SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBQ; ex parte A-G (Qld)* [2012] QCA 202
PARTIES:	**R** **v** **MBQ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 326 of 2011 DC No 63 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	10 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2012
JUDGES:	Margaret McMurdo P and Gotterson JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondent pleaded guilty to raping a three year old and unlawfully and indecently dealing with her – where respondent was 12 years old when committing offence and 14 when sentenced – where the respondent suffered from developmental immaturity and intellectual deficit so that he functioned as a nine year old at the time of the offending – where respondent was sentenced to three years supervision (youth probation) with a special condition that he attend a youth service program with no conviction recorded – whether the sentence was manifestly inadequate *Youth Justice Act* 1992 (Qld), s 184, sch 1 *Muldrock v The Queen* (2011) 244 CLR 499; [2011] HCA 39, cited *R v DAU; ex parte A-G (Qld)* [2009] QCA 244, cited *R v E; ex parte Attorney-General (Qld)* (2002) 134 A Crim R 486; [2002] QCA 417, considered

R v JAJ [2003] QCA 554, considered
R v KU, ex parte Attorney-General (No 2) [2011] 1 Qd R 439; [2008] QCA 154, considered
R v MAC [2004] QCA 317, considered
R v Perini; ex parte A-G (Qld) (No 2) [2011] QCA 384, cited
R v S [2003] QCA 107, considered
R v SBR [2010] QCA 94, cited

COUNSEL: A W Moynihan SC for the appellant
J A Allen for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **MARGARET McMURDO P:** The respondent, who was 12 years old when he committed the offences and 14 when sentenced, pleaded guilty in the Cairns District Court on 5 September 2011 to raping a three year old girl on 12 September 2009 and unlawfully and indecently dealing with her. Unsurprisingly, the sentencing judge ordered a presentence report under s 151 *Youth Justice Act* 1992 (Qld) ("the Act"). On 28 October 2011, his Honour sentenced the respondent to three years supervision (youth probation) with the special condition that he attend the Griffith Youth Forensic Service (GYFS) or any other program as directed by the Department of Child Safety, Youth and Families and that he comply with all reasonable requirements of the program and maintain a satisfactory rate of progress. No convictions were recorded.

[2] The Attorney-General appeals against this sentence on the basis that it is manifestly inadequate; that the judge erred in failing to impose a period of detention in respect of each offence; and erred in not recording a conviction in respect of each offence.

The sentencing proceedings

The facts of the offences

[3] The prosecutor at sentence tendered a statement of the facts of the offending which was to the following effect. The parents of the complainant operated a road house at a remote North Queensland town. In September 2009, they erected a jumping castle near their premises. The castle was next to a previously erected blue dome tent with two rooms. The respondent and other children were playing on the jumping castle before they went to the complainant's home where they watched television in her older brother's room. They then played hide and seek in and around the blue tent. The respondent was hiding in the tent. The complainant came in. He slapped the outside of her vagina with his hand and pulled her knickers down. He told police that he "fucked her" meaning that he was "putting his balls on her bum". He later agreed that this meant that he put his penis into her vagina.

[4] Later, when the complainant's mother was lying down with her trying to put her to sleep, the child began to move up and down in a sexual way. She disclosed that the respondent "did this to [her] in the tent". She added that he "pulled [her] knickers down and did this", indicating the same motion. Her father took her to the local police station. She told police that the respondent put his finger in her "diddle" and "his other doodle" in her "diddy" after pulling her knickers down.

[5] The respondent voluntarily attended the police station with his foster mother and participated in a police interview. He made the following admissions. He touched her vagina which he also described as her front, her privates. He said he pulled her knickers down and "fucked her". He understood that term to mean "rape". He described his understanding of the meaning of "rape" but he denied that he penetrated her vagina. When the complainant's version, that he put his penis in her vagina, was put to him, however, he agreed with it. The respondent was charged and released on conditional bail.

[6] The complainant was examined by a paediatrician on 25 September 2009. The examination showed she was uninjured with a normal and intact hymen and normal external genitalia.

The presentence report

[7] The presentence report was prepared after an interview with the respondent and his mother and consultations with a GYFS psychologist, and a counsellor from a district community centre. The author also perused a psychiatric assessment prepared by Dr Peter Fama on 14 December 2009; letters of support from the remote town's community members; information from the Director of Public Prosecutions (Qld); relevant Department of Communities' files; and pertinent professional publications. The report contained the following information.

[8] The respondent was immediately granted bail and did not spend any time on remand. He had no offending history. His limited intellectual capacity and the passage of time since the offending made it difficult to identify factors contributing to it. Lack of appropriate sexual education and developmental immaturity arising from foetal alcohol syndrome (FAS) may have contributed. He was culturally adopted in 2007 by his foster parents who relocated to the remote town in 2008. Although he was 12 years old at the time of the offences, according to Dr Fama's report his intellectual age is less than his chronological age so that he was probably functioning more in the range of a nine year old boy at the time of the offending. He was then mixing with young children because of the demographics and remoteness of the community.

[9] FAS may have indirectly contributed to his commission of the offences. It can result in cognitive and behavioural deficits including mental retardation, learning difficulties, hyperactivity, attention deficits and poor social skills. Those with FAS typically are impulsive and have difficulty foreseeing the consequences of their actions. They may have a poor sense of personal boundaries, lack judgment and be susceptible to peer pressure.

[10] His background reflected some characteristics of an adolescent child sexual offender. He had not had the opportunity to complete traditional initiation, including education regarding sexual boundaries. Role models, mentors and teachers play an enormous role in the sexual education of youth in Indigenous communities. He was unable to identify anyone with whom he felt comfortable discussing sexual issues. He had not had the opportunity of sex education through the education system as he attended a school with only nine students and there were no culturally appropriate specific sex education modules offered. Developmental delay, lack of foresight regarding the consequences and lack of appropriate sexual education all contributed to his offending and have negatively impacted on his

ability to understand the consequences of his actions. He had an underdeveloped moral understanding as to the seriousness of his behaviour and its impact on the complainant. His intellectual problems are likely to have further impacted on this. Whilst he appreciated his actions were wrong, he could benefit from specialist intervention to enhance his understanding.

[11] As a consequence of his offending, he was expelled from his school and he has had difficulty enrolling elsewhere. He disengaged from education until he commenced at a different school in March 2010 when his foster mother relocated to another remote community where she had the support of her extended family. He is now a boarder at a school where he hopes to finish his education before gaining employment in the mining industry.

[12] As to a probation order, the author wrote:

> "Should the Court sentence [the respondent] to a period of Probation, the Far North Queensland Rural and Remote Youth Justice Service Centre would undertake supervision of this order. During the period of the Probation Order a case plan would be actioned to assist [him] in relation to his offending behaviours as well as to support and encourage him to participate in appropriate community based activities when [he] is on vacation.
>
> While the author has not been afforded the guidance of a specialised sexual assessment from [GYFS], a referral for specialist assessment and intervention is considered appropriate given the nature of the offences. Should the Court seek to make a specialist treatment a condition, it is respectfully requested that the condition be worded:
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> '*Attend the [GYFS] or any other program as directed by the Department of Child Safety, Youth and Families, comply with all reasonable requirements of the program and maintain a rate of progress that is satisfactory to the treatment program.*'
>
> The conditions and requirements of a Probation Order, including the potential consequences for non-compliance have been explained to [the respondent] and he is willing to comply with such an order."

[13] As to a detention order, the author wrote:

> "The Court may consider a Detention Order to be an appropriate sentence for these offences. It is respectfully requested that the court take the following factors into account if contemplating a period of detention for [the respondent]:
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> - A period of detention may disrupt [his] education …
> - A period of Detention may serve to foster relationships with offending peers
> - [He] has not had the benefit of previous supervised orders."

Dr Fama's report

[14] Dr Fama's report, prepared shortly after the offence occurred may be summarised as follows. The respondent had been in the care of his foster mother whom he called "Mum" for seven years. He "presented as a small, tidy 12 year old Aborigine". He

had previously been thought to show physical features of FAS but his appearance at interview seemed unremarkable. He knew his present troubles were "rapes" and was worried about having seen the police, but he was more looking forward to holiday plans involving fishing, camping and pig hunting with his grandparents and brothers and sisters in a remote Indigenous community. He exhibited no signs of mental illness. His over-active behaviour was not sufficient to amount to an attention deficit hyperactivity syndrome. He had previously been diagnosed with intellectual delay and hearing impairment. He had limited general knowledge and calculating ability. His reading was very poor. His level of intelligence seemed within the upper mentally retarded to borderline range. He probably had an IQ of 65 to 85. He was well below average in his school work. His general health was good. His natural parents have alcohol related problems. But he did not abuse alcohol or other substances.

[15] The respondent saw his offending as a piece of mischief rather than a serious offence or crime; it was "just a bit bad". At the time of his offending, he would have been functioning much as a nine year old boy. He did not have the capacity under s 29(2) *Criminal Code* 1899 (Qld) to know he ought not to do the acts constituting the criminal charges brought against him. There was no evidence of mental disease within the meaning of that expression in s 27 of the *Criminal Code*. He had a "pretty borderline" grasp of the charges against him and the workings of the criminal justice system, but with time and patience would be able to instruct counsel and take part in a trial. He did not properly understand at the time he committed the offences that he ought not to commit them. If, however, he was convicted of one or both criminal charges, Dr Fama recommended that the court consider a period of supervision rather than placement in a youth detention centre.

References from community members

[16] The author of the presentence report referred to letters from members of the community where the offending occurred. One from the local Director of Nursing was to the following effect. He had known the respondent for about five years, both professionally and on a social and personal level. He knew the respondent's birth family and had always regarded him as "a bit slow", probably due to FAS. The respondent was invariably happy, friendly and well-liked in the community. He played well with other children and was popular with adults who enjoyed his harmless, playful manner. His foster family had provided a good home and he always attended school where he was a cooperative student, popular with teachers. The incident was totally out of character. He had never before been violent. He did not consider the respondent was aware at the time of his offending of the significance or consequences of his actions. He was confused and afraid afterwards. He was unfairly excluded from school and became the subject of taunts, accusations and insults through the family of the victim's social network. He had lived with shame over the past two years. This had been difficult and harrowing for him and his family. He hoped that the respondent would be given the opportunity to develop to become a purposeful member of society, recognising that no penalty would or could appease the victim's family.

[17] Another reference from a community member supported the conclusion that the offending was out of character and that otherwise the respondent was "a wonderful boy with a good nature, very polite and trustworthy".

The victim impact statements

[18] The complainant's mother provided three victim impact statements. As is to be expected, these dreadful offences have resulted in grave emotional consequences for her and her family. They have received extended counselling. She has had trouble sleeping at night and felt unsafe, scared and embarrassed in the isolated community where the offending occurred. The most recent statement prepared shortly before the sentence stated that the family has had to leave the community and the business they built up over 15 years. They understandably felt angry. She apprehended that the respondent's family was unaffected while her family was struggling, financially and emotionally, with no light at the end of the tunnel.

Counsel's submissions at sentence

[19] The prosecutor at sentence made the following submissions. He accepted the respondent suffered from FAS and resulting developmental immaturity and intellectual deficit. But despite the matters in the presentence report and attached material, the judge should conclude that detention was justified. After referring to *R v DAU; ex parte A-G (Qld)*,[1] *R v KU, ex parte Attorney-General (No 2)*,[2] *R v JAJ*[3] and *R v MAC*[4] the prosecutor contended that the difference in age between the complainant and the respondent required that he spend a period in detention.

[20] Defence counsel at sentence made the following submissions. Under s 208 of the Act, detention may only be imposed if, after considering all other available sentences, and taking into account the desirability of not holding a child in detention, the court is satisfied no other sentence is appropriate in the circumstances. Referring to s 150(2) of the Act, he emphasised the respondent's age and that detention should be imposed only as a last resort and for the shortest appropriate period. He submitted that *JAJ* and *MAC* were distinguishable and emphasised that the respondent had the benefit of a supportive adoptive family. He was doing well at the school where he boarded. He had significant intellectual difficulties explained in the presentence report as arising out of FAS. At the time of the offence, his intellectual age was nine. He pleaded guilty. Although his plea was not particularly early, there were complex legal issues to be determined including whether his interview with police was admissible and whether he was criminally responsible. It was also difficult to obtain his coherent and appropriate instructions as he boarded in another town a considerable distance away. The offending involved no gratuitous violence and caused no physical injury. It was opportunistic, not pre-meditated, and was out of character. In the very unusual circumstances of this offending where the respondent had limited foresight into the consequences of his actions, the appropriate penalty was three years probation with a condition that he undertake a GYFS program. His very young age made the recording of a conviction inappropriate.

[21] An officer from the Department of Communities was present in court. In answer to a question from the judge, she explained that although the respondent was living in a remote community and boarding at a school in another town, he could be referred to the GYFS program. Departmental officers could visit and work with him at his school and during school holiday periods in the community.

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1 [2009] QCA 244.
2 [2011] 1 Qd R 439.
3 [2003] QCA 554.
4 [2004] QCA 317.

The judge's reasons for the sentence

[22] The judge's sentencing remarks may be summarised in this way. The respondent's behaviour was "just downright disgusting". The situation was, however, unusual in light of the matters in Dr Fama's report and the presentence report. Although the respondent was 12 at the time of his offending his intellectual disability meant that his mental age was nine. Under the *Criminal Code*, children under 10 are presumed not to be criminally responsible. Although the respondent was 12, it was relevant that his mental age was nine. He had not been in trouble with the law before or since. He was in the care of foster parents who resided in a remote Indigenous community. He was boarding at a school in a provincial North Queensland town. He had an unfortunate upbringing in that his natural parents abused alcohol and he has FAS. His guilty plea must be given weight.

[23] The case was difficult. Sentences for this type of offending varied from five years detention to lengthy periods of supervision. Some would find the sentence the judge was about to impose hard to understand. Even after allowing for the seriousness of the offending, the respondent's mental age at the time meant that a lengthy period of probation rather than detention was required. Despite the incredibly serious nature of the offending, his Honour determined not to record a conviction, having regard to the respondent's mental age at the time and that he had no previous convictions.

Further evidence led at the appeal

[24] At the hearing of the appeal the Court granted the respondent leave to adduce the following further evidence. Contrary to the information provided in the presentence report and the statement of the Departmental Officer at sentence, between February and May 2012 the Department failed to refer the respondent for the treatment required under the special condition of his probation order. It seems this was because it was wrongly thought it was unnecessary or inconvenient while he was attending boarding school.

[25] In May 2012, however, the Department had him assessed by psychologist Mr David Starkey who found him to possess a low level of criminogenic risk factors. He had a low risk of recidivism and an intervention program had a high probability of success. Expected treatment outcomes included the development of skills to manage his sexually abusive behaviours with a result that he would no longer attempt to meet his needs through sexually abusive behaviours towards others. Mr Starkey was able to commence treatment from 17 June 2012.

[26] He had reported to the Department by telephone and in person since his sentence on eight occasions. He was instructed not to report when he was at boarding school but this had now been corrected and he meets fortnightly with a case worker who has completed a risk assessment to the effect that he is at a low risk of re-offending. The respondent will continue to report weekly by telephone to and receive fortnightly visits from his case worker, who will also make weekly contact with school staff. He will also receive psychological intervention through Mr Starkey. When the respondent returns to his family on school holidays, his progress will be monitored and programs developed for him.

[27] Mr Starkey reported that he administered the Bender Gestalt test to the respondent who is now 15½ years old. He received a score of 5 out of a possible 13 indicating there may be some generalised organic brain damage. Mr Starkey estimated his

overall mental age at between 12½ and 13½ years. Although he is verbally fluent he has limited ability to read material. When questioned about the offending, he appeared confused but adamant that he had done wrong because he was big and the complainant was little. He demonstrated a complete lack of understanding of normal social practice. He would benefit from Mr Starkey's treatment program which should run for at least 12 months.

[28] The respondent's school principal provided a very positive reference. Although the respondent clearly had difficulty with literacy and in his academic achievements, he was a pleasure to have around the school dormitories. He had offered to mow the school grounds and was excited about the prospect of eventually becoming a ground keeper. He generally exerted a positive influence on other Indigenous students and contributed well to the life of the school.

The appellant's contentions

[29] Counsel for the appellant contended that the sentence was manifestly inadequate. He emphasised the statement of this Court in *R v KU, ex parte Attorney-General (No 2)*[5] to the effect that a sentence of up to three to five years detention may be appropriate for juvenile offenders who commit rape and plead guilty and that the sentences reviewed in that case:

> "demonstrate that the sentencing range here extended from lengthy probation orders to significant periods of detention. They do not support a sentence as low as 12 months probation with no conviction recorded as was imposed on the juveniles in this case."[6]

[30] The appellant in written submissions emphasised the age disparity between the complainant and the respondent. There was no physical violence but none was necessary to effect the rape because the complainant was so young and helpless. The victim impact statements reveal the significant effect of the offending on the complainant and her family. The rape of a toddler is such a serious offence that a significant period of detention is the only appropriate sentence consistent with s 150 and s 208 of the Act. The objective seriousness of an offence is to be assessed without reference to matters personal to the offender: *Muldrock v The Queen*.[7]

[31] The primary judge placed too much weight on the respondent's intellectual age and matters of mitigation and allowed these matters to overwhelm the objectively serious nature of the offending and considerations of community protection, an approach criticised by Chesterman JA in *JAJ* at [42]. There was little evidence to show what effect schooling, sex education and counselling will have on the respondent's present and future risk of re-offending given his borderline intelligence. When proper weight was given to the serious nature of the offending and the need for community protection, detention was the only appropriate sentence. The appellant submitted that a sentence of three years probation without the recording of a conviction was plainly unreasonable for an offence of rape of a three year old child, notwithstanding the respondent's youth and intellectual deficits. It was manifestly inadequate. The cases of *KU, JAJ, MAC, R v E; ex parte Attorney-General (Qld)*[8] and *R v S*[9] supported this contention.

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5 [2011] 1 Qd R 439, 489–490 [206]–[207].
6 Above, 491 [212].
7 (2011) 244 CLR 120, 132 [27].
8 (2002) 134 A Crim R 486.
9 [2003] QCA 107.

[32] In oral submissions, counsel primarily emphasised the failure of the primary judge to record a conviction as demonstrating manifest inadequacy, relying on this Court's statement in *KU*:[10]

> "The recording of a conviction for the offence of rape is the irreducible minimum level of denunciation required by an offence of this gravity, and notwithstanding the resulting application of the *Child Protection (Offender Reporting) Act* 2004 [Qld]. Convictions must be recorded in respect of all the offences committed by the juvenile offenders."

Conclusion

[33] I will commence by setting out the relevant statutory principles. The Act is a code for sentencing child offenders.[11] Its objects include ensuring that courts, in sentencing child offenders, deal with them according to principles established under the Act.[12] A court sentencing a child for an offence must sentence the child under Pt 7 of the Act[13] which contains the relevant sentencing principles. The sentencing court is required to have regard to:[14]

> " … the general principles applying to the sentencing of all persons; and
> (b) the youth justice principles; and
> (c) the special considerations stated in subsection (2); and
> (d) the nature and seriousness of the offence; and
> (e) the child's previous offending history; and
> (f) any information about the child, including a pre-sentence report, provided to assist the court in making a determination; and
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> …
>
> (h) any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the *Victims of Crime Assistance Act 2009*, section 15; and
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> …
>
> (k) the fitting proportion between the sentence and the offence.
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> (2) Special considerations are that—
> (a) a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and
> (b) a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community; and
> (c) the rehabilitation of a child found guilty of an offence is greatly assisted by—
> (i) the child's family; and
> (ii) opportunities to engage in educational programs and employment; and

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10 [214].
11 *Youth Justice Act* 1992 (Qld) s 2.
12 *Youth Justice Act* 1992 (Qld) s 2(d).
13 *Youth Justice Act* 1992 (Qld) s 149.
14 *Youth Justice Act* 1992 (Qld) s 150.

> …
>
> (e) a detention order should be imposed only as a last resort and for the shortest appropriate period.
>
> … ."

[34] The youth justice principles are contained in Sch 1 to the Act[15] and relevantly include:

> "1 The community should be protected from offences.
>
> 2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.
>
> …
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> 8 A child who commits an offence should be—
>
> (a) held accountable and encouraged to accept responsibility for the offending behaviour; and
>
> (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and
>
> (c) dealt with in a way that strengthens the child's family.
>
> …
>
> 12 A person making a decision relating to a child under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices.
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> 13 If practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community.
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> …
>
> 16 A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.
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> 17 A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances.
>
> … ."

[35] As to whether a sentencing court records a conviction, the starting point is that a conviction is not recorded.[16] If a court sentences a child under s 175(1)(g) or s 176, the court may order that a conviction be recorded or decide that a conviction not be recorded.[17] The considerations in determining whether or not to record a conviction are set out in s 184 of the Act:

> "(1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including—
>
> (a) the nature of the offence; and
>
> (b) the child's age and any previous convictions; and
>
> (c) the impact the recording of a conviction will have on the child's chances of—
>
> (i) rehabilitation generally; or
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> (ii) finding or retaining employment."

[36] I will next review the cases upon which the appellant relies as demonstrating that a sentence of detention rather than merely supervision was required.

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15 *Youth Justice Act* 1992 (Qld) s 3.

16 *Youth Justice Act* 1992 (Qld) s 183(1).

17 *Youth Justice Act* 1992 (Qld) s 183(3).

[37] In the infamous case of *KU*, all the offenders were older than the present respondent and, unlike him, they all had committed other offences. *KU* bears no resemblance to the facts of this case; the only similarity was that they were both unusual and disturbing cases, although in quite different ways. The observations by this Court in *KU* relied upon by the appellant, both as to the appropriate level of sentence and as to whether a conviction should be recorded, concern the unique circumstantial matrix pertaining in *KU*. They are not statements of general sentencing principles: see *R v DAU; ex parte A-G (Qld)*[18] and *R v SBR*.[19]

[38] In *R v E; ex parte Attorney-General (Qld)*, the respondent pleaded guilty at a late stage to two counts of rape, four of attempted rape and one of torture of a 30 year old wheelchair-bound woman who suffered from cerebral palsy. He was 16 years and four months at the time of the offences and 17½ at sentence. His remorseless offending occurred over five days and included sadistic acts. He had a dysfunctional background and no previous convictions but was a regular user of marijuana and amphetamines. The presentence and psychological reports stated that he lacked awareness of the significance of his behaviour and was at medium risk of sexually re-offending. This Court regarded the offence of torture as the most serious as it subjected the complainant to a terrifying ordeal. The original sentence of two years detention did not reflect the gravity of the offending and the need for lengthy supervision if rehabilitation was to be effected. This Court substituted a sentence of four years detention with release on supervision after serving 50 per cent.

[39] In *R v S*, the applicant pleaded guilty to five counts of burglary and stealing, one count of attempted unlawful use of a motor vehicle, two counts of unlawful use of a motor vehicle with circumstances of aggravation, one count of stealing, one count of entering a dwelling with intent and six counts of rape. He was sentenced to 12 months detention for the property offences and to four years cumulative detention for the rape offences, with convictions recorded for all offences. The total unrecovered or damaged property was a little over $8,000 and one burglary concerned the home of a 73 year old pensioner. Some offending was committed whilst S was on probation, good behaviour bonds and bail. The rapes were perpetrated on three separate occasions upon his first cousin, a 16 year old woman suffering from cerebral palsy. She suffered bleeding on two of these occasions. The offences had a significant detrimental impact on her and destroyed extended family relationships. S was 14 at the time of the offending and 15 at sentence. He had an extensive criminal history including one count of robbery with personal violence. He had breached and otherwise performed poorly on his conditional bail program. According to his presentence report, he associated with known juvenile and adult offenders and his behaviour was negatively affected by marijuana and alcohol abuse. He lacked genuine remorse and insight into the effect of his offending. A psychological report noted that he had an exaggerated sense of entitlement and with his recent sexual maturity had a propensity to take advantage of others, including sexually; he had exploited a vulnerable victim to gratify his sexual desires. This Court concluded the sentence was not manifestly excessive.

[40] In *MAC*, the applicant pleaded guilty to rape and two counts of indecent dealing with C, a child under 12; indecent dealing with N, a child under 12; attempted rape of N; and attempted rape of M. He was 10 years old when he committed the

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18 [2009] QCA 244, [24].

19 [2010] QCA 94, [18].

offences against C, the son of a friend of his mother. C made an immediate complaint to his mother who confronted MAC's mother. MAC initially denied the offence but his mother contacted police and he made admissions. The offending against C involved sodomy, putting his penis in C's mouth and fondling C's penis. When he was about 13, he attempted to rape his three year old niece, M, by pulling down her pants, touching her on the vulva and attempting to insert his penis into her vagina. M told her mother who spoke to MAC's mother, who in turn confronted MAC. When interviewed by police he made full admissions. The offences involving N came to light when MAC's mother approached a female neighbour and asked her to speak with her children about any sexual contact with MAC. N described how, when MAC was 13 and he was six, MAC had attempted to put his penis into his anus and he put N's penis in his mouth and bit it. MAC admitted both incidents to police. He cooperated with the police and entered an early plea of guilty. He had a dysfunctional upbringing. A psychological report described him as having some self-awareness of his offending but with a moderate to high risk of committing further such offences. He was in need of counselling and the development of a relapse prevention plan which could be provided in custody. This Court found that the sentence of four years detention to be released after serving 50 per cent was not manifestly excessive.

[41] In *JAJ*, the applicant was sentenced to three years detention to be released after serving 50 per cent. He was 16 years old and 17 at sentence. He anally raped his three and a half year old step-brother. He had no prior convictions and had the disadvantage of a startlingly dysfunctional background. He resented that his mother had left him to babysit the child. He told police he sodomised him because he was naughty. He described making the child cry by inserting his erect penis really hard into the child's anus because he was angry at having to do housework all day. There was blood on the child's underwear and his anus and there were two significant posterior anal lacerations with mucosa visible through the dilated anus. The psychological report considered that he was at moderate risk of re-offending in a sexually abusive way. This Court substituted a sentence of three years detention but did not interfere with the order releasing him after serving 50 per cent.

[42] It is obvious from this review of the cases relied upon by the appellant that, although all resulted in more serious consequences for the offender, none involved the unusual concatenation of circumstances existing in this case. They did not concern an offender with a mental age below the age of criminal responsibility, with no previous or subsequent criminal history, and with promising rehabilitative prospects. By contrast, as this Court noted in *KU*,[20] non-custodial sentences are sometimes imposed on youths with no prior convictions and promising rehabilitative prospects found guilty of the serious offence of rape, for example, *R v DJL*;[21] *R v MSB*[22] and *R v TAS*.[23] The appellant's cases do not demonstrate that the judge's exercise of the sentencing discretion in ordering three years supervision with appropriate treatment rather than a period of detention, was unreasonable, clearly unjust, involved an error of fact or law or failed to take into

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20 [2011] 1 Qd R 439, 490–491 [209]–[211].

21 Unreported, Britton SC DCJ, Childrens Court Queensland, Indictment No CC17 of 2006, 5 December 2006.

22 Unreported, O'Brien DCJ, Childrens Court Queensland, Indictment No 33 of 2005, 3 November 2006.

23 Unreported, White DCJ, Childrens Court Queensland, Indictment No 28 of 2005, 27 January 2006.

account a material consideration or gave undue weight to any circumstance of matter: *House v The King*.[24]

[43] The respondent's plea of guilty to the offence of rape was an acknowledgement of his criminal responsibility for the commission of an objectively heinous crime, the penile-vaginal rape of a three year old girl by a 12 year old boy. As the sentencing judge appreciated, the sentence does seem lenient. It may be inferred from the absence of any physical injury whatsoever to the toddler complainant and her intact hymen that the degree of penetration and force used was minimal. Whilst any offence of rape of a three year old is grave, this offence viewed objectively was at the less serious end of the range.

[44] A person under the age of 10 years is not criminally responsible for any act or omission: s 29 *Criminal Code*. The fact that the respondent had a mental age of nine years (that is, below the age of criminal responsibility) and had limited grasp of the consequences and moral blameworthiness of his actions at the time he committed the offences is highly relevant to the exercise of the sentencing discretion. It lessened his moral culpability for the offending so that the retributive, denunciatory and deterrent aspects of sentencing were less relevant than otherwise: *Muldrock*[25] and *R v Perini; ex parte A-G (Qld) (No 2)*.[26]

[45] The respondent's cooperation with police and his guilty plea were most significant mitigating factors. It is also highly relevant that he had no prior or subsequent offending history and that he has promising prospects of rehabilitation. This seems consistent with the references from his school and community members, the presentence report and psychologist Mr Starkey's more recent report.

[46] There is nothing in the primary judge's reasons to suggest that his Honour was not fully cognisant of the relevant sentencing principles and acted upon them in this most difficult case. The sentence he ultimately determined upon was appropriate bearing in mind all the relevant circumstances and the apposite youth justice principles. It accorded with the recommendation of Dr Fama and with the tenor of the pre-sentence report. This was not a case where a period of detention had to be imposed.[27] It seems that the respondent will now be thoroughly supervised during the three year supervision order. If he breaches it, he will be dealt with. The sentence is designed both to rehabilitate him[28] and to provide adequate community protection,[29] for the duration of the order and also, if as anticipated the respondent is rehabilitated, into the future. The treatment program is centred on making the respondent accountable for his offending and to ensure he accepts responsibility for it.[30] Unfortunately, no sentence can recompense the complainant's family for the dreadful effect of this offending on their lives.[31] This factor, though relevant, cannot overwhelm the other applicable youth justice sentencing principles. The sentence of three years supervision with a treatment condition was neither manifestly inadequate or tainted by error.

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24 (1936) 55 CLR 499, 507–508.
25 (2011) 244 CLR 120, 132 [27].
26 [2011] QCA 384, [34].
27 See *Youth Justice Act* 1992 (Qld) ss 150(2)(e), 208.
28 *Youth Justice Act* 1992 (Qld) s 150(2)(b), sch 1 Principle 16.
29 *Youth Justice Act* 1992 (Qld) sch1 Principle 1.
30 *Youth Justice Act* 1992 (Qld) sch 1 Principles 8(a), 14.
31 But see *Youth Justice Act* 1992 (Qld) s 150(1)(h).

[47] I turn now to whether the judge erred in exercising his discretion not to record a conviction. This Court in *DAU* declined to interfere with the decision not to record a conviction when sentencing a youth who pleaded guilty to raping a 17 year old fellow-student when he was 15 years old. He had no prior criminal history and his prospects of rehabilitation were likely to be detrimentally affected by a conviction.

[48] In *SBR*, the applicant applied for leave to appeal against his sentence in that a conviction was recorded for the offence of rape. The complainant, SBR's sister, was aged between seven and 10 at the time the applicant licked her vagina, had her touch his penis, lay on top of her with his pants pulled down and on the final occasion digitally raped her with two fingers. The presentence report described his acts as experimental and opportunistic. He lacked emotional maturity and understanding although he had some insight into his offending behaviour and its impact on the victim. He was 17 years old at sentence and neither attending school nor employed. He readily admitted his behaviour and had since been behaving appropriately whilst continuing to reside with his family. This Court concluded that the primary judge in recording a conviction gave insufficient weight to the considerations listed in s 184 and set it aside.

[49] As this Court noted in *DAU*[32] and *SBR*,[33] the statement relied upon by the appellant in *KU* as to the need to record convictions was not a general statement of principle but one limited to the circumstances of that case.

[50] In terms of the considerations for recording a conviction listed in s 184(1)(a),[34] the objective nature of an offence of penile-vaginal rape of a three year old does ordinarily suggest that the recording of a conviction is warranted. That said, this offence is at the less serious end of the range of such offending. As to s 184(1)(b),[35] the respondent's age, both actual and mental, and his absence of any previous and subsequent convictions or offending strongly militated against the recording of a conviction. As to s 184(1)(c),[36] it should be inferred that the recording of a conviction for the offence of rape on the respondent, who was but 12 years old at the time and with a mental age of nine, would have a detrimental effect on his otherwise positive rehabilitative prospects and on the likelihood of him gaining and retaining future employment. The primary judge's sentencing reasons do not suggest his Honour erred in any way in the exercise of his discretion not to record a conviction.

[51] For these reasons, the appeal should be dismissed.

ORDER: Appeal dismissed.

[52] **GOTTERSON JA**: I agree with the order proposed by the President and with the reasons given by her Honour.

[53] **PHILIPPIDES J**: I agree with the reasons of McMurdo P and with the order proposed.

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32 [2009] QCA 244, [24].
33 [2010] QCA 94, [18].
34 Set out at [35] of these reasons.
35 Above.
36 Above.