

By Mark Hunter

## Serra -v- Regina

Court of Appeal No CA11 of 1996

Judgment of Kearney, Angel J and Priestley JJ

### CRIMINAL LAW - SENTENCE APPEALS - ARMED ROBBERY

This applicant sought leave to appeal against the severity of a sentence imposed following his trial in respect of one charge of armed robbery. The applicant has been sentenced to nine years imprisonment, a non-parole period of four and a half years having been specified by the sentencing judge.

The applicant held up a sales assistant at Civic Video, Malak in company with another man. Both robbers wore balaclavas. One brandished a knife, the other a rifle. The sales assistant was tied up and the offenders fled with about \$7,500.

The applicant was nineteen years of age at the time of the robbery. He had previous convictions for ninety four offences, seventy eight of which were before the Juvenile Court. Most of his convictions were for dishonesty offences. He had on four previous occasions been sentenced to detention. On another four occasions he had been sentenced to imprisonment by the Court of Summary Jurisdiction. The armed robbery was committed within days of the applicant's release from prison.

In seeking leave to appeal, the applicant alleged sentencing errors by the trial judge. The Court was referred to papers presented at a symposium on genetics held in London in 1995.

Counsel for the applicant referred to the reception by US courts of evidence indicating an offender's "involuntary genetic disposition towards crime". The Court of Appeal was urged to consider ordering a genetic examination of the applicant.

#### HELD

1. The sentence imposed was within the limits of a sound discretionary judgment; it was not manifestly excessive.

2. Armed robbery is a crime to be viewed with the utmost seriousness and warnings have previously been given by the Court that sentences for this offence would increase.
3. Leave to appeal should be refused and the sentence imposed confirmed.

The Court found that the applicant had not shown a sufficiently accepted scientific basis for genetic evaluation. The Court found that this submission lacked "any foundation."

#### APPEARANCES

Applicant - Counsel: J Nolan  
Solicitors: David Francis & Associates

Respondent - Counsel: Bannon QC  
Solicitors: DPP

## McMorrow -v- Airesearch Mapping Pty Ltd

Court of Appeal No AP8 of 1996  
Judgment of Kearney, Angel and Priestley JJ, delivered 7 March 1997

### CIVIL LAW - WORK HEALTH ACT - DEPENDENCY

#### HELD

A magistrate had dismissed the applicant's claim for benefit pursuant to section 62 of the *Work Health Act*, her de facto husband having died in the course of his employment. The magistrate held that the applicant was not "wholly or in part dependent upon the deceased's earnings at the date of his death" as required under section 49 of the Act.

On appeal before Mildren J, the applicant argued that the magistrate had failed to provide proper reasons for his determination, had failed to properly identify the test for dependency and had misapplied the test set out in *Aaffies -v- Kearney* (1975) 8 ALR 454.

Mildren J dismissed the appeal, referring to the distinction to be drawn between the sharing of expenses and

pooling of income to meet mutual needs.

In a unanimous decision, the Court of Appeal set aside the judgments of Mildren J and the magistrate, holding that they had both failed to properly apply the test for dependency as laid down by Gibbs J in *Aaffies* as follows:

"The question whether there is in fact dependence or reliance at the date of the death is not to be answered by looking only to the circumstances as they existed at that date; past events and future probabilities have to be considered."

The applicant and the deceased had been living together for two years. They intended to marry and have children. The Court of Appeal held that the magistrate had failed to give any consideration to what were the probabilities of the deceased securing better paid and more constant employment in the future or of the applicant stopping work to have children.

The Court of Appeal was of the view that the magistrate had failed to set out with sufficient specificity his findings of fact on the applicant's evidence. The credibility of the applicant being important in determining the issue of dependency, the Court of Appeal therefore considered it inappropriate to order judgment in favour of the applicant and a new trial was ordered.

#### APPEARANCES

Applicant - Counsel: Waters  
Solicitors: Waters James McCormack

Respondent - Counsel: Tippet  
Solicitors: Ward Keller

## BALANCE

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