SUPREME COURT OF QUEENSLAND

CITATION:	*R v York; ex parte A-G* [2004] QCA 361
PARTIES:	**R** **v** **YORK, Gloria Jeanette** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 210 of 2004 SC No 102 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2004; 22 September 2004
JUDGES:	Williams JA, White and Cullinane JJ Joint reasons for judgment of Williams JA and Cullinane J; separate reasons of White J, dissenting
ORDERS:	**1. Appeal allowed** **2. Set aside the sentence imposed at first instance, and in lieu thereof sentence the respondent to five years imprisonment to be suspended after serving two years with an operational period of five years** **3. Order that the order of the sentencing judge made pursuant to s 122 of the *Drugs Misuse Act* 1986 not apply to the publication of the reasons for judgment of this court** **4. A warrant is to issue for the respondent's arrest, to lie in the registry for seven days**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL – APPLICATION TO INCREASE SENTENCE – OTHER OFFENCES – respondent pleaded guilty to a charge that she unlawfully carried on the business of trafficking dangerous drugs and pleaded guilty to a number of counts of possessing dangerous drugs – where the respondent gave extensive and prolonged co-operation with

prosecuting authorities to secure a murder conviction – where evidence placed before the court indicating that the respondent's life would be at real risk if she was sent to prison – where the respondent was sentenced to five years imprisonment wholly suspended because of that risk – whether it was appropriate to suspend the sentence wholly

Corrective Services Act 2000 (Qld), s 38
Drugs Misuse Act 1986 (Qld), s 122
Penalties and Sentences Act 1992 (Qld), s 9(2)(i), s 13A
Supreme Court of Queensland Act 1991 (Qld), s 128(2)

R v Kim Christensen [2002] QCA 113; CA No 313 of 2001, 22 March 2002, cited
R v Gladkowski (2000) 115 A Crim R 446, considered
R v Ianculescu [2000] 2 Qd R 521, cited
R v Le; ex parte A-G [2000] QCA 392; CA No 103 of 2000, 29 September 2000, cited
R v Thompson (1994) 76 A Crim R 75, distinguished

COUNSEL: M J Copley for the appellant
B W Walker SC, with A J Kimmins, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Ryan & Bosscher for the respondent

[1] **WILLIAMS JA AND CULLINANE J:** This is an appeal by the Attorney-General against the sentence imposed on the respondent after she pleaded guilty to a charge that she carried on the business of unlawfully trafficking in the dangerous drugs heroin, methylamphetamine and cannabis between 1 November 1999 and 27 May 2000. She also pleaded guilty to a number of counts of possessing dangerous drugs particulars of which are set out in the reasons for judgment of White J. The sentence imposed on 18 June 2004 was five years imprisonment wholly suspended with an operational period of five years.

[2] Background matters relevant to the sentencing of the respondent and the issues raised by this appeal are substantially set out in the reasons for judgment of White J which we have had the advantage of reading. We will not repeat unnecessarily those matters.

[3] Given the extent of the respondent's drug trafficking and her extensive criminal history, a head sentence of between 10 and 12 years would have been appropriate. Counsel for the Attorney-General on the hearing of the appeal was content to use 10 years imprisonment as the starting point, and we will adopt that as did the learned sentencing judge.

[4] The respondent then had to be given credit for her extensive and prolonged co-operation with prosecuting authorities securing the conviction of Alan John Lace for the murder of Margaret Rose James. That co-operation called for a reduction in the head sentence of at least 40%. Because of that consideration the learned sentencing judge reduced the 10 years starting point to five years, and counsel for the Attorney-

General was prepared to adopt that figure. In our view that reduction is appropriate given the extent of co-operation provided by the respondent.

[5] In addition to that the respondent had to be given credit for her plea of guilty to the charges in question. It was then submitted, by counsel for the Attorney-General that to take account of the plea of guilty a sentence of five years imprisonment should be suspended after serving a term in the range of two to two and a half years. That was lower than the sentence contended for by counsel for the prosecution at first instance.

[6] Looked at objectively in the light of the criminality of the respondent's offending, her criminal history, her co-operation with the authorities with respect to Lace, and the plea of guilty we are of the view that the respondent ought to have been sentenced to a term of imprisonment in the range two to two and a half years.

[7] The question which then, in our view, needs to be addressed is whether or not such a sentence should be imposed given the material placed before the court indicating that the respondent's life would be at real risk if she was sent to prison. Counsel for the respondent placed before the sentencing judge an affidavit of Peter James Binney, an Acting Detective Inspector of Police, and an affidavit of her solicitor, Michael Frederick Bosscher, which deposed to information provided to him by Mr Rob Wildin, a member of the Intelligence Unit in the Department of Corrective Services. The critical extract from Bosscher's affidavit has been quoted by Justice White in her reasons. The affidavit of Binney also deposes to very specific threats directed against the respondent.

[8] In consequence there was clear, unchallenged evidence before the learned sentencing judge that the respondent would be at considerable risk whilst in custody. The prosecution did not place before the learned judge at first instance any material challenging the accuracy of the contents of the affidavits of Binney and Bosscher, nor did it produce any evidence indicating the steps which would be taken by Corrective Services to protect the respondent if she was imprisoned.

[9] The learned sentencing judge recognised that she was dealing with "a most unusual case". On the one hand there was very serious offending by a hardened criminal and on the other hand there was a grave risk to the respondent's safety if she was imprisoned. The learned sentencing judge concluded from considering the material placed before her that if the respondent "were to be imprisoned [she] would face the very real danger of being killed." She went on to say that "in my view it would be an affront to community standards to sentence you in such a way as to open you to the extremely high risk of suffering the ultimate penalty for the assistance you gave to the police and to the Court."

[10] Against that background the learned sentencing judge recognised that without the special factors the offending would have called for a sentence in the range 10 to 12 years, which was then reduced to five years because the co-operation with the authorities with regard to the offence committed by Lace. The learned sentencing judge then said that she had to "take into account your early plea of guilty, and all the personal factors to which I have referred"; that clearly included the risk to the respondent's safety whilst in prison. That is why the wholly suspended sentence referred to above was imposed.

[11] In our view there was an error in the reasoning process of the learned sentencing judge at first instance. The discounting for the plea of guilty should have been identified and then the separate issue should have been addressed, namely were there considerations justifying the court in refusing to impose the sentence so determined. The first step should have resulted in a sentence of five years imprisonment suspended after two or two and a half years with an operational period of five years. Then as a separate issue the question should have been addressed as to whether there was proper ground for not imposing that sentence because of the risk to the respondent's safety whilst in prison.

[12] On the hearing of the appeal the real issue raised for this court was that question, that is whether it was appropriate to wholly suspend the sentence, rather than require the respondent to serve two to two and a half years, because of the perceived risk to her safety whilst in custody.

[13] Senior counsel for the respondent in this court contended that the learned sentencing judge had ultimately acted appropriately on the uncontested evidence before her. Although Wildin had recommended that any sentence should be served at Townsville, counsel submitted that there was no evidence that the real risk to the respondent would be diminished if she was to serve her sentence in Townsville.

[14] At that stage this court had no material supporting Wildin's opinion that there would be less risk to the respondent if she was incarcerated in Townsville rather than at the Brisbane Women's Correctional Centre, nor any other evidence indicating what program or administrative regime Corrective Services proposed to put in place to deal with the risk to the respondent. For those reasons this court took the very unusual step of adjourning the hearing "to give the appellant Attorney-General the opportunity of placing before the Court material from Corrective Services indicating the administrative arrangements that would be made if the Court determined that the respondent should serve an actual period in custody."

[15] In response to that counsel for the Attorney-General placed before the court a letter under the hand of Mr Noel Taylor, Acting Executive Director, Custodial Corrections. That document contains the following passages:

> "A review of the intelligence information indicates Ms York would be at risk if accommodated in a Queensland correctional centre and as such her placement and management would have to be carefully considered by the Department.
>
> If sentenced to a period of imprisonment, on arrival at a correctional centre, Ms York would be subject to a thorough assessment. During the assessment process all matters, including the prisoner's needs and risk factors would be considered. Following the assessment process a decision would be made regarding the prisoner's future management and placement.
>
> In Ms York's case (if sentenced to imprisonment) such management processes that may be considered are the placement of the prisoner in a protection unit at the Brisbane Women's Correctional Centre or the accommodation of the prisoner at Townsville.

> . . .
>
> If sentenced to a period of imprisonment the Department will develop a management plan for Ms York which will focus on her safety and security."

[16] Those trite statements added nothing to what was already before the court and known by the court. Taylor did not address the real issue at all. Not surprisingly senior counsel for the respondent required Taylor for cross-examination. In the witness box Taylor maintained that the Department had the capacity to deal with the respondent, but did not outline any particular arrangements which would be made in the light of the very specific threats referred to in the affidavit of Binney and the report of Wildin. When pressed Taylor accepted the accuracy of paragraphs [6], [7] and [8] of Bosscher's affidavit, evidencing Wildin's conclusions and concerns, although he was forced to concede that he had not read Wildin's report himself. That in itself showed scant regard for the very important issues that the court had raised with the Department.

[17] Regrettably we formed the view that Taylor failed to appreciate the seriousness of the issue with which the court was concerned and about which it was seeking some assistance from him. The best he could do was say that recently the Brisbane Women's Correctional Centre had housed two high profile women in safety. Although he did not name those concerned it was obvious to all to whom he was referring. The position of those women was in no way comparable to that of the respondent. Those women had no association with hardened criminals, had no significant criminal histories and were not the subject of specific threats made by other criminals who had clearly demonstrated a capacity to carry out their threats.

[18] Judges of this court are acutely aware of the murders which have taken place within Queensland Correctional Centres in recent years. Because of what has been learnt through trials associated with those murders some judges of this court have very real concerns about the capacity of Corrective Services to deal with the kind of situation presented by the threats against the respondent. The failure of Taylor to address those issues has only heightened this court's concerns about those matters.

[19] At the end of the day Taylor's evidence really came down to the proposition that after assessment the respondent would probably be sent to Townsville. A problem with that is that Townsville is a mainstream women's prison without any protective custody section.

[20] In the light of what Taylor had to say senior counsel for the respondent submitted that there was no material to show that the learned sentencing judge was wrong in concluding that in all the circumstances the respondent ought not be sent to prison.

[21] We are conscious of the fact that the learned sentencing judge and Justice White, both experienced judges, have concluded that the risk to the respondent's safety in prison is so great that the court ought not impose the two to two and a half years imprisonment we have referred to above. Not without grave hesitation we have come to the conclusion that it would be wrong for this court to so conclude. Once this court accepts that the risk to a criminal's safety whilst in prison was such that the otherwise appropriate penalty, namely imprisonment, ought not be imposed then the whole of the criminal justice system which operates in our society would be

undermined. This court cannot bow to pressure from criminals. In our society imprisonment is the method of punishment primarily imposed for serious criminal offences. Judges must be able, however, to have confidence that those administering the prisons will ensure the physical safety of those persons placed in their responsibility.

[22] This case highlights the onerous responsibility placed on those persons responsible for administering our prison system. Regrettably it would appear that the Department was not in a position to demonstrate to this court that it has the capacity to deal adequately with problems highlighted by this case. But, as we have said, that cannot justify the court in refusing to send a criminal to jail where that is the only appropriate penalty available under our law.

[23] The Acting Executive Director, Custodial Corrections and all the staff under him must now be aware that society has imposed on them the duty of ensuring the safety of the respondent whilst in custody.

[24] Not without serious hesitation we have come to the conclusion that the offences committed by the respondent are so serious that, notwithstanding her co-operation with the authorities, her plea of guilty, and the threats directed at her by other criminals she should serve a term of actual imprisonment.

[25] No application was made to this court to deal with the appeal pursuant to s 122 of the *Drugs Misuse Act* 1986. The matter was heard in open court. We would order that the order of the learned sentencing judge made pursuant to s 122 not apply to the publication of the reasons for judgment of this court.

[26] We would allow the appeal, set aside the sentence imposed at first instance, and in lieu thereof sentence the respondent to five years imprisonment to be suspended after serving two years with an operational period of five years. Order that the order of the sentencing judge made pursuant to s 122 of the *Drugs Misuse Act* 1986 not apply to the publication of the reasons for judgment of this court. A warrant should issue for her arrest, to lie in the registry for seven days.

[27] **WHITE J:** On 11 April 2003 the respondent pleaded guilty to a charge that she carried on the business of unlawfully trafficking in the dangerous drugs cannabis sativa, heroin and methylamphetamine between 1 November 1999 and 27 May 2000; one count of possession of methylamphetamine on 26 May 2000; and two counts of possession of dangerous drugs (cannabis and methylamphetamine) on 12 April 2001. She was sentenced on 18 June 2004 to five years imprisonment wholly suspended with an operational period of five years.

[28] The Attorney-General appeals against that sentence on the ground of its inadequacy.

[29] The applicant was a mature woman of some 54 years when she offended and was 57 when sentenced. She had an extensive criminal history principally for offences of dishonesty in New South Wales, ACT and Queensland but her history also included two assaults (two minor assaults in ACT) and weapons charges in 1999. She has no previous convictions for drug offences. She is not a drug user.

[30] A schedule of agreed facts was tendered to the sentencing court. Between 29 October 1999 and 26 May 2000 Queensland Police and members of the National

Crime Authority conducted a covert operation code named "Operation Jolt". A covert police operative met the respondent and, in due course, her daughter. He purchased large quantities of drugs including cannabis sativa, methylamphetamine and heroin on a number of occasions, initially through intermediaries and then directly from the respondent or her daughter. He was supplied with drugs on 19 occasions for which he paid a total of $51,400. He was supplied with 317.706g of powder of which 97.903g was pure methylamphetamine; 25.001g of rock or powder of which 13.13g was pure heroin; 175 tabs of what was sold as LSD but was not; and 51.9g of cannabis.

[31] It was clear from conversations which took place in the presence of the covert police operative that the respondent was an organised and important trader in unlawful drugs. For example, in respect of a buy on 14 November 1999 when the covert police operative complained of underweight she told him that she had been doing "this" for 12 years and that the person she got the drug from dropped off "pounds" at a time. By about a month later the covert police operative was sufficiently trusted to be invited to collect drugs from the respondent's home. He was introduced to the respondent's daughter whom he saw bagging up green leafy material.

[32] The respondent offered to put the covert police operative in touch with some of her customers when he told her he was thinking of moving to Brisbane.

[33] On a visit to the respondent's home on 21 January 2000 he was introduced by the respondent to a man who was described as "the goey cook". They discussed the supply of drugs including amphetamine, cannabis and LSD. The respondent was heard to make a number of telephone calls, some of which appeared to be drug related. An unknown male arrived and was supplied by the respondent with approximately half an ounce of dark crystalline substance. She handed the cook a large quantity of money in a roll. On other occasions the covert police operative saw the respondent supply other people with drugs.

[34] On a visit by the covert police operative to the respondent's home on 10 February 2000 the respondent discussed ways of "cleaning" money and told him that her son purchased chips at the casino and then cashed them in for cheques. She said that she had buried money in the ground. A little over a week later the respondent told the covert police operative that she needed only a couple of hours notice to obtain heroin.

[35] On a visit to the respondent's house on 24 April 2000 the covert police operative was told by her that she could not supply him with amphetamine because a $100,000 "cook" had gone wrong. Later a man named Christensen arrived with what appeared to be a large garbage bag of cannabis. He told the covert police operative that he was involved in the amphetamine production that had failed. The respondent and her daughter were seen to count a very large amount of money comprising $50 and $100 notes while money laundering was discussed.

[36] On 26 May 2000 police executed a search warrant at the respondent's house. During the search they located a small clip-seal plastic bag containing white powder which weighed 3.347g which on analysis contained 0.073g of methylamphetamine. Cash in the amount of $10,308.70 was seized. Other property belonging to the respondent including jewellery, antique furniture, motor vehicles, her house, land in

Tasmania, and a credit balance in a bank account of approximately $136,000 was restrained. She was subsequently charged with trafficking and possession offences and granted bail. Police executed a search warrant at the respondent's home on 12 April 2001 and located 1,106.8g of cannabis and 0.115g of methylamphetamine. Those offences were committed while she was on bail. There has been no further offending since then.

[37] There was a full hand-up committal.

[38] As was recognised below these were serious offences of drug trafficking warranting a lengthy term of imprisonment. The respondent was involved solely for material gain. Her pleas of guilty were entered on 11 April 2003. The delay in bringing her to sentence involved a number of factors, including negotiations over the restrained property. Other persons identified in Operation Jolt had, in the meantime, been sentenced. The prosecutor below contended for a head sentence in the range of 10-12 years. Her Honour took 10 years as the starting point before discounting for pleas of guilty and other factors. Before this court, Mr M Copley for the Attorney-General conceded that the starting point for a head sentence in this case was 10 years referring to *R v Le, ex parte Attorney-General of Queensland* [2000] QCA 392; CA No 103 of 2000, 29 September 2000 and *R v Ianculescu* [2000] 2 Qd R 521. *R v Kim Christensen* [2002] QCA 113; CA No 313 of 2001, 22 March 2002, a more serious case, also supports this concession. Mr B Walker SC who, with Mr A J Kimmins, appeared for the respondent accepted that a head sentence of 10 years before discounting was appropriate.

[39] The special features of this sentence are the significant cooperation which the respondent afforded the police and prosecuting authorities in Queensland and the assessment by a member of the Intelligence Unit within the Department of Corrective Services that she would be at "significant risk" should she be detained in the Brisbane Women's Correctional Centre.

[40] Mr Kimmins, who appeared for the respondent below, tendered an affidavit to the learned sentencing judge made by Detective Inspector P D Binney, sworn 20 June 2003, deposing to the respondent's assistance and cooperation with the authorities and an affidavit of Michael Bosscher, the respondent's solicitor, deposing to conversations with Mr Wildin, an officer of the Department of Corrective Services employed in the Intelligence Unit, assessing the risks to which the respondent would be exposed on incarceration. Neither affidavit was challenged by the prosecutor at sentence and no other material was advanced by the prosecutor. By s 9(2)(i) of the *Penalties and Sentences Act* 1992 the court was required to take into account the respondent's assistance when sentencing her. Since the respondent's assistance had been given by the time of sentence the procedural provisions of s 13A of that Act did not apply. The court on application by the parties adjourned the proceedings into "chambers" pursuant to s 122 of the *Drugs Misuse Act* 1986 and heard submissions in closed court. It may be noted that the distinction between "court" and "chambers" was abolished by s 128(2) of the *Supreme Court of Queensland Act* 1991 and all business is conducted in court although, by subsection (4), whenever the public interest or the interests of justice require it the extent to which the business of the court is open to the public may be limited.

[41] The respondent's principle cooperation concerned the detection and prosecution of Alan John Lace for murder. Lace had a serious criminal history and was well-known in the prison population. Margaret Rose James was killed by a gunshot wound in her home at Caboolture on 7 July 1999. The shooting occurred in the presence of a witness who was staying in the house at the time. The deceased was closely identified with minor drug supplies. The witness was unable to identify the deceased's assailant from a photographic board and gave a number of inconsistent statements to police. It was thought by police that Mrs James' death was related to drug debts and it was thought that Lace was her supplier. He denied any involvement in her death and produced an alibi.

[42] Further police enquiries identified the respondent's residence where Lace's de facto Linda Cooper was then living. Police understood that Cooper, through her involvement in drug activities, was seeking to fund Lace's legal costs and was making enquiries to establish the whereabouts of the eye-witness to the killing to prevent him giving evidence. Police executed a search warrant at the respondent's address where cash and drugs were located. Cooper was charged with drug and firearms offences. Police spoke to the respondent about her knowledge of the killing of Mrs James. She indicated she would contact police later. About a week later she attended at the Caboolture CIB and agreed to assist with enquiries. The respondent was motivated to assist police initially because of her belief that Lace, to whom she supplied drugs, had robbed her home and stolen a significant amount of cash.

[43] The respondent provided a statement to police outlining a conversation with Lace on the morning following Mrs James' death in which he admitted shooting her. She provided information identifying a person whom Lace had persuaded to dispose of the gun used in the shooting.

[44] The respondent agreed to take place in a recorded contact visit at the remand centre where Lace was being held. In lengthy conversations Lace admitted shooting Mrs James and raised false defences such as accident. At trial an important issue was whether those admissions were of murder or manslaughter only. Lace also made admissions about property offences in respect of which he was later charged. The respondent agreed to take part in a second visit and further conversations were recorded. Lace was a suspect in the shooting of a police officer at Browns Plains during a bank robbery. The conversations recorded during the second visit eliminated Lace as a suspect in that investigation and, according to Inspector Binney, this then allowed resources to be tasked to other targets.

[45] After the respondent's first visit to the remand centre she provided a statement about admissions made by Lace prior to his arrest and gave further assistance which led to the recovery, in a dam at Beenleigh, of gun parts from the weapon which killed Mrs James. This resulted in a further statement from a witness which further implicated Lace. The respondent was telephoned from prison by Lace prior to the committal. He threatened her and she had her telephone number removed from the list of numbers authorised for Lace in the prison.

[46] The evidence for which the respondent was directly responsible was presented at committal on 6 December 1990. She attended the Magistrates Court and gave evidence about her conversations with Lace and wearing a recording device on two

prison visits to him. Lace was committed to stand trial for the murder of Margaret James.

[47] Following the committal proceedings the respondent was visited one night by one of Lace's associates recently released from prison, masked and armed who gave her a copy of her depositions and threatened her that she would be shot if she gave evidence against Lace at his trial. She immediately contacted police. She declined witness protection and continued to assist investigators including an undercover drug operation.

[48] Early in 2000 Lace requested an interview at the remand centre. He supplied a version of events surrounding Mrs James's death to police different to that given to the respondent. This was seen as an attempt to reduce the charge against him from murder to manslaughter.

[49] In October 2000 Lace was convicted of murder by a jury in the Supreme Court at Brisbane and sentenced to life imprisonment. He appealed successfully against his conviction on the ground that certain evidence of a prior inconsistent statement by the respondent had been impermissibly excluded. Lace's retrial occurred in November 2001 and he was again found guilty of the murder of Margaret James and sentenced to life imprisonment. His appeal against conviction was dismissed.

[50] During both trials the respondent attended and gave evidence both on voir dire and before the jury. She attended at court for four days at the first trial and two days at the second trial. She was subject to intense cross-examination on both occasions. Serious threats had been made to her up to and including the time when she gave evidence including by another former prisoner who visited her at home that if she gave evidence in the second trial the threat to shoot her would be carried out. Other threats were passed on to her both verbally and by telephone and information detected by prison intelligence verified a serious threat to her safety. This necessitated, according to Inspector Binney, the assistance of the Special Emergency Response Team (SERT) in escorting the respondent to and from court to give evidence.

[51] Between the time of the committal proceedings and the first trial the respondent was charged with trafficking offences. She was aware that it was likely that she would be sentenced to a term of imprisonment. This gave rise to concerns both for her and for police because Lace was well known within the correctional system with contacts in both male and female institutions. Inspector Binney noted in para 21 of his affidavit that this created a possibility that upon her conviction she would be at considerable risk when in custody. He concluded at para 22 that

> "The evidence supplied by YORK was a major factor in the eventual conviction of LACE for murder."

He noted that she did not falter or waiver in her assistance both before and after being charged despite the continued threats made both against her and her family.

[52] The particularly relevant information in Mr Bosscher's affidavit conveyed to him by Mr Wildin appears at paras 6-9

> "6. Mr Wildin informed me, and I verily believe, that the conclusions of the report [the intelligence assessment report] state that Gloria York will be at significant risk should she be detained in the Brisbane Women's Correctional Centre.
>
> 7. Mr Wildin further informed me, and I verily believe, that the report he has provided to his superiors contains the following information:-
> (a) Mrs York has and will continue to be subject to threats;
> (b) That the Department's assessment is that the threats are genuine;
> (c) That they have had information in the past that Mr Lace has contacted female associates at the Brisbane Women's Correctional Centre with the intent that they inflict harm upon Gloria York should she be incarcerated at that location; and
> (d) That it is believed Mr Lace will again endeavour to secure these arrangements with female associates in the Brisbane Women's Correctional Centre.
>
> 8. Mr Wildin informed me, and I verily believe, that the Department of Corrective Services Intelligence Unit believes that not only is Gloria York at risk from members of the prison community but also anybody associated with her is at risk.
>
> 9. Mr Wildin informed me that at Mrs York's sentence I should instruct Counsel to seek that the presiding Judge make the strongest possible recommendation that Mrs York be sent to a northern centre, preferably Townsville, to complete her sentence in that location."

[53] A lengthy psychiatric report from Dr F I Curtis was tendered below which set out the respondent's background and personal circumstances but also included a reference to a threat which the respondent received while she was giving evidence at Lace's trial. Dr Curtis reported

> "She perceived him as signalling her in the Court that she would be murdered in due course in revenge for her being a Crown witness against him. ... she considered [herself] to be, [at] considerable risk of being murdered herself in revenge for her giving evidence."

[54] At sentence the learned sentencing judge recognised this as "a most unusual case" because it combined "very serious offending which suggest a very severe sentence" with "extensive and I might say very brave assistance to the authorities". Her Honour correctly identified those two factors as paramount in ascertaining the appropriate sentence. She identified a head sentence of 10-12 years absent any other factors as being appropriate for offending of the type in which the respondent had engaged. She selected 10 years as a starting point. Her Honour then turned to the mitigating factors. She identified Lace's murder as "an execution style murder" with which characterisation there was no dissent. She noted the respondent's initial motivation in assisting police related to Lace's wrong-doing against her. Her Honour noted with some particularity the threats which had been made to the

respondent. Her Honour noted that the respondent now lived an isolated life in the country in an attempt to sever all ties or contact with those who might wish her harm.

[55] The learned sentencing judge referred to *R v Gladkowski* (2000) 115 A Crim R 446 for the appropriate approach to discounting a sentence for cooperation with police. Her Honour noted that the approach to sentencing is not a strictly mathematical process and that it was important that the sentence imposed was "not an affront to community standards", *Gladowski*, 448. She concluded that it would be such an affront to sentence the respondent in a way which would expose her to "the extremely high risk of suffering the ultimate penalty" for the assistance which she had given to police and the administration of justice. To give effect to the considerable assistance given by the respondent her Honour discounted the sentence of 10 years by 60 per cent leading to a period of imprisonment for four years. She concluded that such a head sentence would not adequately reflect the seriousness of the offences committed and imposed a head sentence of five years. She proposed to give full effect to the discount by incorporating some further discount in what she described as an "ameliorating order" made on the head sentence. That would also take into account the respondent's early plea of guilty and all the factors personal to the respondent. Her Honour noted the importance of denouncing the seriously unlawful conduct in which the respondent had been involved but considered that deterrence for the respondent was the most important consideration. She concluded that this would be effected by imposing a head sentence of five years wholly suspended for a period of five years.

[56] When the matter came before the court on the Attorney-General's appeal the court was of the view that in order to adequately discharge its duty of weighing the risk to the respondent of harm were she to be committed to prison with the public interest in seeing punishment for serious crime being recognised by a term of imprisonment some part of which should actually be served it required some further information from the Department of Corrective Services. Mr Walker submitted that the prosecution had had an opportunity at sentence to seek an adjournment to counter Mr Bosscher's affidavit, or ought to have anticipated it since the threats to the respondent were well known to the prosecution. The court concluded that the public interest took the case outside the usual approach to fresh evidence. The hearing was adjourned to 22 September to allow Mr Copley to seek a response to the material which had been placed before the court on the question of risk.

[57] The Department of Corrective Services was given information about the court's request in a letter from the Office of the Director of Public Prosecutions enclosing Mr Bosscher's affidavit and drawing particular attention particularly to paras 6-12. Mr Noel Taylor, acting Executive Director of Custodial Corrections responded in broad terms noting that a review of the intelligence information indicated that the respondent would be at risk if accommodated in a Queensland correctional centre and that her placement and management "would have to be carefully considered by the Department". On arrival at a corrections centre the respondent "would be subject to a thorough assessment" in which her needs and risk factors would be considered and a decision made about her future management and placement. The management processes that might be considered were identified as placing her in a protection unit at the Brisbane Women's Correctional Centre; accommodating her in Townsville (which does not have a protection unit); or in accordance with

s 38 of the *Corrective Services Act* 2000 in a special isolation cell, not considered appropriate for extended periods.

[58] Mr Taylor gave oral evidence. He said he would like to test the risk further and believed that Corrective Services could protect the respondent. In cross-examination he admitted that he had not read Mr Wildin's intelligence assessment report nor had he consulted with him but was reliant upon some other officer conveying information to him. He showed some scepticism about the assessment of high risk to the respondent noting that sometimes intelligence information, depending on its sources, was inaccurate. In re-examination he tended to retreat somewhat from this position indicating that he had an open mind about the level of risk to the respondent. There was no special plan presently being considered for the respondent should a warrant issue for her arrest. He indicated that the respondent would start any term of imprisonment in the ordinary prison while the assessment of risk was made which could be done within a week, if necessary.

[59] Mr Copley conceded that a discount of 50 per cent of a head sentence of 10 years for the respondent's very significant cooperation would not be erroneous. The inadequacy identified by the Attorney-General in the sentence imposed below was the suspension of the whole of that sentence. The recognition of the risk to which informers are exposed is well-recognised. The court in *Gladkowski* said at 447-8

> "In these circumstances the applicant is entitled to a substantial informer's discount for his extensive co-operation, which should take into account the risk of incidental retributive violence against him whilst incarcerated. The major point on this application is the extent to which effect should be given to this important factor. It is well recognised that co-operation of this kind, particularly where society benefits from it and it places the informer in a position of danger, calls for 'very substantial discount' (*McGookin* (1986) 20 A Crim R 438 at 449). The necessity of encouraging persons to inform so that offenders may be convicted is regarded as a matter of 'high public policy'. The benefits of such a policy are not likely to ensue without substantial inducement (compare *Golding* (1980) 24 SASR 161; 3 A Crim R 26; *Pang* (1999) 106 A Crim R 474 at 447). Discounts of one-third or even one-half of the sentence that would otherwise be appropriate are not uncommon, according to the value and risk of the assistance rendered (*Golding*; *Thompson* (1994) 76 A Crim R 75; *Demir* (unreported, Court of Appeal, Qld, No 13 of 1995, 4 August 1995)). ... Other decisions including *Thompson* recognise the possibility of the discount exceeding 50 per cent, but at the same time the court must ensure that the reduction does not result in a sentence that is an affront to community standards."

[60] In *R v Thompson* (1994) 76 A Crim R 75 this court noted at 77 with "interest" a submission by the Crown in a Victorian case concerning "white collar" crime involving a profit of some $3 million to the wrong-doer/informer that a wholly suspended sentence would not be inappropriate. The court observed at 79

> "The disadvantages under which the court labours in a case like the present are that the information placed before it by the police is necessarily general rather than specific; further, it is untested."

In this case the information has been tested to the full over a committal and two trials. It is not overstating matters to suggest that the conviction of Alan Lace was secured by the respondent's continued resolution to give evidence in the face of serious threats. Mrs James, it may be inferred, was killed for failure to pay drug debts so that to identify the unlawful act as an execution type killing was not without justification. This underscored the strength of the threat.

[61] The uncontradicted material before the learned sentencing judge was that the respondent was at significant risk of serious harm should she be imprisoned in Brisbane. The only placement which might go some way to reducing that risk was committal to the women's prison in Townsville, which the court has now learnt does not have a protection unit. Without more information it cannot be supposed that placement in Townsville, a decision entirely for the management of the Department of Corrective Services to make, would isolate the respondent from those who would do her harm. The network amongst prisoners is known. In that circumstance it cannot be demonstrated that the learned sentencing judge erred in the exercise of her discretion wholly to suspend the sentence of five years.

[62] What then should the court do in light of the further material provided by the Department of Corrective Services? In my view the Attorney-General has failed to adduce evidence or sufficient evidence to contradict that which was before her Honour. This, it cannot be emphasised too strongly, is far from concluding that the Department is unable to keep the respondent safe from the harm to which the material clearly shows she is exposed. The Department has chosen not to be responsive to the uncontested detailed evidence of risk contained in its own Intelligence Unit report in a way which would permit this court to decide if the respondent ought, in balancing all of the factors, serve some actual period in prison. Any concerns about revealing security programmes or the like could have been accommodated by sealing the evidence. Had I been satisfied on the further evidence which the Attorney-General had an opportunity to adduce of an appropriate plan for the respondent I may well have allowed the appeal and ordered that the sentence of five years be suspended after serving two years. But this has not occurred.

[63] I dismiss the appeal by the Attorney-General.