

By a unanimous decision the Motions were dismissed. Malcolm J, delivering the judgment of the Court said at pp. 4-5:

> "We have considered the authorities cited, and the submissions advanced, and bolstered by the decision in the Thomas' case which we accept as binding on us, we are of the view that when a reference is made by the Governor-General to the Court of Appeal under Section 29(1)(b) the consideration of the point is not a proceeding of the Court, and the opinion is not a decision.
>
> Accordingly, in our view there is no obligation on the Court to sit in public, and there is no right of audience to the applicants or their legal representatives. For these reasons the motions are dismissed."

The case referred to is Thomas (Arthur) v. R. [1980] A.C. 125; [1979] 2 All E.R. 142 in which the Privy Council dismissed an appeal against the "opinion" tendered by the Court of Appeal in

New Zealand to the Governor-General at his request for assistance on two questions relating to the facts of the case (pursuant to the provisions of section 406(b) of the Crimes Act, 1961). It was held that:

> "On the true construction of section 406(b) of the 1961 Act an opinion furnished by the Court of Appeal to the Governor-General in response to a request by him for assistance on a point arising in an application made to him for the exercise of the prerogative of mercy was not a matter on which appeal lay to the Board, since the Court's opinion did not determine any issue or bind the Governor-General in the exercise of the royal prerogative in any way. Furthermore, since the opinion was not a judicial decision binding on the parties it was not a determination for the purposes of section 3 of the 1833 Act. Accordingly, the Board had no jurisdiction to entertain the appeal and the petition would therefore be dismissed."

The appeal to this Court is on the single ground:

> "1. That the Full Court was wrong in law in holding that on a reference by the Governor-General to the Court under Section 29(1)(b) of the Judicature (Appellate Jurisdiction) Act, the Court was correct when they considered such reference in private and certified their opinion to the Governor-General in private without the Applicant having audience."

Accepting a suggestion from the Court, Mr. Phipps agreed that the real question was how does the Court of Appeal proceed on a reference to it by the Governor-General under section 29(1)(b) (supra). Contrary to the decision of the Full Court he submitted that what were involved were "proceedings" because once the judiciary is invoked anything done becomes proceedings. The case of Aubyn McBean v. R. [1976] 3 W.L.R. 482 relied on by Mr. Phipps is clearly distinguishable and is of no help in the instant case.

To my mind the short answer is supplied by Mr. Forte who, relying on Thomas (supra), submitted that there cannot be

proceedings without a decision. Here, there was no decision by the Court of Appeal, no determination of any issue, no infringement of anyone's civil rights accordingly section 20(3) of the Constitution which requires a "decision" cannot apply. Further, submitted Mr. Forte, there is no rule governing the manner in which the Court of Appeal deals with a reference under section 29(1)(b). And, indeed, no one has referred to any such rule.

For his part Mr. Langrin submitted that the manner in which the opinion was arrived at by the Court of Appeal is not in conflict with section 20(3) of the Constitution; that section 29(1)(b) of the Act does not confer any jurisdiction on the Court of Appeal to give any decision in public in respect of any civil rights or obligations and, further, that since the decision in exercise of the prerogative of mercy remained with the Governor-General and not with the Court of Appeal there could be no requirement nor is there any legal necessity for the opinion requested to be determined in public with a right of audience to the appellants. Observing that, significantly, the definition of "proceedings" in Stroud's Judicial Dictionary nowhere mentions a reference to a Court for an opinion by an authority in exercise of the prerogative of mercy he emphasized the fact that there is no contravention of section 20(3) of the Constitution because the reference is not concerned with the matters dealt with by that section viz, the determination of the existence or the extent of a person's civil rights or obligations.

In reply Mr. Phipps contended that Thomas (supra) did not decide that no opinion is a decision but that the opinion was not a decision within the Act. Unless it is a matter of discretion, he submitted, it must be in open court

but he insisted that for section 29(1)(b) there must be an open court hearing and that if there was a private hearing there was a wrong exercise of the discretion.

With due respect to the learned Queen's Counsel I find these submissions less than convincing. Really, there has been no serious challenge to the submissions of Mr. Forte and Mr. Langrin which, in my opinion, are correct.

On a strict interpretation of section 20(3) of the Constitution and section 29(1)(b) of the Act even without the aid of decided cases I have no doubt that the appellants have no basis for their claim. What they are in fact seeking is an involvement in arriving at the opinion to be given to the Governor-General to enable him to exercise his discretion in disposing of their petitions. To warrant so startling a claim there needs to be clear authority. The fact that none has been brought to the attention of the Court is itself authority against the claim.

Apart from the case of Thomas (supra) there is decided authority against the appellants' claim. The case of Michael De Freitas vs. George Ramoutar Benny and Others [1976] A.C. 239 is such an authority. In rejecting a not dissimilar claim before the Privy Council Lord Diplock said pp. 247D - 248A:

> "They turn next to the contention that before advice is tendered to the Governor-General as to the exercise of the prerogative of mercy in the appellant's case, the appellant will be entitled (1) to be shown the material which the Minister who tenders that advice has placed before the Advisory Committee on the prerogative of mercy and (2) to be heard by that committee in reply at a hearing at which he is legally represented. It is submitted on behalf of the appellant that under sections 70 to 72 of the Constitution the functions of the Advisory Committee on the prerogative of mercy established under section 71 are quasi-judicial

> "in their nature and that, accordingly, any failure to grant to the appellant the rights he claims would contravene the rules of natural justice and infringe his right not to be deprived of life except by due process of law that is secured to him by section 1(a) of the Constitution.
>
> Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives."

In my opinion this furnishes a complete answer to the appellants' claims and for this and other reasons already advanced I agree that the appeals be dismissed.

DOWNER J.A. (AG.)

The appellants Cooper and Kerr have been before this Court on two previous occasions. A retrial was ordered after the first appeal, see R. v. Kerr & Cooper 24 W.I.R. at 484, and after a second trial their convictions for murder and sentences of death were affirmed, see R. v. Kerr & Cooper (No. 2) 31 W.I.R. 292. Subsequently they petitioned for special leave to appeal to the Privy Council which was dismissed on 11th July, 1985, see Order dated 31st July, 1985.

After the determination of these criminal proceedings the appellants petitioned the Governor-General purusant to section 90 of the Constitution for the exercise of the prerogative of mercy and it is therefore instructive to cite the relevant sections. They read as follows:

> "90 (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -
>
> (a) Grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
>
> (b) grant to any person a respite, either indefinite or for a special period, from the execution of any punishment imposed on that person for such an offence;
>
> (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
>
> (d) remit the whole or 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) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

"90 (1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

It is important also to quote the prayer of the petition to determine what options were open to the Governor-General by virtue of the Constitutional instrument. The prayer reads:

"Your Petitioner prays that -

(i) That he may be granted a free pardon by Your Excellency in Privy Council in the exercise of the powers conferred by Section 90 of the Jamaica Constitution;

(ii) That his case may be referred to the Court of Appeal in Jamaica for further legal argument and advice from the Court of Appeal as to the correctness and desirability of the conviction and sentence;

(iii) such further or other relief as Your Excellency, the Governor-General in Privy Council deems just.

AND your petitioner will ever pray."

It will be observed that section 90 (1) of the Constitution contemplates that in capital cases the Governor-General in Privy Council is empowered to seek information, from the report of the trial judge and elsewhere, and this was merely adopting the well-known Constitutional Convention which was followed by successive Home Secretaries in England, see de Freitas v. Benny (1976) 2 A.C. 239 at p. 247 where Lord Diplock said:

> "Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives."

It is against these Constitutional provisions and principles that Parliament enacted 29 (1) (a) and (b) of the Judicature (Appellate Jurisdiction) Act. The Governor-General referred the matter to the Court of Appeal, and the Court of Appeal in turn gave its opinion. As this section is part of the subject matter, in dispute, it is perhaps helpful to set it out in extenso:

> "29 (1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistarte in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either -
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon."

The gist of Mr. Phipps' complaint before the Supreme Court and on appeal was that the reference to the Court of Appeal, which it was conceded was under section 29 (1) (b) compelled the Court to hear the matter in public and that the Petitioner had the right to legal representation. Failure therefore he contended, to proceed in this manner resulted in a breach of the applicant's Constitutional rights pursuant to section 20 (3) of the Constitution. It is/the light of those allegations that there
in

was an appeal against the decision of the Supreme Court (Malcolm, Orr & Ellis JJ.) which refused the declaration sought. To understand the nature of the claim and to come to a determination, resort must be made to the material parts of section 20 of the Constitution. They read as follows:

> "20 (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
>
> (3)All proceedings of every court and proceedings relating to the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public."

This section forms part of Chapter 3 dealing with Fundamental Rights and Freedoms. Section 13 specifically mentions as a Fundamental Right the protection of the law. It is clear that the protection of the law which the Constitution envisages is where persons are charged for criminal offences or their civil rights or obligations are being determined. It would not be a breach of fundamental rights if Parliament empowered the Court of Appeal to furnish the Governor-General with their opinion pursuant to section 29 (1) (b) of the Judicature (Appellate Jurisdiction) Act and the Court sat privately as the power being exercised is one of mercy by the

Governor-General in Privy Council. A similar situation arose in New Zealand, where the issue was whether there could be an appeal to the Judicial Committee of the Privy Council, when the Court of Appeal in that country gave an opinion under a comparable statute, see Thomas v. The Queen (1980) A.C. at p. 125. It was held that an appeal did not lie. Because of the nature of that case, the court, it would seem chose to sit in public or at least published its opinion. It may also have had the assistance of counsel as Mr. Phipps contended. However, at p. 133 it was recognized in that case that "the Court of Appeal was free to conduct their 'inquiry' in such a manner and in accordance with such procedure as they thought fit, and were not obliged to conform to the Rules governing criminal appeals." The Court of Appeal of Jamaica being a superior Court of record has similar powers and could not therefore be said to have contravened section 20 (3) of the Constitution by hearing the matter in private without the assistance of counsel. Furthermore, in support of this contention we may point out that it would be incredible for a condemned man to argue, that he had a right to a hearing in public before a Supreme Court judge, exercising his power pursuant to section 91 (2) of the Constitution. All that section 29 (1) (b) of the Judicature (Appellate Jurisdiction)Act has/is done to empower the Court of Appeal on a reference to perform wider functions than those performed by a judge of the first instance in capital cases. The fact that the Court of Appeal is interposed between the petition and the decision of the Governor-General in Privy Council does not alter to the essential characteristics of the Prerogative power, it only gives the Governor-General an authoritative source of judicial advice. At the end of the day the novel claim for a declaration that "the appellants' constitutional rights have been infringed by the failure of the

Court on a reference by the Governor-General to the Court of Appeal under section 29 (1) (b) of the Judicature (Appellate Jurisdiction) Act to consider the matter in public and to certify their opinion in public without right of an audience to the Appellant" fails. The judgment of Malcolm J. in the Supreme Court was well founded, and consequently the appeal is dismissed.