SUPREME COURT OF QUEENSLAND

CITATION:	*Schmith v Nolan* [2003] QCA 93
PARTIES:	**DAWN ARLENE SCHMITH** (applicant/applicant) v **MARK ROBERT NOLAN** (respondent/respondent)
FILE NO/S:	Appeal No 10153 of 2002 DC No 171 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	10 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2003
JUDGES:	Davies and Jerrard JJA and Atkinson J Separate reasons for judgment of each member of the Court, Davies and Jerrard JJA concurring as to the order made, Atkinson J dissenting
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY - COMPENSATION - QUEENSLAND - where respondent pleaded guilty to entering premises and stealing - where District Court dismissed application for compensation pursuant to the *Criminal Offence Victims Act* (Qld) 1995 - whether personal offence was taken into account by sentencing judge - whether question of construction of the *Criminal Offence Victims Act* (Qld) 1995 arose *Criminal Offence Victims Act* (Qld) 1995, s 24 *Penalties and Sentences Act* (Qld) 1992, s 189
COUNSEL:	S D Guttridge for the applicant No appearance for the respondent
SOLICITORS:	Lewis & McNamara (Hervey Bay) for the applicant No appearance for the respondent

DAVIES JA: This is an application for leave to appeal from a judgment in the District Court on 9 October 2002. The judgment was one dismissing an application for compensation pursuant to the *Criminal Offence Victims Act* 1995.

The respondent to that and this application pleaded guilty in the District Court on 14 March 2002, to, amongst other offences, 19 counts of entering premises and stealing. One of those counts was an offence committed at 4.50 p.m. on 3 April 2001, at a store called "Fisherman's Feast", at Chermside. In a schedule tendered as an exhibit before the learned sentencing judge, in which all offences were briefly described, this offence was described as follows, and I quote:

> "At about 4.50 p.m. the accused entered the store and after paying for a small item, reached over the counter and grabbed money from the till where a struggle ensued."

In another column of the schedule, presumably for the description of the place where the offence occurred or the complainant, there is noted - and I quote:

> "Fisherman's Feast - Chermside - Dawn Schmith."

In describing the entering and stealing offences to the learned sentencing judge, the prosecutor said:

> "There were one or two instances where the ladies behind the counter or the till attempted to stop the accused, where they tried to grab the money, but no force was perpetrated against them in person by the accused - the prisoner was successful in getting it and running away."

The prosecutor then went on to distinguish the offences before the learned sentencing judge, from the offences upon which the respondent had been convicted four years before, which had involved actual violence. He described those earlier offences as cases in which a complainant has "held onto the accused and he has physically pushed them away in those instances in order to get out of the shop".

In her victim impact statement, which was also before the learned sentencing judge, the applicant mentioned that the respondent pushed her. So there seems to be some inconsistency between the description which the prosecutor gave of this offence and this victim impact statement. The schedule, earlier referred to, is somewhat ambiguous on this question, referring to "a struggle", but not to any assault and not identifying, or at least clearly identifying, who was involved in the struggle. I would have been prepared to infer without more, however, that the person involved was the applicant.

It is unsurprising, in the circumstances, that the learned sentencing judge did not expressly refer to, or apparently rely on any pushing by the respondent of the applicant, in imposing the sentence which he did. Indeed, he did not even refer specifically to the facts of this case. No doubt that was because this was one of 19 almost identical offences. His Honour said of these, I quote:

> "The facts relating to each of the offences being dealt

> with this morning are set out in a schedule, and I do not intend recounting those facts beyond noting that many of the offences charged as entering premises and stealing involved you reaching over a counter in small businesses and snatching money from the till."

His Honour imposed the same sentence, one of three years' imprisonment, in respect of all 19 offences of entering premises and stealing.

Other than the learned sentencing judge's sentencing remarks, none of the material to which I have so far referred, that is the transcript of argument before the sentencing judge, a schedule of offences, or the victim impact statement of the applicant, were before the learned judge, from whose decision this application was brought. The applicant now seeks to adduce evidence of these on this application notwithstanding that it was available to her, and could have been adduced by her, on the hearing of her application for compensation. I shall defer consideration of the question whether, in my opinion, that evidence should now be admitted.

The application was refused in the District Court because the learned District Court judge was of opinion that s 24 did not apply. That section provides:

> "(1) This section applies if someone (the '**convicted person**') -
>
> (a) is convicted on indictment of a personal offence; or

(b) is convicted on indictment and a personal offence is taken into account on sentence.

(2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.

(3) The court may make an order (a '**compensation order**') for an amount to be paid by the convicted person to the applicant because of the injury."

The learned District Court judge held, first, that the respondent was not convicted on indictment of a personal offence. That is undoubtedly correct. An offence of entering premises and stealing is not a personal offence within the meaning of s 21. The contrary is not contended by the applicant here.

Secondly, the learned District Court judge held that although the respondent was convicted on indictment, a personal offence was not taken into account on sentence. His Honour reached this conclusion because he was of the view that a personal offence is taken into account on sentence only where it is taken into account under s 189 of the *Penalties and Sentences Act* 1992. It is plain that no personal offence against the applicant was taken into account under that section. However his Honour added, "There is no evidence that the judge was

ever told that the applicant had been assaulted but for these reasons, it would not have assisted the applicant's case to show that he had."

The applicant's submission, through Mr Guttridge, is that she should have leave to appeal because there is an important question of law involved in this matter, namely whether "taken into account on sentence" in s 24(1)(b) of the *Criminal Offence Victims Act* means only taken into account under s 189 of the *Penalties and Sentences Act* or whether it may mean also taken into account as a matter relevant to the sentence which should be imposed and Mr Guttridge submitted in his written outline that the learned sentencing judge took into account in sentencing the respondent that he had, in the course of committing the offence of entering premises and stealing where the applicant was present, assaulted the applicant by pushing her.

On the facts as I have stated them, including the further evidence which was not before the learned District Court judge from whom this application is brought, there is nothing, in my opinion, to indicate that the learned sentencing judge took into account, in any way, in sentencing the respondent, that he pushed or, indeed, even may have pushed the applicant at or about the time he committed the offence of entering premises and stealing at the Fisherman's Feast store at Chermside.

Accordingly, in my opinion, no question of construction of the *Criminal Offence Victims Act* arises in this application. That

is not to say where facts, which give rise to such a question are shown, leave should not be granted.

In my opinion, there is an arguable question as to whether his Honour, Judge McGill, was correct or not in confining the phrase "taken into account" to mean "taken into account under s 189 of the Penalties and Sentences Act." This case, therefore, in my opinion, is a most unfortunate case for the applicant who has plainly suffered a great deal.

In cases such as this where a judge takes into account, in imposing the sentence which he or she does, either the use of force or circumstances indicating some other personal offence, he or she should say so. However, for the reasons I have given, I would dismiss the application.

JERRARD JA: I agree with the judgment of the presiding Judge.

ATKINSON J: I will not repeat the facts as have been detailed by Justice Davies, however in my view the learned sentencing Judge did take into account on sentence a personal offence. The reasons why I say that are that in his Honour's sentencing remarks he referred to two matters which together showed that a personal offence had taken place.
In his sentence he referred to the schedule in which the offences are set out. He did not enumerate the facts any further than referring to the schedule. The schedule itself does show that this offence involved a struggle and that the complainant was the applicant here.

Further, his Honour referred in his sentencing remarks to the victim impact statements. There were two victim impact statements put before the learned sentencing Judge. One of them was from the applicant here and she said in recounting the terrible impact of this offence upon her that he had pushed her around before he left the store.

In the circumstances, I am of the opinion that a personal offence was taken into account in the sentence imposed.

I would specifically reserve the question of whether or not taking into account in that section only refers to the very narrow reading that the learned Judge below thought that it had rather than a wider and more beneficial meaning which seems more in keeping with the Criminal Offence Victims Act 1995 and its objects.

I would give leave to appeal.

DAVIES JA: The application for leave is refused.
