SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dutton* [2005] QCA 394
PARTIES:	**R** **v** **DUTTON, Damian James** (applicant)
FILE NO/S:	CA No 205 of 2005 DC No 661 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	27 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2005
JUDGES:	Williams and Jerrard JJA and Atkinson J Separate reasons for judgment for each member of the Court, each concurring as to the order made
ORDER:	**Application for an extension of time within which to appeal against conviction refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – applicant pleaded guilty to nine offences – application for extension of time to appeal against conviction filed 15 months late – whether the applicant produced sufficient material to satisfy the Court that his original plea of guilty was irregular *Meissner v R* (1995) 184 CLR 132, considered
COUNSEL:	The applicant appeared on his on behalf M R Byrne for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant, Damian James Dutton, pleaded guilty on 15 April 2004 to nine offences committed on four occasions between 29 January and 4 March 2003. There was one count of sexual assault, one count of rape, one count of attempted rape, one count of sexual assault with a circumstance of aggravation, one count of exposing an intellectually impaired person to an indecent act, two counts of indecent acts in a public place, one count of going armed so as to cause fear and one count of wilful damage.

On 16 April 2004 he was sentenced to an effective term of 10 years' imprisonment. The learned District Court Judge structured that sentence by imposing a sentence of seven years' imprisonment on the count of rape and three years' cumulative imprisonment on the count of attempted rape with equal or lesser sentences on the remaining counts.

The sentences imposed on counts 1 to 3 on the indictment were concurrent and the sentences imposed on counts 4 to 9 were concurrent with each other but cumulative on the sentence imposed on the count of rape. His Honour declared the applicant had been convicted of a serious violent offence in respect of the rape offence.

The terms of a suspended sentence of six months' imprisonment imposed in the Beenleigh Magistrates Court on 12 September 2002 had been breached by the applicant's commission of these further offences and he was ordered to serve that six month

sentence concurrently with the sentences imposed on counts 1 to 3.

The applicant now applies for an extension of time to appeal against his conviction. That application was filed on 12 August 2005, about 15 months late. Grounds explaining the delay in making the application and an outline of argument were attached to the application. By way of explanation for the delay the applicant contends in his written submissions that he was originally advised that he could not appeal against the conviction because he pleaded guilty but he now says that he has different advice.

He claims in the written submissions that he only pleaded guilty because his barrister told him that the prosecution had DNA evidence which established his guilt and that if he entered an ex officio guilty plea he would not receive more than six years' imprisonment. He now seeks to have the prosecution produce the DNA evidence in Court so that it can be contested.

He also claims in his written submissions that the case against him was weak because none of the witnesses referred to prominent tattoos on his body. He also contends in his written submissions that witness statements produced by the police were contradictory and non-corroborating.

It should be recorded that the applicant previously successfully applied for leave to appeal against his sentence.

That is reported as *R v Dutton* [2005] QCA 17. The sentence initially imposed on counts 5 and 7 of three years was reduced to two and a-half years. That was to give effect to the learned primary Judge's intention that the applicant serve a total of about seven years' imprisonment before becoming eligible for post prison community based release and the fact that the sentences, as originally structured by the learned primary Judge, overlooked the operation of section 161C of the *Penalties and Sentences Act* 1992 (Qld) as interpreted in *R v Powderham* [2002] 2 Qd R 417.

Before the Court today the applicant made oral submissions expanding on what was contained in his written outline. It is obvious from those submissions that he concedes that he did, in broad terms, meet with the complainants on the four occasions in question. That is in the sense that they, at least, saw each other on that occasion. He still denies that there was any conduct on his part which constituted the offences, though it is clear that at the time he pleaded guilty he was fully aware of the nature of the charges that he was facing. It appears that he had an expectation, possibly resulting from statements made by his barrister, that he could expect a sentence no greater than six years' imprisonment if he pleaded guilty.

In the course of oral submissions reference was also made to the DNA evidence. Shortly before today's hearing the prosecution provided the applicant with a copy of the report from the John Tonge Centre dealing with the DNA evidence which

was placed before the Court on sentence. It apparently indicates that testing of saliva on the breast and bra of one of the women involved in the incident on 29 January 2003 showed a match with the applicant's DNA. The applicant, nevertheless, maintained that he wishes to have that DNA assessment tested in open Court.

In my view the applicant has failed to produce material sufficient to satisfy this Court that his original plea of guilty was irregular.

In *Meissner v R* (1995) 184 CLR 132 at 141, Brennan, Toohey and McHugh JJ observed that a person charged with an offence is at liberty to plead guilty or not guilty and that a Court will act on a guilty plea entered in open Court by a person of full age and apparently of sound mind and understanding provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a Court acts on such a plea even though the person entering it is not, in truth, guilty of the offence.

Here, the applicant has not provided any satisfactory explanation for the lengthy delay in bringing his application for an extension of time and more significantly he has not produced any material to justify setting aside the guilty pleas. It follows that the application for an extension of time to appeal against his conviction should be refused.

JERRARD JA: I agree with the judgment of the learned presiding judge and with the orders His Honour proposes. Mr Dutton has not shown any reason as to why his convictions on his own pleas of guilty caused any miscarriage of justice. He has told this Court that he knew what the allegations were when he pleaded guilty and when he made pleas of guilty he admitted the truth of the allegations which he knew. The problem he faced after he was sentenced was that he had received a significantly higher sentence than he expected to have passed upon him but that does not establish that a miscarriage of justice occurred.

ATKINSON J: I agree with the reasons of Justice Williams and Justice Jerrard and with the order proposed by Justice Williams.

WILLIAMS JA: The order of the Court is that the application is refused.
