SUPREME COURT OF QUEENSLAND

CITATION:	*R v Schmidt* [2003] QCA 287
PARTIES:	**R** v **SCHMIDT, James Ernest** (appellant/applicant)
FILE NO/S:	CA No 37 of 2003 DC No 98 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	10 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2003
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to set aside plea of guilty dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST CONVICTION RECORDED ON A PLEA OF GUILTY - PARTICULAR CASES - where appellant pleaded guilty to one count of house breaking and one count of wilful damage - where appellant, in company with another, deliberately caused damage to the unit of a friend - where appellant sentenced to 30 months imprisonment - where appellant pleaded guilty because he was told that his co-accused was sentenced to 12 months for same offence - where Crown prosecutor under misapprehension that this was the case - where appellant did not contend at hearing that the facts were not as put forward by the prosecutor - whether mistake as to sentence of co-accused resulted in miscarriage of justice in appellant's pleading guilty CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where

	appellant had substantial and serious criminal history - where at time of sentence appellant serving a period of imprisonment - where co-accused sentenced to 30 months - whether sentence manifestly excessive
COUNSEL:	Appellant/applicant appeared on his own behalf M R Byrne for respondent
SOLICITORS:	Appellant/applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: On 23 January 2003, the appellant pleaded guilty to two offences, one of housebreaking and one of wilful damage, both committed on 9 December 2000. He was sentenced to 30 months imprisonment on the first of those offences, and three months imprisonment on the second. In case there is any doubt about this matter, I should emphasise that the second was ordered to be served concurrently with the first. A recommendation was made in respect of the first of those offences that the appellant be considered for post-prison community based release after serving nine months of that sentence. Notwithstanding his guilty plea, the appellant now wishes to appeal against his convictions and to seek leave to appeal against his sentences.

The facts on which he was sentenced following his plea of guilty were as follows. The complainant Sutherland had been a drinking companion of the appellant. He had introduced the appellant to a woman, Maureen Gardner, with whom the appellant had entered into a de facto relationship. The relationship had deteriorated to the point where there was a complaint by Ms Gardner that the appellant had assaulted her.

In August or September 2000, the appellant came to Sutherland's unit and, during the course of a brief

conversation, told him that he was going to "kill that bitch Maureen Gardner" and that he would "knock her place off and everything that she has got". He then implied that Sutherland had been involved in some sort of set up in introducing the appellant to Gardner and then said, "She is not taking food out of the mouths of my kids." At the end of the conversation he said to Sutherland "It is an iron bar for you", and then left.

Then on the day of this offence, 9 December 2000, at about 4.30 p.m. Sutherland was at home watching television when there was a ring at the door. He opened it to see the appellant and another man, Algra. Sutherland said "Hello" whereupon the appellant placed the palm of his hand on Sutherland's chest and pushed him backwards into the unit. The appellant and Algra then came into the unit and the appellant said words to the effect, "I told you I was coming back, you fucking prick". Algra then proceeded to steal some of Sutherland's goods. It is not suggested that the appellant was involved in any way in this stealing.

The appellant however proceeded to cause deliberate damage to the contents of the unit. He threw pot plants about, he ripped the top off a coffee table, he picked up a fan and threw it across the room, also a television set. He threw ceramics about as well as Sutherland's food. He then opened the refrigerator and threw the food out of the refrigerator onto the floor. He went into a bedroom and Sutherland could hear him throwing things about inside the room. From time to

time the appellant yelled obscenities at Sutherland. The appellant then came outside, picked up a bicycle and took it out through the entry door. He then threw it over the verandah railing where it landed on the ground nearby, severely damaging it. The two men then left the unit and drove away.

Sutherland did not report this event for two days, a matter which the learned sentencing judge described as one of some concern. His explanations were that he had no telephone, for a time he did not have the courage to go outside, and he had no means of getting to a police station.

On 18 January 2002, Algra pleaded guilty before the same sentencing judge to one count of breaking and entering with intent, one of wilful damage, one of stealing and one of assault. He was sentenced to 30 months' imprisonment for the offence of breaking and entering a dwelling with intent, and lesser sentences for the other offences. A recommendation for post-prison community based release after nine months was also made. A charge of armed robbery against him was not proceeded with.

The main basis for the appellant's appeal and his application for leave to appeal against sentence is that he agreed to plead guilty because he was told, and his counsel was told, that Algra had been sentenced by this judge to only 12 months imprisonment for breaking and entering with intent and that the 30 months term of imprisonment had been imposed upon the

armed robbery count. It does seem that there is some factual basis for this assertion because the Crown prosecutor was under the misapprehension that this was the case and did not contend for a sentence longer than 12 months. It was only during the course of the hearing that his error was corrected by the learned sentencing judge.

There is undoubtedly a discretion in this Court to allow the entry of a plea of guilty to be set aside permitting an order to be made for a trial. Whether that should be permitted or not depends on whether to allow the guilty plea to remain would result in a miscarriage of justice.

The appellant's counsel, no doubt on his instructions, did not contend in the hearing before the learned sentencing judge that the facts were not as put forward by the prosecutor. I do not think that a mistaken impression by the Crown prosecutor as to what sentence had been imposed on Algra, communicated to the appellant's counsel could be said to result in a miscarriage of justice in the appellant pleading guilty to the offences which he did. Moreover, it appears that this information, communicated by the prosecution, was contrary to the information which the appellant's legal advisers had received from the Court as to the sentence imposed on Algra.

It was not suggested that the pleas of guilty were entered otherwise than in the exercise of a free choice by the appellant and with full knowledge of what the pleas entailed.

Nor did the appellant in any respect dispute the facts as outlined to the Court by the prosecutor.

The appellant also complained in his writing to this Court, if not in his submissions made to us this morning, about the opinion of Dr Fama, a psychiatrist, being provided to the Court by his counsel without his authority. There is nothing in the opinion which, in my view, harmed the appellant's prospects on the sentence hearing and it is unclear how the appellant submits it affects his plea of guilty.

I do not think that, in the circumstances I have outlined, a plea of guilty by the appellant resulted in any miscarriage of justice. I would accordingly dismiss the application which is, in effect, one to set aside the plea and enter a plea of not guilty.

As to sentence, the applicant takes umbrage at the description of the offence as a home invasion. That was not, as I have pointed out to the applicant this morning, a description of the offence in legal terms but a means of emphasising that an offence of house breaking assumes more serious proportions when it involves vigilante style activity such as this offence did; invading the sanctity of an innocent person's home, in company, in circumstances likely to cause fear to the home owner or to members of his or her family.

The applicant has a substantial and serious criminal history. His most serious criminal offences relevant to the offences

the subject of his present application were rape in 1971, for which he was imprisoned for two years, aggravated assault on a female in 1979 for which he was imprisoned for six months cumulative upon an existing sentence, wilful damage to property in 1989 for which he was sentenced to a cumulative term of three months, and assaults occasioning bodily harm in 1999 for which he was sentenced to 18 months.

The appellant appears to, although it is not completely clear that he does, complain of a lack of parity with the sentence imposed on Algra, who also had a serious criminal record, although perhaps not quite as serious as that of the present applicant.

Algra's participation in this offence, though no less active was, it seems to me, in support of the applicant, for whose purpose they were committed. However the applicant complains that a period of custody which he served from 4 July 2002 until the date of sentence was not taken into account by the learned sentencing judge. That is incorrect. His Honour plainly took it into account in imposing the sentence which he did, and said that he had done so.

He said:

> "I take into account that you have, in fact, been in custody for almost seven months now. Whilst that is not a period of incarceration to which I can give effect by way of a declaration, it is, nonetheless, I think a factor which I am entitled to take into account when considering the appropriate sentence to be imposed in this case."

It is no doubt arguable that this should have resulted in a lower sentence than that imposed on Algra. However when the appellant's threats and the fact that the invasion was plainly at his instigation are taken into account, I do not think that there was any lack of parity.

The sentence was I think on the whole a moderate one. Accordingly, in my opinion, the application for leave to set aside the plea of guilty and the application for leave to appeal against sentence should both be dismissed.

WILLIAMS JA: I agree.

JERRARD JA: I agree. I add only that there is some discrepancy in the records as to whether the sentence for the offence of rape was one of two years or eight years, but that does not matter, because what is important is the fact of the conviction for rape.

DAVIES JA: The orders are as I have indicated.
