PARTIES:	NELIO AVELINO DASILVA SERRA v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA11 of 1996
DELIVERED:	24 February 1997
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JUDGMENT OF:	Kearney, Angel and Priestley JJ

CATCHWORDS:

Criminal law and procedure - Armed robbery - Application for leave to appeal against sentence of 9 years imprisonment, 4½ years non-parole - Young offender - Alleged errors in sentencing - Significance of sentencing in other cases - Deterrence predominant aim in sentencing for this crime - Significance of prior judicial warnings of heavier sentences for this crime - Duty of prosecution as to accused's antecedents - Consideration of submission of 'involuntary genetic disposition towards crime' -

R v Lilliebridge (unreported, Court of Criminal Appeal (NT), 7 April 1994), referred to.
Pham and Ly (1991) 55 A Cr R 128, referred to.
R v Gordon (1994) 71 A Crim R 459, referred to.
Veen v The Queen [No.2] (1987-88) 164 CLR 465, referred to.

REPRESENTATION:

Counsel:

Applicant:	J.P. Nolan
Respondent:	J.W. Adams

Solicitors:

Applicant:	David Francis & Associates
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

No. CA11 of 1996

BETWEEN:

NELIO AVELINO DASILVA SERRA
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, PRIESTLEY AND ANGEL JJ

REASONS FOR JUDGMENT

(Delivered 24 February 1997)

THE COURT:

The application for leave to appeal

From 10 to 16 July 1996 the applicant stood his trial on a charge that on 19 November 1995 in Darwin he robbed one Alan Greatorex of certain items including about $7534 in money, the property of Home Entertainment Group Pty Ltd. The robbery was aggravated first in that it was committed in company, and second in that the robbers were armed at the time with a rifle and knife; see s211(2) of the Criminal Code.

On 16 July the jury found the applicant guilty as charged. The learned trial Judge sentenced the applicant to 9 years imprisonment, with a nonparole period of 4½ years. The maximum punishment for aggravated robbery is imprisonment for life. The applicant now applies under s410(c) of the *Criminal Code* for leave to appeal against sentence.

The evidence before the jury

There was undisputed evidence that an armed robbery took place at the Civic video shop at Malak at about 11.45 pm on Sunday 19 November 1995, about 15 minutes before closing time. Mr Greatorex, the sales assistant, was alone in the shop when 2 men entered wearing balaclavas and gloves. One menaced him with a rifle and told him to open the till. The other man, who held up a knife, said words to the effect "hurry up, we're not joking". Mr Greatorex said that he was "scared, frightened for my life". He opened the till. The rifleman used that weapon to motion him out from behind the counter. He was directed to lie on the floor. He lay on his stomach. He felt what he took to be the muzzle of the rifle in his ribs and was told "don't move". He later heard the noise of some coins dropping on the floor. He was then instructed to open the safe in the back room. He did so. He was directed to lie on the floor again, and did so. The 2 robbers emptied the safe and then tied him up with a pair of long socks before departing with their booty. Mr Greatorex untied himself after about a minute and raised the alarm.

A witness testified that she had seen 3 young men walk from the park opposite the Malak Shopping Centre (where the video shop was located) at about 11.40 pm, and later return carrying something. There was evidence that when the applicant was in gaol in September 1995 he had said that he intended to rob a video store. He was at large after serving that sentence for only a matter of days before this robbery was committed. There was evidence that some 2 days after the robbery the applicant and one James Bishop had been heard bragging about how they had got away with the robbery; that they had said they obtained $7500 from it, the man they had robbed had "shit bricks" from fear, and the third man involved with them had acted as the "cockatoo". There was evidence that while the applicant was in gaol after the robbery, on remand, he caused a threatening letter to be sent to one Marriott. Mr Marriott testified that the applicant had approached him before the robbery, to obtain a firearm; that he had then broken into premises about a week before the robbery, and stolen a Remington .308 rifle and ammunition; and that he took the rifle to a room where he discussed a price for it with the applicant, and left the rifle there.

The submissions on sentence

The Crown did not hand up the usual written statement of the applicant's antecedents. Instead, Detective Senior Constable Pollock testified as follows. He had known the applicant since 1989. The applicant's usual associates were persons who had been in custody, a small tight-knit group of persons usually well known to the Police. The applicant was a "leader", who usually committed offences in company. He used alcohol and drugs. He had been at

liberty for some 11 days before committing this crime. He was never out of gaol for very long, before again coming to Police attention.

The Crown case on sentence was that this was a bad example of an armed robbery in company: it was premeditated; a rifle and a knife were used, though there was no evidence that the rifle was loaded; the victim was menaced, manhandled and tied up; the robbers were disguised and had chosen a vulnerable target late at night, with a planned get-away; the applicant had later threatened a witness, to change his evidence; he had a bad criminal record, and had been out of gaol for only about a week when he committed this crime, the commission of which he had contemplated in gaol. The sentencing should be such as to protect the public, particularly persons working in vulnerable positions: it should embody both specific and general deterrence.

Ms Morris of counsel for the applicant at his trial stressed, in mitigation, his unfortunate upbringing. He was born on 13 March 1976, so he was 19 years and 8 months old when he committed the robbery. She did not seek a presentence report; she said that she had been the applicant's counsel for some 5 years, and her instructions were 'well-established'. His family had migrated from Timor in 1984. The parents separated about April 1989, and the Welfare authorities then became involved with the family. The applicant remained in the family home with his mother, his sister, and 4 brothers. His mother went to work, and the children were looked after by their grandmother. In 1989 the applicant was assessed as having a 'conduct disorder'. He truanted from school that year. He reported that he had been physically abused by his older

brother since he was 9 years of age. He was placed in foster care; he absconded after 4 months. He was in and out of the juvenile detention centre, until he became a boarder at St John's College; he was expelled in May 1990, but had begun to achieve on the academic front. By age 14 he was living on the street and with friends. He went back to East Timor for 4 weeks in August 1990. Since then he had been in and out of the detention centre, and eventually did time in an adult prison. Two of his previous offences, in 1993 and 1994, involved violence; one arose from a fight outside a cinema, and the other involved an argument between 2 groups of boys in which he threatened to use a baseball bat.

Ms Morris submitted that for the applicant the robbery was "a leap into a much bigger league" of crime. She submitted that the role he played was not clear from the evidence at trial - whether he was the rifleman, knifeman, or 'cockatoo'. She noted that Mr Greatorex had suffered no physical injury or violence; the robbers had not threatened him with violence, as opposed to giving him instructions; he could not be certain that he had been prodded by the rifle.

Ms Morris referred as "similar" cases to the following 7 sentencing cases involving aggravated robberies in the Territory over the last 5 years by "young men of similar antecedents" to the applicant. Unlike him, they had all pleaded guilty.

(1) *R v Schmidt, Williams and Walker* (unreported, Supreme Court (NT) (Martin CJ), 8 April 1993) involved an aggravated street robbery of two men at a suburban bus stop on 5 December 1992 at about 9.30pm. They were threatened by knives; one was kicked in the head. The prisoners all had many priors; Mr Schmidt had many convictions for assault. Messrs Schmidt, aged 18, and Williams, almost 19, were each sentenced to 3 years imprisonment for the robbery. Mr Schmidt was also dealt with for 3 aggravated assaults; in the result he was sentenced in all to 3½ years imprisonment, with a nonparole period of 15 months. Mr Williams was also dealt with for 1 aggravated assault; his effective sentence remained one of 3 years imprisonment, with a nonparole period of 15 months. Mr Walker, aged 18, was charged with 7 other offences, and had 46 further offences, (mainly unlawful entries and stealings), taken into account; he also received 3 years imprisonment for the robbery, but in all his effective sentence was 6 years imprisonment with a nonparole period of 2 years.

(2) *R v Lilliebridge* (unreported, Court of Criminal Appeal (NT), 7 April 1994) was one of 3 sentencing appeals in armed robbery cases decided by this Court on the same day. It involved the planned robbery of a newsagent by 2 brothers, aged 30 and 22 years, at about 6.30 pm on 27 February 1993. They carried firearms (a loaded sawn-off 12-gauge shotgun, and a loaded sawn-off .22 calibre rifle) and wore disguises and gloves. They were each sentenced to 6 years imprisonment, with a nonparole period of 2½ years. The shotgun had been presented to the head of a victim; the victims were tied up with tape, and were terrified. The younger brother had 2 priors for unlawful entry and

stealing; the elder had no relevant priors, but had played a greater part in the planning. The Crown appeal against inadequacy of sentence was dismissed. Angel J said at pp28-30:

> 28. "The learned sentencing Judge said that the respondents Lilliebridge terrified their victims into submission and used a degree of violence 'that brings this offence into the more serious category'. *This robbery too, was of the worst kind*." (emphasis added)
>
> 29. "…[The robbery] was premeditated and carefully planned. The premises were 'cased' on a day prior to the robbery and the layout thereof familiarised. Balaclavas were worn; the get-away car was carefully positioned; sawn-off weapons and ammunition were obtained and made ready. The robbery took place near closing time, which was calculated to reward the biggest return. *The sawn-off shotgun and rifle were loaded at the time of the robbery. This is a significant aggravating circumstance; it demonstrates increased criminality on the part of the participants, an added determination on their part; and introduced a danger of harm to others in the event of a deliberate or accidental discharge*. The brothers' taking of drugs increased the risk of harm to others through use of the loaded weapons. The robbery was carried out in company. Both accused pointed the loaded weapons at staff in the store. Employees were taped up with the intention of enabling a good escape and a significant amount of money was taken as well as jewellery. I think the Crown was correct in submitting that *this was a very serious example of the crime of aggravated armed robbery*. …" (emphasis added)
>
> 30. "The planning and execution of this robbery indicates a high degree of criminality. … I have reached the conclusion that no manifest injustice would be done if the appeals against the Lilliebridge sentences are dismissed in the exercise of this Court's residual discretion to do so; see *Holder v Johnston* [1983] 3 NSWLR 245 at 255-256; (1983) 13 A. Crim. R. 375 at 384-386, per Street CJ. Accordingly, I would dismiss the appeals … In doing so, *I would add that these sentences [6 years, with a nonparole period of 2½ years] cannot be regarded as any sort of precedent or guide as to the disposition of future cases of armed robbery of the same or similar gravity in Darwin. In my opinion, future armed robbers like the Lilliebridges can expect much heavier sentences*." (emphasis added)

The Lilliebridges had pleaded guilty; the passage last emphasized, with which we respectfully agree, is to be understood in that light - that is, bearing in mind the usual considerable mitigating effect of a guilty plea, persons pleading guilty to serious armed robberies committed after 9 April 1994 could expect "much heavier sentences" than the 6 years/2½ years received by the Lilliebridges. It is a clear indication that the range of sentencing for that crime should thereafter be increased.

(3) *R v Spicer, Tartaglia and Fotiades* (unreported, Court of Criminal Appeal (NT), 7 April 1994) involved a planned armed robbery of a private home in Darwin on 8 February 1993 at about 10.30pm; the 2 householders were threatened with death in order to obtain cash from a safe, and were tied up. Messrs Spicer and Tartaglia, disguised and wearing gloves, were armed with a loaded 20-gauge sawn-off double-barrelled shotgun, a loaded sawn-off .22 calibre rifle, and a knife. Mr Fotiades drove the car. A Crown appeal against their sentences was allowed. Mr Tartaglia's sentence of 6 years imprisonment with a 2½ year nonparole period was increased to 8 years imprisonment with a nonparole period of 4 years; he was 20 years of age and his numerous prior convictions for unlawful entries and stealing related to his drug habit. Mr Spicer's sentence of 5½ years imprisonment was increased to 7 years, and his nonparole period of 2 years was increased to 3 years; he was 22 years of age and he had no relevant priors. Mr Fotiades' sentence of 3 years imprisonment with a nonparole period of 9 months was increased to 4 years imprisonment with a nonparole period of 18 months; his priors were not significant. These increased sentences, imposed on appeal, were expressed to

be less than would have been appropriate had they been imposed by the sentencing judge; this appellate restraint accorded with a well-established sentencing approach based on the 'double jeopardy' principle as applied to Crown appeals - see *Griffiths v The Queen* (1989) 167 CLR 372 at 386 per Deane J, *Papazisis and Bird* (1991) 51 A Crim R 242 at 247 (Vic), *Dodd* (1991) 57 A Crim R 349 at 354 (NSW), *Leucus* (1994-95) 78 A Crim R 40 at 51-2, per Murray J (WA), *Clarke* (1996) 85 A Crim R 114 at 117 per Charles JA (Vic), *Comptroller-General of Customs v D'Aquino Bros Pty Ltd* (1995-96) 85 A Crim R 517 at 538-541 per Hunt CJ at CL (NSW) and, most recently, *R v Rogers* (unreported, Court of Criminal Appeal (NT), 21 November 1996).

Angel J said in *Spicer, Tartaglia and Fotiades* (supra) at 4 and 9:

> 4. "Armed robbery is a major crime for which the maximum penalty is life imprisonment and *time and again courts have emphasised that severe punishment is required for those who commit armed robbery* and that it is a crime where there is less room for subjective factors to be considered in mitigation because *the principal sentencing considerations are retribution and personal and general deterrence*, see eg *Williscroft* [1975] VR 292, *Spiero* (1970) 22 SASR 543, *Zakaria* (1984) 12 A Crim R 386." (emphasis added)
>
> 9. "As far as the offence itself is concerned, it is a very serious offence; it is an offence that carries life imprisonment as a maximum penalty.
>
> Both accused [Messrs Spicer and Tartaglia] invaded a private home with a sawnoff shotgun and a sawnoff .22 calibre rifle. The firearms were loaded. In addition Mr Tartaglia was in possession of a knife. It was a premeditated act with a degree of planning and preparation involved in the execution of the robbery. The victims of the robbery were personally threatened and placed in an extremely terrifying and distressing situation.

> The accused did display some humanity; … Whilst I give the accused some credit for this consideration to their victims, it cannot really detract from the fact that it was the accused who were the cause of the terror and distress."

His Honour at 14-15 characterized some of the aggravating features of the particular robbery as follows:

> "It was premeditated and carefully and professionally planned. The [victims] were specifically targeted in the expectation of large monetary gain. Steps were taken in advance to prevent identification of the participants, to carry out the execution of the robbery and to make good an escape and to avoid apprehension. Disguises and weapons and ammunition were obtained. The crime was committed in company. It was committed at night. Balaclavas and gloves to avoid finger prints were used. A sawn-off shot gun and a sawn-off rifle and a knife were used. The firearms were loaded. The firearms were pointed directly at the [victims] and accompanied by threats to kill. A substantial sum of money was taken. Menacing and violent conduct was employed almost throughout the incident. [The female victim] had a knife held across her throat. The means of escape was pre-planned. Telephone wires were cut. The robbery was carried out in a private house. It involved the violation of the security of the [victims'] home and of their personal security within their home. The crime could have been worse, it is true, but *this robbery was of the worst kind*. It called for heavy penalties." (emphasis added)

At 16-18 his Honour said:

> "It is well settled that *young persons who commit serious armed robberies, despite their youth are, in the absence of exceptional circumstances, to be severely punished*, see eg *Pham and Ly* (1991) 55 A Cr R 128 at 135. *There are no exceptional subjective factors here which justify retribution and deterrence taking a secondary or equal role in sentencing* the respondents Tartaglia, Spicer and Fotiades for these crimes. *That is not to say subjective factors are altogether irrelevant*. As Hunt CJ at CL (Allen and Loveday JJ agreeing) said in *Vu* (CCA(NSW), 11 November 1993, unreported) at 4, citing *Pham* (supra), with approval:
>
> > "If young people of twenty years of age want to commit crimes of this serious nature, and to act in an adult way in doing so, then they

> will be punished as adults with much less weight being given than would usually be given to their youth".
>
> See also *Hawkins* (1993) 67 A Crim R 64 at 66.
>
> …
> I respectfully agree with Priestley J that no clear pattern of sentencing for armed robbery emerges from the past cases to which [the learned sentencing judge] and this Court were referred." (emphasis added)
>
> 18 "… lone knifepoint robberies from tills during daylight hours have [in the Territory] attracted sentences up to six years imprisonment. The present sentences are, on their face, manifestly disproportionate to the sentences in such cases, for the present robbery is of a far graver kind. In *Halse* (1985) 38 SASR 594 at 596, King CJ commented that breaking and entering a shop is 'somewhat less serious' than breaking and entering a house; see, too, per White J at 596, 597. *Here, other things being equal, armed robbery in a dwelling house is more serious than in shop premises*." (emphasis added)

(4) *Wade v The Queen* (unreported, Court of Criminal Appeal (NT), 7 April 1994) involved the armed robbery of a female taxi driver at knifepoint, with threats. The appellant had a bad criminal record. The Court of Criminal Appeal reduced his sentence of 10 years imprisonment with a nonparole period of 4 years, to 7 years imprisonment with a nonparole period of 3½ years, for a "very nasty crime" involving "ferocious threats of disfiguring violence". Priestley J attached a schedule of 38 sentences for armed robberies in the Territory between 1980 and 1993, which indicated that the heaviest sentence imposed in that period for that crime was 10 years imprisonment with a nonparole period of 4½ years. This was in *R v Duffey* (unreported, Supreme Court (NT) (Nader J), 21 May 1987), a planned robbery of the Casino in Darwin at about 5am; Mr Duffey, aged 22 years, armed with a sawn-off .22 calibre Armalite rifle and a wooden baton, held up and trussed a security guard, and then struck him heavily on each shoulder to knock him out. The

reference to a sentence of '10 years imprisonment' in the schedule is misleading. Mr Duffey was sentenced at the same time on 7 charges of aggravated unlawful entry of buildings, 7 of stealing, the Casino robbery, and a deprivation of liberty. He had 21 other offences taken into account, mainly unlawful entries and stealing. For the aggravated robbery he was sentenced to 8 years imprisonment; his total effective sentence *on all 16 charges* was 10 years imprisonment, with a nonparole period of 4½ years.

(5) *John Velis v The Queen* (unreported, Court of Criminal Appeal (NT), 22 June 1994) involved 2 street muggings at night in December 1991, in company, in which bodily harm was caused. The first victim was kicked unconscious in a city street; the second was punched. The appellant, aged 17 years and 2 months at the time, had many prior convictions, including 3 for aggravated assault. He also had committed 3 subsequent offences of violence. He was sentenced to an effective sentence of 5 years imprisonment with a nonparole period of 2 years, to be served cumulatively upon a sentence he was then serving. This was upheld on appeal as "perfectly appropriate"; the Court noted the "hideous deprivation" in his childhood and youth.

(6) In *R v Jason Morley* (unreported, Supreme Court (NT) (Kearney J), 19 August 1994) the prisoner aged 18 entered a flat, struck the occupant with a hammer, and stole her purse; she required stitches. He was sentenced for this armed robbery to 4 years imprisonment, with a nonparole period of 2 years. This was one of 10 offences for which he was sentenced at the time; his total effective sentence was 6 years imprisonment, with a nonparole period of 2

years. We note that subsequently he was sentenced to 10 years imprisonment for aggravated unlawful assault, with 4 years concurrent for armed robbery, a nonparole period of 6 years being fixed (unreported, Supreme Court (NT) (Kearney J), 24 November 1995).

(7) *R v Kirkman and Casey* (unreported, Supreme Court (NT) (Thomas J), 9 July 1996) involved the planned robbery in company of a service station at 2.35 am, in January 1996. Mr Kirkman was aged 20, and Mr Casey 19. They were disguised. A knife was used by Mr Kirkman on the operator; he received a minor laceration, and was traumatized. Both prisoners had extensive priors, with Mr Kirkman having 2 prior assaults. They were each sentenced to 4 years imprisonment, with a nonparole period of 2½ years, Mr Kirkman's sentence being cumulative upon a 6 months sentence arising from a breach of bond.

The applicant's prior criminal record

The applicant's extensive record of prior offending was before his Honour. His first appearance was before the Juvenile Court on 21 June 1989, aged 13. Prior to committing the present offence he had appeared before courts on 18 occasions; he also appeared before a court later, on 14 December 1995. He had been convicted of some 94 offences, 78 of them before the Juvenile Court. Most of his offences were unlawful entries and stealing. In addition he had been dealt with for 6 breaches of bonds or probation, 5 of them before the Juvenile Court. He had failed to observe the conditions of any bond into which he had entered.

The applicant had been directed by the Courts at times to carry out community service work. He was first sentenced to detention on 18 August 1989, aged 13; he received 7 months detention, being released on 18 months probation after being detained for 2 months. He was next sentenced to detention on 15 March 1991; this was detention for 9 months, when aged almost 15. He absconded from the juvenile detention centre and committed further offences; he received a cumulative 2 months and 21 days detention on 3 May 1991. On 2 June 1992, aged 16, he received 4 months detention for possessing cannabis and for an unlawful entry. On 25 September 1992 for breach of bond and an unlawful entry, he received a total of 9 months and 13 days detention. He escaped from the centre and committed other offences; on 2 November 1992 he received an effective further 1 month detention. By now he was also unlawfully using motor vehicles. He again escaped from lawful custody and appeared for the first time before a Court of Summary Jurisdiction on 4 June 1993, aged 17 years; he was sentenced to 1 month imprisonment. Thereafter he has appeared before Courts of Summary Jurisdiction on 6 occasions, facing 7 charges. He received suspended sentences of imprisonment on 24 August 1993; these were activated on 1 October when he was dealt with for aggravated assault, receiving a total of 7 months imprisonment. He received a further 7 months imprisonment on 15 November 1993, for criminal deception. On 31 May 1994, he received an effective 9 months imprisonment for unlawful entries, receiving and attempting to steal. On 15 September 1995 he appeared before the Supreme Court for an aggravated unlawful entry on 4 April 1995, receiving a sentence of 11 months imprisonment with effect from 4 April. A few days after his discharge, he

committed the robbery of 19 November. After committing that crime he appeared before the Court of Summary Jurisdiction on 14 December, receiving a total of 3 months imprisonment for various offences.

The sentencing remarks

In sentencing the applicant his Honour noted that he had been found guilty of "robbery with circumstances of aggravation", the particulars being the stealing of the cash and other items accompanied by a threat "to use violence upon [the victim] in order to obtain the property being stolen". His Honour continued:

> "The robbery involved the following circumstances of aggravation. At the time of the robbery you were in the company of James Dudley Bishop and you were armed with dangerous weapons, namely a firearm and a knife. Threats were issued before the stealing. It was open to the jury to accept evidence that *whilst you were in gaol you indicated an intention to commit a crime such as this, and that within days of being released from prison you were planning to implement it, and proceeded to do so.*
>
> *You arranged for Curtis Marriott to steal a rifle for your use*. Certainly there were yourself and James Bishop involved, and the evidence of the young people in the nearby park indicates that there was another. The three of you waited in the park until there were no customers in the shop late at night, crossed over the road and two of you entered. One held a rifle and the other a knife. Bishop had been given a knife and gloves by a Robert Dalley just before the event, and Curtis [Marriott] had given you the rifle. A third person stayed outside, probably to keep watch.
>
> The two who entered threatened the store assistant who was then alone and somewhat vulnerable, made him lie down, removed money from the till and then under further threat forced him to go to the office and open the safe, then tied him up and removed a substantial sum of money that was in the safe. The three offenders then made off with the proceeds across the park where you were again seen, but not identified, by the young people, and through adjoining parklands to Vanderlin Drive where you probably had a car waiting in which to complete the getaway.

Impressions from shoes including some reasonably distinctive impressions which were traced to Bishop were found by the police and followed. The Tuesday's newspaper carried a story of the events and you discussed it with other people at the unit at the old Nightcliff Hotel where you tended to congregate at the time, pointing out the inaccuracies in the report. And, to some degree, bragging about success. You live with your grandmother and other members of the family nearby to where the shoe prints were lost. But it is unlikely that you went home that night anyway.

…

The jury were well entitled to take into account the lies you told police, in coming to a view as to your guilt. [The applicant had presented an alibi defence (p18), which the jury clearly disbelieved].

…

The day after the robbery, you, your mother and grandmother went to a car sales yard and a car was purchased for $1600 in cash produced from your grandmother. A few days later she paid $3000 in cash to her bank account which had never been used for any purpose other than the receipt and paying out of her pension. The jury would have been entitled to disregard her evidence as to how she came by that cash, and the purpose for which she put it into the bank - it was quite unconvincing.

The coins and cash were probably your share of the proceeds of the robbery. There was no offer to make restitution. I do not accept there was any innocent explanation for your lies to the police as to where you were on the night of the offence. Nor do I accept that there was any innocent explanation for the threatening letters that you personally wrote and dispatched to Curtis Marriott whilst you were in prison [afterwards]. As to your personal circumstances I note that you were born on 13 March 1976 and that you are now but a little over 20.

You have an extremely poor family background. You migrated from Timor, but your parents split up, and to some extent your grandmother was expected to look after you but she failed in that. Your parents abandoned you in effect, and at the age of 14 having had practically nothing by way of a decent education, you were virtually on the streets.

You had had opportunities in the meantime for reform through the Welfare branch - the fostering care that was on offer, and indeed, during long periods of time, in the Don Dale [juvenile] Detention Centre. Rather than take advantage of [these opportunities of] bettering yourself, you rejected all those opportunities, and in fact, escaped from the Don Dale

> Centre many times, which means you had to be put in gaol at the age of 17 to secure you and protect the public from you." (emphasis added)

His Honour then referred to the applicant's criminal record, observing that "*you have a substantial record of criminal offending* …" (emphasis added). He continued:

> "There are no significant convictions [in that record] to indicate that you were a person of violent propensity.
>
> … This is the first time that you have gone armed and engaged in a robbery, but in all the circumstances, that does not have any real significance so far as the penalty is concerned. …
>
> You exhibit a gross disregard for the rights and property of other people and a gross disrespect for the law. *Frequent sentences to imprisonment for lesser offences have not deterred you from becoming further engaged in most serious criminal conduct.*
>
> *You are not punished again for past offending, but what you did was no aberration.* Punishment for this offence and deterrence, coupled with the overriding need to protect the community from you and people like you, assumes much greater importance in this case than the factors which might tend to leniency in others.
>
> *Your age, in all the circumstances, is of little significance*. People who engage in offences such as this must be expected to be treated as if they are adults, regardless of their chronological age." (emphasis added)

His Honour then referred in general terms to other sentences imposed for armed robberies, and continued:

> "Looking to the guidelines for sentencing contained in the new legislation [s5 of the *Sentencing Act*] the extent of punishment in this case must be significant. …"

His Honour then clearly went through the various sentencing guidelines set out in s5 of the Act, viz:

> "You and others must be discouraged from committing this or similar

offences. Personal and general deterrence assume major importance. It is made quite clear to (sic, by) the community, acting through the court, that it strongly disapproves of the conduct in which you were involved. Like any offences, *there are degrees of seriousness in relation to aggravated robbery, but this is amongst the worst type dealt with by this court in recent years*.

There is a real need to protect the community from you, as your antecedents demonstrate. There is nothing before the court to show that you are less to blame than any of the others who were present. Given that it was you who sought out the rifle, that you are a known associate of James Bishop and had planned to perform a robbery such as this, *I attach to you a substantial share of the blame*.

You have caused loss of about $7,500. None of the stolen money had been recovered from you. You acknowledge, in discussion with your friends and bragging about it, that you caused Mr Greatorex to be really frightened and the most adverse impact on him lasted for 10 days or thereabouts, but continued to a lesser degree. …

You gave no assistance to law enforcement agencies in the investigation to (sic, of) the offence. To the contrary you unsuccessfully tried to deceive them by putting up a false alibi and telling other lies. *The significant mitigation of penalty* which has been made available, and might in the future be available *to an offender who pleads guilty, is not available to you*." (emphasis added)

His Honour then proceeded to impose the sentence the subject of this application.

The applicant's submissions on the application for leave to appeal

The application for leave was argued on 3 broad grounds by Mr Nolan of counsel for the applicant.

(a) Alleged errors in sentencing

Mr Nolan submitted that his Honour had made 11 errors when sentencing.

First, he had placed undue emphasis on the particular role played by the applicant in the crime. It could not properly be inferred that the applicant was one of the two present within the store, and so a direct participant in the encounter with Mr Greatorex. Of those two, it was not clear who did what. Mr Nolan submitted that in cases such as *R v Spicer, Tartaglia and Fotiades* (supra, pp8-11) the circumstances treated as aggravating in the sentencing of a particular participant were his own violent acts or threats of violence. He submitted that applying that approach to the applicant in this case led to the conclusion that the applicant's sentence was too severe, bearing in mind also his antecedents and his age (19) at the time.

We accept that the role played by an offender in the commission of an offence is relevant to his sentence; a principal offender will be dealt with more severely than an offender who plays a minor role. As Gibbs CJ said in *Lowe v the Queen* (1984) 154 CLR 606 at 609:

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, … and such matters as the age, background, previous criminal history and general character of the offender, and *the part which he or she played in the commission of the offence, have to be taken into account*". (emphasis added)

Although there was evidence before the jury from which it could be concluded that the applicant was one of the two robbers who entered the store - see p3 - it is not clear from what his Honour said at pp15, 17 and 18 whether he accepted that evidence or acted on Ms Morris' submission (p5). However, his Honour considered at p18 that the applicant bore "a substantial share of the

blame", for the reasons there specified - his seeking out a rifle to use in this armed robbery, his association in it with James Bishop, and his planning to carry out the robbery. There was ample evidence to warrant these findings, and his Honour's conclusion therefrom as to the applicant's "substantial" blameworthiness.

We note in passing that the difference in the sentencing of Mr Tartaglia and Mr Spicer in *R v Spicer, Tartaglia and Fotiades* (supra at p8) was due to the difference in their respective prior criminal histories; otherwise they were held to be "equally culpable".

Second, Mr Nolan submitted that the time which the applicant had now spent in prison for this offence had worked a 'sea-change' in him; further, his family situation had now changed markedly for the better, in that members of his family were now prepared to see to it that he changed his ways. He had an offer of an apprenticeship open to him if his sentence were reduced to a sentence of the order of 5 years imprisonment (as Mr Nolan sought), with a corresponding reduction in the nonparole period; the existence of this offer would also be an inducement to him to rehabilitate himself while serving his sentence.

We note that none of these matters were put before his Honour for sentencing purposes. From their nature, some of them could not have been. This submission amounts to an attempt to place further evidence before this Court. Further evidence will not customarily be admitted on sentence appeals

unless proper grounds for its reception are established; in our opinion no such grounds have been established. This Court does not usually intervene on the basis of events which have occurred since sentence, and so fresh evidence is very sparingly received to establish that those events occurred, though regard may be had to them to show the true significance of facts in existence at the time of sentence, or where they suggest that a miscarriage of justice occurred; see *Rostrom* (1995) 83 A Crim R 58 at 60-2, and *Young* (1996) 85 A Crim R 104 at 108-110. The matters adumbrated by Mr Nolan were not such as probably to have had an important influence on the sentencing; they do not suggest that the sentencing involved a miscarriage of justice.

Third, Mr Nolan submitted that *R v Lewfatt* (1993) 3 NTLR 29 and on appeal (1993) 3 NTLR 41, indicated that in a case where the facts were "sufficiently extraordinary" (as he submitted the present facts were) an armed robbery did not necessarily attract "a Draconian sentence of imprisonment" so as to satisfy the requirements of deterrence. This was in support of a submission that his Honour had erred, in that he had not imposed the minimum sentence required to give efficacy to the requirements of specific and general deterrence.

R v Lewfatt (supra) involved an inexperienced robber, a 19 year old female, a recent mother, who on 8 January 1992 committed an unpremeditated robbery at knifepoint of a small scale business in broad daylight in Casuarina, to obtain money for cannabis. Other persons were present and she was recognised; it was a hopeless crime. She had numerous priors for dishonesty.

She was sentenced to 3 years imprisonment; service of that sentence was suspended on recognizances requiring her to undergo home detention for 9 months and be of good behaviour for 3 years. The learned Judge, sentencing in April 1993, observed at 31 that he considered that sentences hitherto imposed for "armed robberies involving shopkeepers, garages and so forth" were too lenient and should be increased, "this type of offence having become alarmingly prevalent"; he cited in support at 31-2 nineteen cases reported over the 10-month period from 1 June 1992. His Honour said of the case before him at 39-40:

> "Other relevant factors were the limited planning involved in the offence, and the fact that the offence was impulsive, and carried out to enable the prisoner to obtain drugs. The circumstances of the offence indicated that it was very much at the bottom end of the level of seriousness for offences of this type.
>
> …
>
> I would like to make it clear … that *the sentence I have imposed in this case is not to be regarded as a precedent for the general range of sentences for armed robbery*. I am conscious that, *even compared with the existing sentencing range, this sentence could be seen as a mercifully light sentence*. However, there were in my opinion special considerations which justified the approach I have taken." (emphasis added)

A Crown appeal against sentence was dismissed. On the appeal Kearney J said at 42:

> "The direction that service of that term [of 3 years imprisonment] be fully suspended, on the basis that the respondent entered into a home detention order and a recognizance [to be of good behaviour], constituted exceptionally lenient punishment. *Normally, armed robbers can expect to serve and are required to serve, a period of immediate imprisonment*. … *The result is an exceptionally lenient punishment, viewed against the current sentencing pattern in this Court for this offence*; it is, however, a punishment which in all the circumstances lay within the proper exercise

of his Honour's sentencing discretion." (emphasis added)

Angel J said at 43:

> "Armed robbery is a very serious crime for which the maximum penalty is imprisonment for life and *ordinarily it is to be treated as a charge where the punitive and deterrent aspects of punishment prevail over the reformative*. Ordinarily, even a first offender of good character is properly to be imprisoned to mark disapproval by the law of the conduct in question and as an example to others of what will become of them should they do likewise. Nevertheless, *each case must be decided on its own circumstances; there is no absolute rule of thumb*.
>
> In the present case, I do not think it can be said that his Honour's exceptional sentence is exceptionable.
>
> As armed robberies go, this was at the lower end of the scale. It was ill-conceived and gained little money. More importantly, for present purposes, subsequent to the offence but prior to sentencing, the respondent had apparently been brought to her senses by a term of imprisonment served in relation to an unrelated offence. She had apparently "turned a new leaf" …" (emphasis added)

We consider that the submission based on *R v Lewfatt* (supra) takes no account of the very different quality of the offending in that case; it was of much less intrinsic seriousness than this case. It takes no account of the fact that the robbery in *Lewfatt* was committed almost 4 years before the applicant's robbery, and before the remarks in *R v Lilliebridge* (supra) at p7. Nor does it take account of the remarks of the learned sentencing Judge and of this Court in *R v Lewfatt*, emphasised at pp22-3. The sentencing in *R v Lewfatt* fell outside the normal range; accordingly, it does not serve as a reference point for the sentencing in this case, which falls to be dealt with in accordance with the usual approach that the predominant need for deterrence necessitates a sentence of immediate imprisonment. The characterization of the present sentence as "Draconian" and (in a written submission) as "unduly

harsh", begs the question whether the sentence is manifestly excessive. It is of course correct that a sentence should be the minimum required; the general principle in sentencing is that if less will do, more is superfluous. The central common law principle of proportionality in sentencing requires that punishment must not exceed the gravity of the offence; this accords with s5(1)(a) of the *Sentencing Act*. Mr Nolan did not address in this submission the question whether the sentence was manifestly excessive. We observe generally that in a sentence appeal it is a wrong approach to compare the sentence under challenge with that imposed in another case, simply because the offenders may have similar characteristics, and may have committed similar crimes.

Fourth, Mr Nolan submitted that sentencing for armed robbery in the Territory was usually in the vicinity of 4 to 6 years imprisonment, with longer sentences restricted to crimes involving actual violence or threats of violence. As illustrations he referred to *Wade v The Queen* (supra) at p11 and *R v Lilliebridge* (supra) at pp6-8. He observed that the offenders in those cases, like the offenders in *R v Spicer, Tartaglia and Fotiades* (supra) at pp8-11 habitually used drugs and had imbibed alcohol to acquire 'Dutch' courage to perpetrate their offences. He pointed to the contrast with the facts of the present case both in that regard and in the lack of "particularly violent" words directed at Mr Greatorex.

We consider that menacing a person with a rifle and a knife, as here, constitutes a threat of violence, without more. We observe that it is not a fact

that sentences for robberies of the present type - armed robbers holding up small enterprises at vulnerable times - attract sentences of from 4 to 6 years imprisonment. Particularly where firearms are carried, as here, sentences of that order would often be completely inadequate; such cases should normally attract sentences of 6 to 8 years, on a plea of guilty and absent other circumstances of aggravation such as those in *Lilliebridge* at p7. This submission also takes no account of the very public warning in *Lilliebridge*, issued some 19 months before this offence, that "much heavier sentences" (p7) could be expected in future. See, for comparative sentencing elsewhere, *McGoldrick* (1994) 71 A Crim R 152 (Q'land), *Ellis* (1993) 68A Crim R 449 (NSW), *Bainbridge, Cullen and Ludwicki* (1994) 74 A Crim R 265 (Q'land), *Baldwin* (1989) 39 A Crim R 465 (Vic) and *King* (1988) 34 A Crim R 412 (SA).

Fifth, Mr Nolan submitted that the applicant may have been the 'cockatoo', and never entered the shop. He said that "it was never properly brought out at trial … exactly what the specific acts were". In essence this repeated Ms Morris' submission at p5. The applicant was 1 of 3 persons who committed the crime in company but, Mr Nolan submitted, he could not be identified as having taken some particular part on the basis of which he could "be singled out and sentenced more severely". We addressed this submission (pp19-20) and the basis on which his Honour sentenced the applicant when dealing with the first submission, of which it also formed part.

Sixth, he submitted that it was not open to his Honour to find for sentencing purposes that the applicant '*arranged for Curtis Marriott to steal a rifle for your use'* (p15), because there was no "substantiated evidence" to that effect before the jury. We note that Mr Marriott gave evidence to this effect at transcript pp96, 105-6 and 110. Mr Nolan submitted that there were other versions of the transaction, but conceded that the evidence from Mr Marriott was the only evidence on the point placed before the jury. We consider that Mr Marriott's evidence warranted the finding expressed by his Honour at p15, which was in accordance with the jury's verdict.

Seventh, Mr Nolan submitted that what Detective Senior Constable Pollock, "a source with little objectivity", said at the sentencing stage (see pp3,4) should not have been received. It was hearsay, and his reference to the applicant being a "leader" had led to his Honour being "particularly dismissive" of the applicant's antecedents, or giving undue adverse weight at p17 to them. He submitted that this approach did not accord with that to which a sentencer was required to "have regard" in the guidelines in s5 of the *Sentencing Act*. He rightly conceded that in this type of case deterrence was the pre-eminent aim in sentencing; it is a specific purpose of sentencing, set out in s5(1)(c) of the *Sentencing Act*. However, he submitted, rehabilitation - the purpose set out in s5(1)(b) - was also important in this case. As to what his Honour said at pp16-17:

> "You had had opportunities in the meantime for reform through the Welfare branch.
>
> …

You have a substantial record of criminal offending …";

he submitted that to the extent that these findings were based on what Detective Senior Constable Pollock had said, they were not properly founded.

We consider it is clear that his Honour's conclusions at pp16-17 were not based on what the Police officer said. The reference to "opportunities … for reform" was an inference derived from the applicant's history given by Ms Morris at p5 and open to be drawn, and the latter is simply an accurate assessment of his admitted criminal record (pp13-15). We note that a sentencing Court may inquire into any matter which may assist it in its task; see *Marquis* (1951) 35 Cr. App. R. 33. Where a matter put forward on sentence by the Crown is challenged by the offender, proper proof should be required before regard is had to it, at least where the burden of proof lies on the Crown; see *Anderson v The Queen* (1993) 177 CLR 520 and *R v Ali* [1996] 2 VR 49 at 54-62. A Police officer giving evidence of antecedents should not make general observations of a derogatory nature about an offender; see *Bibby* [1972] Crim. L.R. 513. Detective Senior Constable Pollock's observations were not of that order. The Crown has a "well recognized" obligation to produce an antecedent report "showing such of the subjective material elicited in relation to the accused as is necessary to present a fair picture to the sentencing judge": *R v Gamble* [1983] 3 NSWLR 356 at 359. We consider that it is desirable that such a report be in written form, a copy being provided to counsel for the accused when the jury retires. Section 5(2)(e), (f) and (s) of the *Sentencing Act* warranted his Honour having "regard to" the applicant's antecedents.

Eighth, Mr Nolan referred to some sentencing remarks by his Honour, to the effect that in sentencing he had not been influenced by "uninformed comments" in the Press, and warning the applicant that there was no "pattern of weak sentencing in relation to armed robbery." Mr Nolan submitted that his Honour nevertheless may have been influenced by these "uninformed reports", and was also "perhaps unduly influenced" by the lengthy sentences imposed in cases such as *R v Spicer, Tartaglia and Fotiades* (supra at pp8-11), without taking into proper account that they were more serious cases than the present case. On that basis, he submitted, the present sentence was too high than was warranted by the facts of the case, and was based rather on a "perceived need to impose a greater sentence".

It is correct that *R v Spicer, Tartaglia and Fotiades* (supra at pp8-11) was an armed robbery of a worse type, and itself a worse crime, than the present case; the sentencing for such a crime committed today would be much heavier than it was then. *R v Lilliebridge* (supra) at pp6-8 was an armed robbery of much the same type as the present case, but with more aggravating features. It is clear from the remarks at p8 that such a crime would command a "much heavier sentence" today. His Honour no doubt bore in mind what was said in those cases; he had been referred to them by defence counsel. In his remarks now attacked, he referred to the length of sentences of persons currently serving terms for armed robbery, and the sentences imposed in 5 cases in 1996. We consider that there is no substance to this submission; his Honour's

remarks were proper, and did not bear the connotation that Mr Nolan sought to place on them.

Ninth, Mr Nolan, while conceding that in sentencing for this crime youth "in isolation can't be a mitigating factor", submitted that the sentence should be reduced to one which gives the applicant, a person "whose total character is still unformed", and who is "a very young man", "a real prospect of rehabilitation", "a final opportunity". He stressed that the applicant had "no past history of violence"; he should be treated as being at "the lower end of the scale for punishment"; and he came from "the most extreme type of broken family". These submissions were in general support of submissions that his Honour had given insufficient weight to mitigating circumstances, particularly the applicant's youth, deprived background and immaturity, and to his prospects for rehabilitation.

Submissions along these lines take no account of the predominant basis of sentencing in armed robbery cases, as stated, for example, by Angel J in *R v Spicer, Tartaglia and Fotiades* (supra) at p10. The learned sentencing Judge rightly treated (p17) the applicant's age as of "little significance". In *R v Rogers* (supra), a case of the attempted armed robbery of a bank, this Court cited the observation at p10 above by Angel J in *R v Spicer, Tartaglia and Fotiades,* and earlier similar observations in *R v Williscroft* (1975) VR 292 at 299, *R v O'Brien and Potts* (unreported, Supreme Court (Vic), 28 February 1986), *R v McNally* (unreported, Court of Criminal Appeal (Vic), 8 December 1988) and *R v Brett* (1987) 140 LSJS 343 (SA) at 344, all stressing the

seriousness of the crime of armed robbery and the need for its deterrence by way of condign punishment. To similar effect are observations in *R v Spiero* (1979) 22 SASR 543 at 548-9, *R v Knight* (1981) 26 SASR 573 at 574-5, *Zakaria v The Queen* (1984) 12 A Crim R 386 at 388 (Vic), *R v Chan* (unreported, Court of Criminal Appeal (Vic), 5 May 1989) and *R v Thomson* (unreported, Court of Criminal Appeal (SA), 21 May 1991) at 3. In general, rehabilitation is the main aim in sentencing a young offender such as the applicant; see *GDP* (1991) 53 A Crim R 112 at 116 (NSW). However, sentencing in cases of armed robbery, as in other crimes of considerable gravity, constitutes an exception. This is because it is such a serious crime that even where the offender is young the Court would cease to function as protector of the community unless deterrence and retribution were significant sentencing considerations; see *R v Gordon* (1994) 71 A Crim R 459 at 469 (NSW). Accordingly, in weighing the need for condign punishment of armed robbers against the need to rehabilitate a young offender, the former need will usually prevail. In *Pham v Ly* (1991) 55 A Crim R 128 (NSW), an aggravated robbery case, Lee CJ at CL put it this way at 135:

> "It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes …".

See also *R v Readman* (1990) 47 A Crim R 181 (NSW). The need for deterrence is even greater when the crime is planned; *R v Tait* (1979) 46 FLR 386 at 399. His Honour rightly adopted this approach. The applicant well

knew what he was doing when he took part in this robbery; he hoped to get away with it, and denied his guilt to the end.

Tenth, Mr Nolan submitted that *Wade v The Queen* (supra) at p11 indicates that a distinction should be drawn in sentencing between armed robberies in company which involved use of a firearm, and knifepoint robberies by a single 'fairly impetuous offender'. We observe that any such distinction would not benefit the applicant in this case.

Eleventh, Mr Nolan submitted that the facts of the present armed robbery were not as bad as those in *R v Spicer, Tartaglia and Fotiades,* (supra) at 8-11 and in *R v Lilliebridge* (supra at 6-8); we accepted that point, in dealing with the eighth submission (p28). He submitted as a corollary that the head sentence here should have been of the order of 5 years imprisonment.

This submission takes no account of the indication by Angel J in the Court of Criminal Appeal in April 1994 in *R v Lilliebridge* (supra) at p8 that in future "much heavier sentences" could be expected for serious armed robberies, and remarks to similar effect by other sentencing Judges. The present crime falls squarely into that general category. As to the significance of such warnings see *Yardley v Betts* (1979) 22 SASR 108 at 113-4, per King CJ. It is wrong to assess the present sentence for a crime committed in November 1995, against sentences for more serious crimes committed in February 1993, in light of those indications in the interim by sentencing Judges. Further, the submission takes no account of the pleas of guilty in

those cases, a factor to which his Honour rightly referred as 'significant mitigation … not available to [the applicant]."

(b) Undue weight on the applicant's character and prior record

Mr Nolan submitted that his Honour had erred in that he placed undue weight, adverse to the applicant, on his character and previous criminal record, with the result that he had in effect been "double sentenced" for his previous offences. The basis for this was a submission that his Honour in effect had indicated (p17) that he did not believe that the applicant's previous "frequent sentences to imprisonment" had effectively deterred him; and in order to do so, had now imposed an unduly heavy sentence.

There is nothing in his Honour's sentencing remarks (pp15-18) to suggest that he fell into this error; to the contrary, he specifically observed (p17) that "You are not punished again for past offending …", after noting that the applicant's previous "frequent sentences" had not deterred him. It is clear that his Honour correctly inferred from the applicant's antecedent criminal history that the present offence was "no aberration". His Honour's remarks showed that he rightly treated the applicant as manifesting by this offence a continuing attitude of disobedience of the law, a factor which warranted a more severe penalty; see *Veen v The Queen [No.2]* (1987-88) 164 CLR 465 at 477-8, and *Hooper* (1995) 80 A Crim R 147 at 158-9 (SA).

(c) The "wolf in the fold" submission

Mr Nolan submitted that there was a real possibility that there were involuntary physical causes for the applicant's aberrant behaviour, of a genetic or neuropsychological nature. In support he relied on 6 papers presented at a symposium on "Genetics of Criminal and Anti-social Behaviour" held at the Ciba Foundation, London, in February 1995. He submitted that the genetic makeup of a person was a physical matter which could be determined scientifically; it could found a submission in mitigation of sentence if it rendered an offender less able to consider and restrain his criminal actions. To this end, he submitted that this Court should now consider whether it should order that a genetic examination of the applicant be carried out.

We note that no attempt has been made by the defence at any time to have the applicant genetically evaluated in any way. It is not suggested that any fresh evidence relating to the genetic makeup of the applicant has been discovered. It is no part of this Court's function to probe on appeal possibilities which were open at trial and not then sought to be relied on. In addition, as far as we are aware, scientific knowledge in Australia has not reached the point where expert evidence of genetic evaluation is accepted as per se relevant to sentencing for crime. It has not been shown that genetic evaluation and its consequences for criminal behaviour are as yet generally accepted in the relevant scientific community in Australia as a reliable body of scientific knowledge such that a special acquaintance with it could render the opinion of an expert of assistance to a sentencing judge, nor has it been shown that it is treated as reliable and relevant; cf. the differing tests for the admission of novel scientific evidence in the courts in *Frye v United States*

293 F.1013 (D.C.Cir.1923) and *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) US S.Ct. 2786; 125 L Ed 2d 469. Apart from referring the Court to the articles mentioned, Mr Nolan did not seek to show that genetic evaluation has a sufficiently accepted scientific basis to render its results properly the subject of expert evidence relevant to sentencing. We reject this submission, as lacking any foundation.

Conclusions

We note that the Court records disclose that the applicant's co-offender James Dudley Bishop pleaded guilty to this armed robbery and to 26 other offences over an earlier period of some 11 months, mainly unlawful entries at night and stealing. He was sentenced on 30 September 1996 under s52 of the *Sentencing Act* to a single aggregate sentence of 12 years imprisonment for all 27 offences, with a nonparole period of 6 years. His application of 28 October for leave to appeal against the severity of sentence, has not yet been heard. No third person appears to have yet been charged.

The question on an application for leave to appeal against sentence is whether the sentence was within the limits of a sound discretionary judgment, having regard to all relevant matters; these include in this case the maximum sentence of imprisonment for life and the primacy of the need for special and general deterrence in sentencing for armed robberies. The applicant must establish error in the exercise of a wide and substantial sentencing discretion, either from the sentencing remarks or as inherent in a sentence which is so manifestly excessive that it is only explicable on the view that the sentencer

erred in some way; or in the absence of a legitimate basis for some particular finding of fact relevant to sentence. See generally *R v Spicer, Tartaglia and Fotiades* (supra) at 31-2 per Priestley J, and *Weatherall v The Queen* (1987) 28 A Crim R 70 (ACT). To put the relevant questions in the way formulated in *House v The King* (1936) 55 CLR 499 at 505: has the applicant shown that his Honour acted upon a wrong principle, allowed extraneous or irrelevant matters to affect the result, misunderstood the facts, failed to take some material consideration into account, or imposed a sentence which is unreasonable or plainly unjust?

It is right to examine the sentence imposed in the light of earlier sentences of this Court and of sentencing Judges. It is from this collective wisdom that any general pattern of sentencing for this offence may be discerned. See *R v Spicer, Tartaglia and Fotiades* (supra) at 36-40 per Priestley J, citing *Lowe v The Queen* (1984) 154 CLR 606 per Mason J at 610-611 on the need to avoid "unjustifiable discrepancy in sentencing"; *Ellis* (supra) at 460 per Hunt CJ at CL; and *Sheppard* (1995) 77 A Crim R 139 (Q'land).

Some 2½ years ago it was indicated in this Court that sentences for serious armed robbery would increase. Individual sentencing Judges have also indicated that this should be expected. The present crime was a carefully planned and executed robbery, carried out by a number of persons in company, an attack in which they carried weapons and were disguised. It constituted a serious example of the crime of armed robbery, though not in the 'worst case'

category which merits life imprisonment. It merited the imposition of a substantial sentence of immediate imprisonment. The applicant was unable to rely on mitigating factors such as a plea of guilty. Despite his youth he has a bad prior record, though this was his first robbery. The sentence imposed is very much longer than any which the applicant has hitherto received. This 'jump' in length over his previous sentences is wholly due to the marked increase in the seriousness of the crime he committed in November 1995.

We respectfully adopt and apply what King CJ said in *R v Brett* (supra) at 344:

> "It has been said over and over again in this Court that armed robbery is a crime which must be viewed with the utmost seriousness. It puts the victims in fear and sometimes, although not in the present case, in danger. The fear is not confined to the immediate victims of the particular crime. The prevalence of armed robbery in the community puts in fear and causes continuing anxiety to a considerable section of the community whose employment requires them to be in charge of money and other property …".

Small enterprises such as suburban video rental shops provide a useful service to the public. To meet public needs they stay open late at night; they lack the sophisticated protection of institutions such as banks, and they are often staffed by one vulnerable person. They are therefore particularly susceptible to attack, constituting easy targets for those who seek to enrich themselves at others' expense. The courts must provide such protection as they can for them; this is done by making it clear that when persons who commit offences such as this are detected they will inevitably face a severe sentence which contains an element designed to persuade like-minded persons that this crime is not worth it. See *R v Donaldson* [1968] 1 NSWR 642.

As we have sufficiently indicated in discussing the applicant's submissions, we discern no error in sentencing in his Honour's sentencing remarks. The findings of fact made for the purpose of sentencing were all open to be made. No wrong principle was acted upon. No extraneous or irrelevant matters affected the result. All material considerations were taken into account. We do not consider that in all the circumstances of the offence and of the offender this sentence was manifestly excessive; it is not obviously too severe or wholly out of proportion to the degree of criminality involved. It is not unreasonable or plainly unjust. In short, the sentence imposed lay within the proper exercise of the sentencing discretion.

Accordingly, as we do not consider that any of the grounds relied on were reasonably arguable, we dismiss the application for leave to appeal and affirm the sentence imposed.

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