SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lowe* [2003] QCA 306
PARTIES:	**R** **v** **LOWE, Peter Anthony** (applicant)
FILE NO/S:	CA No176 of 2003 DC No 350 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for Reopening (criminal)
ORIGINATING COURT:	District Court at Gympie
DELIVEREDEX TEMPORE ON:	21 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2003
JUDGES:	Williams JA, Mackenzie and Helman JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Order that the 225 days during which the applicant was in custody between 6 December 2000 and 20 July 2001 should count as time served under the sentence of imprisonment for six years he was ordered to serve on 20 July 2001**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – OTHER MATTERS – QUEENSLAND – application for pre-sentence custody to be declared time served under a sentence
COUNSEL:	S Ryan for the applicant R J Ponting for the respondent
SOLICITORS:	Legal Aid (Queensland) for the applicant Director of Public Prosecutions (Queensland) for the respondent

HELMAN J: On 22 November 2000 in the District Court at Gympie the applicant was found guilty of the offence of unlawfully doing grievous bodily harm with intent to do so and was sentenced to imprisonment for eight years. On 20 July 2001 an

appeal to this Court against his conviction was dismissed, but he successfully challenged his sentence, which was reduced to imprisonment for six years. The Court declared that 240 days in which the applicant was confined in pre-sentence custody should count as time served under the sentence.

What brings the applicant back to this Court is the effect of an obvious oversight at the time when the applicant's appeal was considered and determined.

On 6 December 2000 the applicant instituted his appeal, but failed to elect to be treated as a prisoner serving a term of imprisonment pending the determination of the appeal. The effect of the law in force at that time was that in the absence of a direction by this Court under a repealed section of the Criminal Code, s.671G(3) the time that the applicant was in custody between 6 December 2000 and 20 July 2001, 225 days, cannot be counted as part of the applicant's term of imprisonment. The Court was not asked for a direction of the kind I have mentioned because, it seems, those appearing for the applicant were unaware of his failure to elect to be treated as a prisoner serving a term of imprisonment.

There is no doubt, I think, that if the Court had been asked for such a direction, it would have granted that request since there are no exceptional circumstances that would have called for its refusal: see R v. Jones [1998] 1 Qd.R. 672. This application is for a direction pursuant to the repealed s.671G(3). The applicant seeks to invoke the inherent

jurisdiction of this Court and the Crown does not resist the application. R. v. Harrington (1996) 88 A.Crim.R. 550 was a case not materially different from this in which a direction of kind sought by the applicant was made, the Court not doubting that it had the power to make the direction.

I should then order that the 225 days during which the applicant was in custody between 6 December 2000 and 20 July 2001 should count as time served under the sentence of imprisonment for six years he was ordered to serve on 20 July 2001.

WILLIAMS JA: I agree.

MACKENZIE J: I agree.

WILLIAMS JA: The order will be as Justice Helman indicated.
