SUPREME COURT OF QUEENSLAND

CITATION:	*Lowe v Director-General, Department of Corrective Services* [2004] QSC 418
PARTIES:	**PETER ANTHONY LOWE** **(applicant)** **v** **DIRECTOR-GENERAL, DEPARTMENT OF CORRECTIVE SERVICES** **(respondent)**
FILE NO/S:	B5392/04
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	26 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2004
JUDGE:	Atkinson J
ORDER:	**1. That the respondent's decision is quashed;** **2. That the respondent forthwith reconsider the question of the remission of the applicant's sentence according to law;** **3. The respondent pay the applicant's costs of and incidental to the application, to be assessed.**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant convicted of doing grievous bodily harm with intent to cause grievous bodily harm – where applicant was sentenced to 8 years imprisonment – where applicant's sentence reduced on appeal to 6 years imprisonment – where application for remission of one third of applicant's term of imprisonment pursuant to s 75 *Corrective Services Act* 2000 (Qld) unsuccessful. ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND

IRRELEVANT CONSIDERATIONS – where applicant sought remission of term of imprisonment – whether unacceptable risk to community if discharged – where "Risk Needs Inventory" assessment of applicant's risk to community was not updated after a successful appeal – whether proper to take into account unqualified "Risk Needs Inventory"

Corrective Services Act 2000 (Qld), s 12, 75, 77

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited
R v Lowe [2001] QCA 270, cited
R v Lowe [2003] QCA 306, cited

COUNSEL: M T Brady for the applicant
M J Burns for the respondent

SOLICITORS: Aboriginal and Torres Strait Islanders Corporation for Legal Services for the applicant
Crown Law for the respondent

[1] On 22 June 2004, the applicant, Peter Anthony Lowe, sought a statutory order of review of the decision by the respondent, the Department of Corrective Services ("the Department"), not to grant remission of the applicant's term of imprisonment. The matter was heard on 21 October 2004. Orders were made quashing the respondent's decision and directing the Department to forthwith reconsider the question of the remission of the applicant's sentence according to law. I said that my reasons for making those orders would be published later. These are those reasons.

[2] On 22 November 2000, Mr Lowe was convicted after a jury trial in the District Court in Gympie of the offence of causing grievous bodily harm with intent to cause grievous bodily harm. He was sentenced to 8 years imprisonment, with a declaration that time served in pre-sentence custody was time already served under the sentence.

[3] On 29 November 2000, Mr Lowe underwent an initial security assessment, pursuant to the *Corrective Services Act* 2000 (the "CS Act") s 12. He was ascribed 'Medium' level classification. The nature of his offence was described as "Violent – Serious" and his previous convictions were taken into account. The Initial Security Assessment was verified on 1 December 2000.

[4] On 6 December 2000, Mr Lowe lodged an appeal against his conviction and sentence.[1]

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1 *R v Lowe* [2001] QCA 270.

[5] On 7 December 2000, a Risk Needs Inventory ("RNI") was prepared by a counsellor at the Arthur Gorrie Correctional Centre, after a meeting with Mr Lowe where he responded to a number of questions asked of him. The RNI assessed the level of risk posed by the prisoner to the community as part of the admission assessment procedures. Mr Lowe deposed to never having been asked to do, nor having done, any updated testing or assessment of his "risk needs".

[6] The RNI awarded Mr Lowe a score of 11 which placed him at the lowest end of the category of medium level risk to the community. The ranges for each of the categories were: low, 0 – 10 points; medium, 11 to 25 points; high, 26 – 40 points; and extreme, 40+. Mr Lowe received four points under the heading "Criminal History" for having had prior arrests, prior community orders, prior community or custodial breaches and more than two adult or youth violations; one point under the heading "Recreational Activity" for "could use free time better"; two points under the heading for "Violence Potential" for intimidating/controlling others and physical assaults; and four points under the heading "Criminal Attitudes" for having thought that his sentence was not appropriate to the offence, that he should not have got jail time for his offence, that someone else was to blame for his being there and that he was unfavourable towards supervision. He received no points under the headings "Employment Potential", "Alcohol and Drugs" and "Relationships". Had Mr Lowe's assessment been ten or less, he would have been assessed as a low risk to the community. Specifically relevant to this application is that included in the matters for which Mr Lowe received a point was that he did not believe that his sentence was appropriate to the offence.

[7] The RNI recorded Mr Lowe as having a "High" security classification, although the Department has conceded that this is incorrect.[2] His legal status was wrongly described as "remand, no bail" and this may explain why Mr Lowe's security classification was described as "High", as s 12(1) of the CS Act provides that all prisoners on remand receive a security classification of "High". Mr Lowe's security classification history revealed that he was classified "Medium" from 29 November 2000 until 4 September 2002.

[8] On 20 July 2001, the Court of Appeal dismissed Mr Lowe's appeal against conviction but granted his application for leave to appeal, allowed his appeal against sentence and reduced his term of imprisonment from 8 years to 6 years with a declaration that time spent in pre-sentence custody count as time served under the sentence.[3] No further RNI assessment was done after the successful appeal against sentence. This was in spite of the fact that a point had been marked against Mr Lowe for asserting his opinion that his sentence was not appropriate, a view with which the Court of Appeal agreed when they found the sentence of 8 years imprisonment to be manifestly excessive.

[9] On 6 August 2001, a Change of Status review was conducted and verified on 7 August 2001, following Mr Lowe's successful appeal to the Court of Appeal. The Change of Status review recorded the variation of Mr Lowe's sentence. His

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2 Additional material provided by M J Burns, received 1 November 2004.

3 *R v Lowe* [2001] QCA 270.

security classification and his community risk level, however, remained unchanged. It was recommended that he be removed from Arthur Gorrie Correctional Centre to Woodford Correctional Centre. This occurred on 10 August 2001.

[10] On 5 March 2002, a Sentence Management Review was conducted, which was verified on 15 March 2002. Sentence Management Reviews take place regularly, approximately every six months. There were a total of seven Sentence Management Reviews from 29 November 2000 until 26 October 2004.

[11] On 4 September 2002, as a result of a second Sentence Management Review, which was verified on 6 September 2002, Mr Lowe's security classification was reduced from "Medium" to "Low". On 18 December 2002, Mr Lowe had a third Sentence Management Review, which was verified on 19 December 2002. His security classification was further reduced from "Low" to "Open". At subsequent Sentence Management Reviews on 11 June 2003, 16 December 2003, 28 June 2004 and 15 September 2004, and a further Change of Status review on 11 November 2003, his security classification of "Open" was not altered.

[12] On 21 July 2003, a further appeal was heard in which Mr Lowe's time spent in custody between the time that he lodged his appeal and the hearing of his appeal, being 255 days, was declared time spent in custody under his sentence.[4]

[13] Mr Lowe applied for remission on 11 February 2004 pursuant to s 75(1) of the CS Act. The Chief Executive of the Department, by his authorised delegate, considered whether or not to grant remission of up to one third of Mr Lowe's term of imprisonment pursuant to s 75(2) of the CS Act. Section 75(2) of the CS Act provides that:

> "(2) … the chief executive may grant remission of up to one-third of the term of imprisonment if satisfied –
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> (a) that the prisoner's discharge does not pose an unacceptable risk to the community; and
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> (b) that the prisoner has been of good conduct and industry; and
>
> (c) of anything else prescribed under a regulation."

[14] On 27 February 2004, Mr Lowe received a letter dated 16 February 2004 from the Department, in accordance with the obligation imposed by s 79(2) of the CS Act, stating that the authorised delegate was considering not granting Mr Lowe remission of his sentence on the basis that she did not consider his discharge would pose an acceptable risk to the community. The letter listed the material considered by the delegate. It included the transcript of the proceedings in the District Court in Gympie on 22 November 2000 and the transcript of the proceedings in the Court of Appeal on 21 July 2003; but not the decision made by the Court of Appeal on 20 July 2001 where Mr Lowe's appeal against sentence was allowed. Mr Lowe instructed his solicitors, the Aboriginal and Torres Strait Islanders Corporation for Legal Services ("ATSILS"), to respond on his behalf.

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4 *R v Lowe* [2003] QCA 306.

[15] On 22 April 2004, after various extensions were granted, ATSILS forwarded a letter to the Department. In that letter, ATSILS responded to each of the points made in the Department's letter of 16 February 2004, including that the Department had taken into account the RNI completed on 7 December 2000, that that RNI had been completed prior to Mr Lowe's successful appeal and that had Mr Lowe received 10 points instead of 11 he would have, at that time, been assessed as a low risk, and that he was currently an open classification.

[16] On 27 April 2004, the Department decided not to grant remission of Mr Lowe's term of imprisonment on the basis that the delegate was not satisfied that his discharge would not pose an unacceptable risk to the community.

[17] At the request of Mr Lowe's solicitors, the Department provided reasons for the decision not to grant remission of the sentence. The Department examined the nature of Mr Lowe's offending and that he was serving a sentence of 6 years imprisonment for the offence of grievous bodily harm with intent to cause grievous bodily harm. The Department also considered a number of relevant matters including the decision in the Court of Appeal on 20 July 2001.

[18] Section 77 sets out a number of factors that the Chief Executive must consider when determining whether the prisoner's release poses an unacceptable risk to the community. The list is not exhaustive of the matters the decision maker may consider. Specifically included in the list are any relevant remarks made by the sentencing court. Not specifically included in the list, but clearly relevant, is the decision of, and the reasons given by, the court which determines in any appeal from the sentence imposed by the sentencing court. An appeal may have an effect not only on the length of sentence but may change the basis for the points awarded on the RNI. In such a case, if the RNI is to be taken into account, it should either be updated after appeal or, at the least, any qualifications to it should also be taken into account. The statement of reasons said that the RNI of 7 December 2000 had been taken into account. It did not, however, say that account had been taken of the fact that the basis for the points used to assess the applicant's risk of re-offending by his answers to the RNI had changed as a result of Mr Lowe's successful appeal against sentence.

[19] The respondent argued at the hearing of the application that there were a number of errors in the RNI which would have led to a higher points score. This may be true. However if the use of the RNI by the decision maker was not only flawed by reason that she failed to take into account the effect on the RNI of the Court of Appeal's subsequent decision to reduce the applicant's sentence, the fact that the RNI was also incorrect even at the time it was done, does not remedy the problem.

[20] In these circumstances the RNI could not properly have been taken into account in making the decision with regard to remission of sentence without an acknowledgement of its errors and limitations. To take it into account without qualification was to take into account an irrelevant consideration and to fail to take account of relevant considerations. This is not an appropriate case for the court to exercise its discretion not to set aside the decision on the ground that the relevant

matter was so insignificant that the failure to take it into account could not have affected the decision.[5] That is why the orders were made quashing the decision and directing the Department to forthwith reconsider the question of the remission of the applicant's sentence according to law.

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5 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.