SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBT; R v HMM; R v ACA; R v NY* [2020] QCA 170
PARTIES:	**In CA No 251 of 2019:** **R** **v** **DBT** (first applicant) **In CA No 262 of 2019:** **R** **v** **HMM** (second applicant) **In CA No 266 of 2019:** **R** **v** **ACA** (third applicant) **In CA No 271 of 2019:** **R** **v** **NY** (fourth applicant)
FILE NO/S:	CA No 251 of 2019 CA No 262 of 2019 CA No 266 of 2019 CA No 271 of 2019 DC No 196 of 2019 DC No 149 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Childrens Court at Brisbane – Date of Sentence: 13 September 2019 (Moynihan QC DCJ)
DELIVERED ON:	18 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2020
JUDGES:	Morrison JA and Boddice and Williams JJ

ORDERS: **In CA No 251 of 2019: R v DBT (first applicant)**

The application for leave to appeal is refused.

In CA No 262 of 2019: R v HMM (second applicant)

The application for leave to appeal is refused.

In CA No 266 of 2019: R v ACA (third applicant)

The application for leave to appeal is refused.

In CA No 271 of 2019: R v NY (fourth applicant)

1. **The application for leave to adduce further evidence is refused.**

2. **The application for leave to appeal is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the first applicant pleaded guilty to one count of rape; one count of indecent treatment of a child under 16; and three counts of carnal knowledge of a child under 16 – where the second applicant pleaded guilty to one count of rape and one count of carnal knowledge of a child under 16 – where the third applicant pleaded guilty to one count of rape; three counts of indecent treatment of a child under 16; three counts of carnal knowledge of a child under 16; and one count of robbery in company – where the fourth applicant pleaded guilty to one count of rape; two counts of indecent treatment of a child under 16; two counts of carnal knowledge of a child under 16; two counts of extortion; and one count of distributing child exploitation material – where the applicants were sentenced pursuant to the *Youth Justice Act* 1992 (Qld) (Youth Justice Act) – where the first, third and fourth applicants were each sentenced to five years' detention in respect of the count of rape – where the second applicant was sentenced to four-and-a-half years' detention in respect of the count of rape –where all of the applicants seek leave to appeal against their sentences on the basis that they are manifestly excessive – whether leave should be granted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where convictions were recorded in respect of each of the applicants for the count of rape – where all of the applicants submit that convictions ought not to have been recorded – where the fourth applicant further submits that the sentencing judge failed to properly consider

that the prima facie position under the *Youth Justice Act* is that a conviction is not to be recorded; failed to properly consider the factors in s 184(1)(b) and (c) of the *Youth Justice Act* in deciding to record convictions; and failed to have adequate regard to the Charter of Youth Justice Principles – whether convictions should have been recorded

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the first applicant further submits proper consideration was not given to the varying levels of criminality existing between the co-accused – where the second applicant further submits that the sentencing judge erred by failing to apply the "parity principle" – whether the parity principle was applied

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – where the fourth applicant further submits that the sentencing judge failed to give adequate weight to the resultant cancellation of the child's refugee visa pursuant to s 501(3A) of the *Migration Act* 1958 (Cth) (Migration Act) – whether the sentencing judge failed to adequately take into account the effect of the Migration Act

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where the fourth applicant seeks leave to adduce further evidence in respect of the effect of the resultant cancellation of the child's refugee visa – whether leave should be granted in the circumstances

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld), s 3
Juvenile Justice Act 1992 (Qld), s 208
Migration Act 1958 (Cth), s 501
Penalties and Sentences Act 1992 (Qld), s 12
Youth Justice Act 1992 (Qld), s 150, s 183, s 184, s 208, s 209, s 220

R v A; Ex parte Attorney-General (Qld) [2001] QCA 542, cited
R v AAQ [2012] QCA 335, cited
R v AAV (2014) 247 A Crim R 547; [2014] QCA 343, cited
R v DAU; Ex parte Attorney-General (Qld) [2009] QCA 244, cited
R v E; Ex parte Attorney-General (Qld) (2002) 134 A Crim R 486; [2002] QCA 417, cited
R v EI [2011] 2 Qd R 237; [2009] QCA 278, cited
R v GBD (2018) 342 FLR 244; [2018] QCA 340, cited

R v IC [2012] QCA 148, cited
R v JAJ [2003] QCA 554, cited
R v KU; Ex parte Attorney-General (Qld) [2011] 1 Qd R 439; [2008] QCA 154, cited
R v LAO [2019] QCA 222, cited
R v MAC [2004] QCA 317, cited
R v MBU [2012] QCA 349, cited
R v MBQ; Ex parte Attorney-General (Qld) [2012] QCA 202, cited
R v Patrick (a pseudonym); R v Patrick (a pseudonym); Ex parte Attorney-General (Qld) [2020] QCA 51, cited
R v PZ; Ex parte Attorney-General (Qld) [2005] QCA 459, cited
R v S [2003] QCA 107, cited
R v SBR [2010] QCA 94, cited
R v SBY (2013) 228 A Crim R 334; [2013] QCA 50, cited
R v SCU [2017] QCA 198, cited

COUNSEL: M J Power for the first applicant
J R Cook for the second applicant
E P Mac Goilla Ri and A Cousen for the third applicant
S A Lynch for the fourth applicant
D Balic for the respondent

SOLICITORS: Legal Aid Queensland for the first applicant
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Wallace O'Hagan Lawyers for the third applicant
Bouchier Khan Lawyers for the fourth applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Williams J and agree with those reasons and the order her Honour proposes.

[2] **BODDICE J:** I agree with Williams J.

[3] **WILLIAMS J:** The four applicants apply for leave to appeal against the sentences imposed on them in the Children's Court on 13 September 2019. Each of the applicants had pleaded guilty to offences including carnal knowledge of a child under 16 years and rape. These were serious offences against two female complainants. In respect of the rape offences, the applicants DBT, ACA and NY were sentenced to a period of five years detention. The applicant HMM was sentenced to four and a half years detention. Each of them was to serve 50 per cent with a conviction being recorded. Some or all of the applicants were also sentenced in respect of other related offences including carnal knowledge, indecent treatment, extortion and distributing child exploitation material with sentences of 18 months detention with convictions recorded, to be served concurrently. ACA was also sentenced in respect of robbery (on a separate indictment) to six months detention to be served concurrently.

[4] Each of the applicants sought to appeal on the ground that the sentence was manifestly excessive and also that convictions ought not to have been recorded. Three of the applicants also raised additional grounds as follows:

(a) DBT:

(i) In sentencing the applicant, proper consideration was not given to the varying levels of criminality existing between the co-accused.

(b) NY:

(i) The learned sentencing judge failed to give adequate weight to the resultant cancellation of the child's refugee visa pursuant to s 501(3A) of the *Migration Act* 1958 (Cth) (Migration Act);

(ii) The learned sentencing judge failed to have adequate regard to the Charter of Youth Justice Principles;

(iii) The learned sentencing judge failed to properly consider that the prima facie position under the *Youth Justice Act* 1992 (Qld) (Youth Justice Act) is that a conviction is not to be recorded and failed to properly consider the factors in s 184(1)(b) and (c) of the Youth Justice Act in deciding to record convictions; and

(iv) The learned sentencing judge failed to consider all other sentencing options reasonably available before imposing the sentence of detention.

(c) HMM:

(i) The learned primary judge erred by failing to apply the "parity principle".

Overview of circumstances of the offending

[5] The relevant facts are set out in the 13 page statement of facts which was marked as exhibit 4 at the sentencing hearing. The offending relates to three separate incidents, with some of the lesser offences occurring between those incidents, or after in respect of one.

[6] The first set of offences relates to an incident on 20 January 2018 (first incident) when the first complainant (aged 15 and a half years) agreed to meet DBT for sex. She was not aware that ACA and NY would be present. All three committed indecent treatment and unlawful carnal knowledge of the first complainant. NY filmed the offending on his mobile phone and threatened to release the footage. NY also sent a copy of the video to the first complainant.

[7] Arising out of the first incident and the related subsequent events:

(a) ACA was charged with three counts of indecent treatment and two counts of carnal knowledge.

(b) DBT was charged with one count of indecent treatment and two counts of carnal knowledge.

(c) NY was charged with one count of indecent treatment, one count of carnal knowledge, one count of recording indecent image of a child (indecent treatment), one count of extortion and one count of distributing child exploitation material.

[8] The second set of offences relates to an incident on 13 February 2018 (second incident). The first complainant was walking home from school when she walked

past DBT, HMM, ACA and NY. The four of them guided her to an abandoned house in Woolloongabba.

[9] Each of the applicants is charged with one count of carnal knowledge in respect of the event on 13 February 2018. Each of the acts of carnal knowledge took place without the consent of the complainant, but she did not communicate that absence of consent to the applicants.

[10] The next set of offending relates to an incident involving the second complainant on 11 March 2018 (third incident). The second complainant (aged 17) agreed to meet DBT for sex. She was unaware that ACA, NY and HMM would be present. Each of the four applicants raped the second complainant. After the rapes had taken place, ACA threatened the second complainant with a switchblade so that the second complainant would not "talk". NY filmed the offending on his mobile phone and threatened to release the footage if she reported it. NY was charged with one count of extortion in relation to that conduct. They were all charged with rape in relation to the incident.

[11] ACA was also charged separately with two different co-offenders with one count of robbery in company in circumstances where one of his co-accused threatened to stab a male complainant if he did not take off his shoes and provide them to the co-accused.

[12] The learned sentencing judge's sentencing remarks go into considerable detail about the offending and the circumstances of each of the applicants. It is necessary to repeat some of that here to have an understanding of the nature and seriousness of the offences and the individual involvement of each of the applicants.

NY's antecedents

[13] NY was born in Iran and is a non-citizen refugee. The pre-sentence report noted that NY's "upbringing in Iran and his family's strong Islamic traditions strongly influenced his understanding of gender roles, relationships and sexual development".[1]

[14] NY's mother identifies as a religious minority and was persecuted as a result, spending three years in custody. Upon his mother's release, NY's parents sought asylum in Australia when NY was 10 years old. Following arrival in Australia by boat, the family was detained at Christmas Island for approximately one month. During this period, the detention centre had an impact on NY's physical health and he began experiencing seizures. The family then spent approximately three months at the Northern Immigration Detention Centre, then the Adelaide Immigration Transit Accommodation and finally moved to a suburb in Brisbane.

[15] Once in Brisbane, NY enrolled in primary school where he quickly became proficient in English and performed well at school. However, his home life was stressful and he continued to experience seizures, with several admissions to hospital. His father also experienced health issues and underwent major heart surgery. His parents separated in 2014. His mother re-partnered and NY took on the role of caring for his father. His education continued and he began playing

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1 AB page 164.

community basketball. It was through this that he developed close relationships with his co-offenders.

[16] At the time of the offending, NY was 16 years and six months of age. He was arrested on 13 March 2018 and participated in a formal interview with police. He gave a false version of the telephone conversation he had with the first complainant the day after the event. NY, at that stage, was unaware that the conversation had been recorded by police.

[17] The pre-sentence report author expressed the opinion that NY presents as a moderate to high risk of sexual recidivism.[2] He was assessed as being a moderate risk of reoffending and a probable high risk of sexual offending.

[18] The pre-sentence report also identified:

(a) NY had access to pornography multiple times each week and this shaped his own sexual interest. This included to the extent of modelling group sexual behaviour on what had been viewed in the pornographic material and also discussing engaging with females in that context.[3]

(b) NY and his co-offenders appeared to characterise the first complainant as someone with a "sexual reputation".[4] He was excited by the prospect of re-enacting what he had seen in the pornographic material. NY indicated that he filmed the offending so that he could later use it for masturbation.[5]

(c) NY had also engaged in group sexual activity with the second complainant on an occasion prior to the offending and he was of the opinion that she "would be ok with it again".[6]

(d) In respect of the offending against the second complainant, NY realised she did not want to be there any longer after she had urinated, but despite that knowledge, developed a confidence to continue. NY felt sexually entitled and was subject to peer group influences that led to his offending.[7]

(e) NY is not an Australian citizen and is at risk of deportation to Iran upon the completion of his sentence. NY suffered anxiety due to the fear of being returned to Iran and separated from his family.[8]

(f) After the offending, NY expressed remorse and demonstrated sympathy towards the complainants.[9]

ACA's antecedents

[19] ACA was 17 years of age at the time of the offending. ACA has no criminal history but the robbery offence was committed while he was on bail for the other current offences. At the time of sentencing ACA had been in pre-sentence detention for a total of 104 days.

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2 AB page 205.
3 AB page 190.
4 AB page 192.
5 AB page 193.
6 AB page 193.
7 AB page 195.
8 AB page 188.
9 AB page195-196.

[20] ACA was born in Australia of Ethiopian - Sudanese descent. His parents migrated to Australia in 1997 pursuant to the Australian Refugee and Settlement Humanitarian Program. The family became Australian citizens in 2002. ACA reported a positive transition for the family and an enjoyable upbringing in Australia within a close-knit family unit.

[21] The pre-sentence report noted that ACA's prolonged "exposure to IPV,[10] in combination with other causal factors, has likely contributed to his sexual offending and the coercive, threatening, violent and intimidating nature of it".[11] Further, it may also "have exposed him to a distorted relationship template which endorsed gender-type beliefs regarding male entitlement and justifications for coercion and violence in relationships".[12]

[22] ACA attended a private high school where he developed an interest in basketball. However, he began to engage with antisocial peers and was expelled in grade 11 due to his involvement in the physical assault of a young student. The pre-sentence report noted that ACA was dismissive when questioned about the assault being considered intimidating and/or violent. The report author concluded that this type of behaviour is "viewed as normal for [ACA] and can be considered as a contributing factor to the robbery offence".[13]

[23] ACA then attended another private high school for the remainder of grade 11 and part of grade 12. There, he was accepted into a basketball program and also joined a basketball team where he met his co-offenders. ACA expressed a desire to pursue a career in professional basketball in the future, including in the United States of America.

[24] Subsequently to being charged with these offences, ACA was suspended from high school and completed his secondary studies through a college.

[25] The pre-sentence report also noted:

(a) The presence of co-offenders during the commission of the offences "appears to have served to further diffuse his sense of personal responsibility for his actions".[14]

(b) In relation to the second complainant, he took the primary role in coercing and threatening the second complainant.[15]

(c) After the offending, he demonstrated some insight into his offending but engaged in "denial, minimisation and victim blaming" and chose not to accept full responsibility.[16]

(d) During the interviews, he consistently denied aspects of the complainants' accounts and had poor empathy.

(e) Although ACA "expressed some empathy for the victims, their families and friends, he lacked the requisite level of insight and detail to demonstrate a full appreciation and comprehension of what they had to endure".[17]

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10 Intimate partner violence.
11 AB page 219.
12 AB page 239.
13 AB page 219.
14 AB page 241.
15 AB page 241.
16 AB page 219.
17 AB page 219.

(f) In relation to the robbery offence, ACA was dismissive of his behaviour and minimised his role. He also trivialised the experience of the complainant.[18]

[26] The pre-sentence report concluded that ACA presents as a moderate to high risk of sexual recidivism.[19]

DBT's antecedents

[27] DBT was 15 years and 10 months of age at the time of the offending. He is the youngest of the four co-offenders and is the same age as the first complainant and younger than the second complainant.

[28] He has a criminal history involving entering premises and dishonesty offences, and committed offences while on bail for the present matter. At the time of sentencing, he had been in pre-sentence detention in relation to these offences for a total of 314 days.

[29] DBT was born in North Sudan but his family migrated to Queensland on humanitarian grounds under the Australian Refugee and Settlement Humanitarian Program when DBT was two years old. His family became Australian citizens in 2010. DBT did not report any adverse developmental experiences and reported an enjoyable upbringing in Australia within a loving and supportive family unit.

[30] DBT achieved a high level of academic excellence at school and attended high school on a scholarship. DBT was heavily involved in basketball and quickly became a talented player, playing for several teams including one where he built close relationships with his co-offenders.

[31] The pre-sentence report identified:

(a) He was self-exposed to pornography at the age of 13 which led to conversations of objectification of women.[20]

(b) As he was the youngest of the offenders, he was less likely to fully consider the harmfulness of the conduct engaged in.[21]

(c) DBT was "not provided with the necessary tools to equip him to understand consensual sexual behaviour and the Australian laws accompanying it … much of his sexual attitudes and behaviour were learned from his peer group and the discourse of pornographic material where women may be dehumanised as objects of men's sexual gratification".[22] This was reinforced by open discussions with peers normalising casual sexual encounters and misogynistic attitudes towards women.[23]

(d) Peer group influence and motivation to gain acceptance and inclusion appears to have played a critical role in his sexual abusive behaviour.[24]

(e) The presence and involvement of the co-offenders in the offending "may have served to internally minimise the harm of his actions, lessening his sense of accountability".[25]

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18 AB page 219.
19 AB page 244.
20 AB page 260.
21 AB page 282.
22 AB page 260.
23 Ibid.
24 AB pages 260-261.
25 AB page 261.

(f) DBT expressed remorse for his actions and identifies the harmful impact that the offending has had on the complainants, their families and the community. He appeared to experience strong feelings of shame and guilt.[26]

[32] The pre-sentence report concluded DBT presents as a moderate risk of sexual recidivism.[27] He was observed to engage in rape supportive attitudes and victim blaming throughout the interview process.[28]

HMM's antecedents

[33] HMM was 16 years and one month of age at the time of the offending. He has no criminal history. At the time of sentencing, HMM had been in pre-sentence detention for a total of 343 days.

[34] HMM was born in a refugee camp in Nairobi, Kenya, and he migrated with his family (mother, stepfather and six half-siblings) under the Australian Refugee and Humanitarian Settlement Program in 2005 when he was three years old. His family became Australian citizens in 2009. He comes from a close family and reports an enjoyable childhood within a loving and close-knit family unit.

[35] At high school HMM became involved in sport, particularly soccer, and played at a representative level. He also became heavily involved in basketball and played for a basketball team where he met his co-offenders.

[36] HMM maintained a high level of academic motivation through high school and excelled in his athletic pursuits.

[37] The pre-sentence report identified:

(a) HMM's understanding of appropriate and inappropriate sexual behaviours was largely formed by self-exposure to pornography. He was exposed to pornography from the age of 13.[29]

(b) This exposure encourages "males to view females simply in terms of sexual potential, not as entire beings worthy of mutual respect and regard".[30]

(c) Discussions with peers encouraged a "sexual double standard" whereby sexual freedom and promiscuity is encouraged for men but not for women.[31]

(d) His exposure to aberrant peer group attitudes and norms, combined with poor appreciation of ethical sexual behaviour, may have distorted his understanding of appropriate sexual expression.[32]

(e) He was introduced to the concept of group sexual activity by his co-offenders the day of the second incident involving the first complainant on 13 February 2018.[33]

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26 AB page 270.
27 AB page 283.
28 Ibid.
29 AB page 317.
30 AB page 318.
31 AB page 325.
32 Ibid.
33 AB page 318.

(f) Peer group influence and aberrant group processes also appear to have played a significant role in HMM's decision to engage in the offending. The report noted, "The presence of co-offenders may have served to diffuse a sense of personal responsibility for his actions, resulting in him disregarding his awareness that his behaviour towards [the] second complainant was abusive, harmful and illegal".[34]

(g) He appeared heavily influenced by his co-offenders and did not appear to initiate or lead arrangements for meetings with the first complainant or the second complainant.[35]

(h) HMM expressed remorse and regret for his offending and had some appreciation for the harmful effect his behaviour has had on the complainants.[36] However, the report observed that HMM's account of the offences suggested refutation and victim blaming.[37]

(i) The pre-sentence report concluded that HMM has a low risk of sexual reoffending and would benefit from therapeutic, educational and preventative interventions.

First set of offences – first complainant / first incident

[38] NY was 16 years old, ACA was 17 years old and DBT was 15 years old at the time of the first incident. The first complainant was aged 15 and a half years. On 20 January 2018, the first complainant agreed to meet with DBT for consensual sex. However, ACA was with DBT when they met up. While the three of them were walking towards an abandoned house in Woolloongabba, NY joined them. The first complainant did not communicate that she wanted to leave.

[39] Once the four of them were inside the abandoned house, ACA directed the first complainant to sit on a bucket and then ACA exposed his penis and repeatedly told the complainant to perform oral sex on him. ACA put one of his hands on the first complainant's head and pushed her head towards his penis and forced his penis into her mouth. NY and DBT stood nearby while this was happening. The first complainant said that she was scared but did not resist or communicate her lack of consent.

[40] At this time, the first complainant's mother was calling on her mobile phone and the first complainant asked if she could pick up the phone. The applicants agreed and the first complainant walked to the side of the house to answer her phone. ACA walked with her and stood next to her whilst she was on the phone. As a result, the first complainant felt she could not leave. Following the phone call, ACA put his hands on the complainant's shoulders and walked her back into the house.

[41] Once back in the abandoned house, the three applicants threw the first complainant onto a mattress on the ground and stripped off her skirt and underpants. All three groped the first complainant's breasts and produced a vibrator and began rubbing her vagina with it.

[42] Following this, DBT was left alone with the first complainant. DBT pulled his pants down to expose his penis and told the first complainant to perform oral sex.

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34 AB page 327.
35 AB pages 325-326.
36 AB page 321.
37 Ibid.

He then made the first complainant turn around and began engaging in the act of carnal knowledge of the complainant, causing her pain. DBT continued with the act of carnal knowledge in several different positions. DBT had been wearing a condom and when he was finished he threw the condom on the ground and went outside.

[43] Immediately following, ACA came inside where the first complainant was lying on the bed. ACA pulled his pants down to expose his penis and told the complainant to perform oral sex. Then, ACA put on a condom and engaged in the act of carnal knowledge with the first complainant and then made the first complainant perform oral sex again. Following that, he told the first complainant to turn around so that she was on all fours and continued the act of carnal knowledge. At this point, ACA asked the first complainant "oh, did you like that?" The first complainant did not respond as she was scared.

[44] ACA then went outside. The third offender, NY, went into the room and told the first complainant to perform oral sex on him. NY then put on a condom and told the first complainant to get on all fours, and engaged in the act of carnal knowledge on her.

[45] ACA and DBT then came back into the house and DBT said "round two". DBT then put on a condom and again engaged in the act of carnal knowledge of the first complainant from behind while she was on all fours. While this was happening, ACA forced the first complainant to perform oral sex on him.

[46] NY had the flashlight on his mobile phone on and began recording the incident. The first complainant asked NY if he was recording a video of the incident. NY told her he was simply using it as a flashlight.

[47] Following this, ACA took his penis out of the first complainant's mouth, put on a condom and engaged in an act of carnal knowledge with the first complainant whilst she was on all fours.

[48] The first complainant's mobile phone was ringing again and she asked if she could answer it. She was told no. The three offenders grabbed her mobile phone and did not let her answer it.

[49] After these events, the three offenders walked out of the house. The first complainant put her clothes on and left. As the first complainant began walking home, the three offenders walked with her and said "we're gonna do it again". The first complainant told them no. The first complainant then walked in another direction to the three offenders.

[50] About a week later, some of the offenders contacted the first complainant to arrange to meet up again, however the first complainant did not want to.

[51] NY began sending messages telling the first complainant that if she did not meet up with them, he was going to send the video he had taken of the first incident to the school and her friends and would show it to her mother.

[52] NY sent a copy of the video to the first complainant via Snapchat. NY also sent a picture to the first complainant that showed his Facebook Messenger being "one button click away" from sending the video to the first complainant's uncle.[38]

Second set of offences – offending against the first complainant / second incident

[53] The second set of offences occurred on 13 February 2018. The first complainant was walking home from school and she walked past DBT, ACA, NY and HMM. The four offenders followed her. The first complainant tried to get away but the four offenders continued following her. ACA put his arm around her and escorted her while DBT, NY and HMM walked behind them.

[54] The first complainant said that she did not want to do this and that her mother was worried about her. The first complainant asked why they were making her do this. ACA said "you have to do what I say 'cause I'm your daddy'".

[55] They arrived at a different abandoned house in the same street in Woolloongabba and the first complainant was taken into a room. ACA stayed in the room with the first complainant while the others stayed outside. ACA stripped off the first complainant's clothing and then began groping her buttocks. Following this, ACA pulled his pants down to expose his penis, put his hand on the first complainant's head and had the first complainant perform oral sex on him. Following this, ACA put on a condom and then engaged in an act of carnal knowledge. When he had finished, ACA went out of the room.

[56] DBT went into the room with the first complainant, pulled his pants down and had the first complainant perform oral sex on him. DBT then put on a condom, laid on the ground and instructed the first complainant to get on top of him and he engaged in the act of carnal knowledge. DBT subsequently left the room.

[57] Immediately following, HMM went in the room with the first complainant and stood over the first complainant whilst she was on her knees. HMM pulled his pants down to expose his penis and had the complainant perform oral sex and rub his penis. HMM then instructed the first complainant to get down onto the floor on all fours, he put a condom on and then engaged in the act of carnal knowledge with the first complainant from behind. The first complainant suffered abrasions on her face, elbows and knees as a result of being rubbed against the ground while this was occurring. HMM subsequently left the room.

[58] NY then went into the room with the first complainant and stood over her whilst she was on her knees. NY had the first complainant perform oral sex on him and then instructed her to get on all fours. NY put on a condom and engaged in an act of carnal knowledge with the first complainant from behind. NY continued the act of carnal knowledge in various positions.

[59] The first complainant's phone rang at this time. The first complainant said to hurry up because her mother was worried and NY said "fuck your mum". Following this, he took the condom off and put his penis in the first complainant's mouth and masturbated until he ejaculated into the first complainant's mouth.

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38 AB page 123.

[60] The offenders then left the house, the first complainant dressed herself and walked home. The offenders followed her for some time but she ran and hid in a bathroom and then went a different way home to avoid them.

[61] All of these offences were without the consent of the first complainant, but she did not communicate that absence of consent.

[62] Following these offences, the complainant took pictures of the abrasions on her face, elbows and knees that she had received during the act with HMM. The first complainant also told one of her friends about the offending.

[63] A few days later on 17 February 2018, NY sent a Snapchat message to the first complainant warning her not to go to the police because "you're gonna lose this case so just warning ya". He also said that the other offenders had videos of her showing that she was "enjoying it" and that going to the police would make it worse for her. The first complainant was able to take screenshots of some of these messages.

[64] On 28 May 2018, the first complainant disclosed the offending to a guidance counsellor and then to the deputy principal. Subsequently, the first complainant's mother and father were told of the offending and the matter was reported to police that day with an interview taking place the following day.

Rape offences – offending against the second complainant / third incident

[65] The second complainant was 17 years old at the time of the offences. She had previously met DBT and NY but not HMM and ACA.

[66] On 10 March 2018, the second complainant received calls from DBT and a third party to meet them at a hotel in the city. The second complainant caught a bus to the city. NY then called her and told her to catch a bus to Buranda and he would meet her there. He said he was with DBT and ACA.

[67] The second complainant did not go to meet them as she had become "nervous". She caught a bus back home. That night, she received several calls from NY who was angry that she had not turned up. NY told her that "she had wasted his time".

[68] Subsequently, on Sunday 11 March 2018, the second complainant received Facebook messages from DBT asking her to "hang out with him". DBT said he was by himself. The second complainant agreed and was told to meet him at Buranda. DBT called her and gave her directions to an abandoned house in Woolloongabba. During the call, the second complainant confirmed with DBT that she was just meeting him and he repeatedly said he was alone.

[69] When the second complainant arrived at the house at approximately 6.00 pm, DBT was waiting outside for her. They entered the house, the second complainant saw another person in one of the rooms and she asked who that was. She was told it was just someone who lived there. The second complainant then went into one of the bedrooms. NY entered the room and told DBT to get out and that he was "going first". ACA also came into the room at that point and offered the second complainant some cannabis which she declined. NY told the two others to get out of the room, which they did. DBT entered the room again handing NY two

condoms and spoke to him in a whisper. DBT left the room leaving the second complainant and NY in the room.

[70] NY and the second complainant engaged in consensual sexual acts, including oral sex and consensual sexual intercourse. The second complainant needed to use the toilet but, given the state of the toilet beside the room they were in, the second complainant asked to be able to go downstairs into the yard. NY followed her outside. The second complainant urinated while NY was standing about two metres away from her. The second complainant considered running away at this stage as she felt scared. She was worried that as the boys were bigger and stronger than she was, they would chase her, and she did not try to leave.

[71] NY escorted the first complainant back upstairs and back into the same room. The second complainant indicated that she did not "feel good" and asked him if they could stop what they were doing. The second complainant told NY that she felt scared and wanted to leave. NY at this stage responded "you're not leaving until all of us have nutted". The second complainant understood this to mean ejaculated. DBT then entered the room and asked "why are you still talking? Just have sex". NY responded "this girl is acting up". Then, ACA and HMM entered the room. At this stage, ACA, NY and DBT kept saying to the second complainant that she could not leave until they had all "nutted". The second complainant said that they could not force her to do anything she did not want to. NY laughed and told her he would "force it however I want". At this stage, the four offenders were surrounding the complainant and she was very scared.

[72] NY and ACA then touched the second complainant's breasts and bottom and NY became angry and punched a cupboard in the room. The second complainant told the four offenders that she would go to the police if they forced her to do something she did not want to do. DBT then said that ACA had already had dealings with the police and they would only get a "slap on the wrist". DBT also told her that if she went to the police, they would show the police a video that they had of the second complainant having consensual sex on a previous occasion and her "reputation would be ruined".

[73] The second complainant asked DBT why he lied to her about being alone and DBT responded "I can't dog on my boys". The second complainant started crying and told them she was crying because she did not know how to get herself out of this situation. DBT said he would call her an Uber "if she gave them all top", meaning performing oral sex on them. As the second complainant thought this was the only way to get out of this situation, she agreed.

[74] NY told the others to get out of the room and he stayed and told the second complainant to perform oral sex on him. NY pulled out his mobile phone and began to video record the second complainant. He then directed the second complainant to get on the floor on her stomach. As she was getting onto her hands and knees, NY said he was going to "do anal". The second complainant said no and it was going to hurt her. NY persisted and the second complainant started crying. At that time, DBT put his head through the door and told NY not to do that and then left. NY pulled the second complainant back onto her hands and knees and raped her while the second complainant continued to cry. NY had his hands on the second complainant's hips and was holding onto her quite tightly. After he ejaculated, NY removed his penis, took off the condom and threw it out the window of the house.

Following this, he went to the door to the hallway and yelled out "who's next?" and then left the room.

[75] DBT entered the room with his penis exposed. He put his mobile phone flashlight up against the wall to shine light on them. At this stage, the second complainant was sitting on the floor and DBT stood in front of her. The second complainant started performing oral sex on him. DBT told her not to use her hands and to only use her mouth. He then put one hand on the back of her head and pushed her head against his penis. After a short time, he put a condom on and told the second complainant to go "doggy style". DBT then raped her. DBT had both his hands on the second complainant's hips and was holding her quite tightly. After ejaculating, DBT threw the condom on the ground, grabbed his mobile phone and left the room without speaking to the second complainant.

[76] ACA then entered the room and walked over to where the second complainant was sitting on the floor. ACA removed his penis from his pants and the second complainant performed oral sex on him for a short time. ACA then instructed her to get into "doggy style". ACA put on a condom and used the flashlight on his mobile phone to shine light onto the second complainant's vagina and began raping her. The second complainant asked if she could move her legs into a different position and ACA said no. After raping her for some time, ACA got annoyed and withdrew, pushing her into a wall as he left the room.

[77] While the second complainant was being raped by both DBT and NY, ACA had stood at the doorway and looked at the second complainant in the room.

[78] HMM then entered the room. HMM approached the second complainant who was near the wall where ACA had pushed her, he removed his penis from his pants and positioned it near the second complainant's mouth. He did not speak to her and the second complainant performed oral sex on him for a short period. After a short time, HMM told the second complainant to turn around and she got onto her hands and knees. He started raping her. He was not wearing a condom.

[79] At that stage, NY stood at the door and told HMM to "go fast, go at a pace" and HMM began thrusting fast with his hands on the second complainant's hips. This was causing the second complainant pain and her arms began to feel weak so she could not hold herself up anymore. As she began to slouch forward, HMM told her to arch her back and pushed down on her lower back. During this time, the second complainant told HMM "no" several times and that it hurt. The second complainant also said that she did not want to do it and NY told the second complainant "you're a bitch if you stop". This was repeated several times while HMM continued to rape her. Eventually, HMM withdrew, stood up and left the room.

[80] The second complainant then started getting dressed while all of the four offenders were outside the room. ACA said to the others "she's going to talk". The second complainant was leaving the room and told them she was not going to. NY said that the second complainant was too scared to talk but both DBT and ACA said she was going to and one of them said "we should slit her throat". ACA had a switchblade that was connected to a keyring in his hand. NY said "no, don't do that, that's basically attempted murder".

[81] ACA walked towards the second complainant and held the knife up in his hand. The second complainant was scared he was going to put it to her throat. Then, ACA put the knife by his side and said "just kidding", and started to walk away.

[82] Subsequently, NY used the video recording from the incident involving the second complainant in an attempt to illicit the second complainant's agreement to engage in further sexual activity and sent the video to a third party.

[83] The second complainant made a formal complaint to the police. The second complainant participated in a pre-text phone call with NY and on that call, NY made further threats to send the video to her friends at school and that "yesterday was payback for stuffing" him around on Saturday night by not coming to meet them.

[84] NY made further threats about the use of the video and tried to arrange a further meeting the next day with the second complainant to "finish it off tomorrow".

The further offending by ACA

[85] On 31 August 2018 at the Mount Ommaney Shopping Centre, ACA, with two other offenders, approached a separate complainant. A co-offender threatened to "deck" the complainant if he did not take off his shoes. This escalated to threatening to stab the complainant if he did not take off his shoes. At this stage, the complainant feared he would get stabbed, took off his shoes and put them in front of the offenders. ACA was a party to the offending due to his presence.

Sentencing remarks

[86] The learned sentencing judge in the sentencing remarks stated as follows:[39]

> "The defendants each fall to be sentenced under the provisions of the *Youth Justice Act 1992* (Qld).
>
> The sentence must help the child rehabilitate and punish them in a way that is just in all the circumstances, be proportionate to the nature of the offending, deter the child and others from committing this type of offence, make it clear that the community, acting through the courts, denounces this sort of conduct and protect the community.
>
> I have read and taken into account the charter of Youth Justice Principles and sentencing principles in s 150 of the Act. In both, it is made clear that primacy is to be given to sentencing options that promote rehabilitation. A child's rehabilitation is greatly assisted by the child's family and opportunities to engage in educational programs and employment. Further, a detention order should be imposed only as a last resort and for the shortest appropriate period. But the protection of the community remains a relevant principle.
>
> In *R v E; Ex Parte Attorney-General (Qld)* [2002] QCA 417, Jerrard JA said:
>
> > '… courts sentencing juvenile offenders are instructed by both the statutory commands in the *Juvenile Justice Act*, and the shared wisdom of other experienced judges, to have as

[39] AB pages 88-89.

> a principal object the rehabilitation if possible of the juvenile offender while the offender is still a juvenile. Nevertheless, courts are not to overlook the fact that the protection of members of the community from the infliction of harm can be achieved not only by the means of the rehabilitation of the individual causing that harm in the past, but also by sentences having a generally deterrent effect in the community.'

In *R v Nagy* [2003] QCA 175, Williams JA observed at [39] that:

> 'Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence, for the most serious (or the last point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality.'

A conviction is not to be recorded against a child who is found guilty of an offence other than under s 183 of the Act.

Section 183(3) of the Act relevantly provides:

> '**183 Recording a conviction**
>
> …
>
> (1) [sic] If a court makes an order under s 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction may not be recorded.'

The relevant considerations in determining whether or not to record a conviction are set out in s 184(1), (2) and (3) of the Act. Those sections relevantly provide:

> '**184 Considerations whether or not to record conviction**
>
> (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
>
> (ii) finding or retaining employment'."

[87] His Honour then went on to consider the comparable cases and the factual background relevant to each of the applicants.

[88] In respect of NY, his Honour noted that counsel for NY submitted that:[40]

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40 AB page 97.

> "…taking into account his background, contrition and insight into the offending, rehabilitation, the hardship of deportation, continued detention by his visa being cancelled and time having to be served in an adult prison, the appropriate sentence is one of three years' detention to be served by way of conditional release order, together with an order for three years' probation."

[89] In respect of ACA, his Honour noted that Counsel for ACA submitted that:[41]

> "Taking into account [ACA's] plea of guilty, lack of criminal history, difficult background, exposure to intimate partner violence, attempts to rehabilitate himself through education and the fact that he will serve the balance of any period of detention in an adult facility … the appropriate sentence is one of two years' detention with release after serving 50% of that term, and that no conviction be recorded."

[90] In respect of DBT, his Honour also noted that Counsel for DBT submitted that:[42]

> "… in light of [DBT's] personal circumstances, the appropriate sentence is a period of … 20 months detention, coupled with an order that [DBT] serve 50% of that period, and that no conviction be recorded. Alternatively, that the defendant be sentenced to three years' detention to be served by way of conditional release order coupled with a lengthy period of probation."

[91] Finally, in respect of HMM, his Honour noted that Counsel for HMM submitted that:[43]

> "… the appropriate sentence is a period of 644 days detention, with an order that [HMM] serve 50% of that period, and that no conviction be recorded. Alternatively, that [HMM] be sentenced to a conditional release order combined with a period of probation."

[92] Detailed pre-sentence reports were obtained in this case in respect of each of the applicants and reference was made to relevant aspects by his Honour in the sentencing remarks.

[93] Following the review of the factual backgrounds of each of the applicants, his Honour stated:[44]

> "Turning now to the criminality involved in the rape of the second complainant, LR. Taken alone, it is a very serious example of the offence of rape, warranting a significant period of detention.
>
> Each of you was involved as a principal offender in a gang rape of the complainant. The offending was premeditated.
>
> The complainant was misled as to the true position and your true intentions until it was too late for her to leave and she was isolated and alone in an abandoned house.

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41 AB page 99.
42 AB page101.
43 AB page 104.
44 AB pages 104-106.

Some of you contend that this case is less serious than some to which I have been referred because the complainant was not very young; the age disparity was not great and there was no gratuitous violence. However, the complainant was a child herself.

There was no need for gratuitous violence because the complainant was overwhelmed by the threat and menace of your combined presence. In any event, the act of rape in itself in this case was, as I set out earlier, a quintessential violent act.

It is clear the complainant was terrified and did not consent to the acts relied on to constitute the offences. She was helpless and vulnerable against your combined force.

The act of rape was brutal. The experience was physically painful for her and the place and way in which the acts occurred would have amplified the horror and ensured to the humiliation of the complainant.

The complainant was threatened with a knife to compel her silence. Further, [NY] and [DBT] threatened to share the video of her engaging in a sex act if she were to complain.

You all showed a complete and callous lack of concern for the welfare of the child at the time of and immediately after the events. You used and abused her.

I do not distinguish between each of you in terms of your criminality in relation to that event.

It was not an isolated aberration. It was the combination of a pattern of predatory behaviour. It needs to be placed in context of other criminal acts by each of you that add to the criminality and for which you must also be punished.

…

There is no evidence that any of you would have desisted from the course of predatory behaviour in the absence of a complaint.

I have read and take into account the victim impact statements of TS and her mother, setting out the significant consequences your actions had and continue to have on her and her mother. I note the brave appearance of TS at the sentence hearing.

I keep firmly in mind the passage I quoted earlier from *Lowe v The Queen* (1984) 154 CLR 606 earlier, but I need to instinctively synthesise and balance the competing considerations of your separate cases to arrive at a just sentence that reflects the entire criminality.

For example, [NY] has the additional criminality involved in the extortion and the distribution of child exploitation material, but he is the only defendant subject to the real prospect of deportation and immigration detention when released from this sentence. And [HMM] was not involved in the first incident concerning the complainant, TS. I do not consider that [ACA] being a party to the

subsequent street robbery adds significantly to his overall criminality.

I do not consider that a restorative justice process should happen instead of or to inform the sentence order.

I will impose in each case what I find to be the shortest appropriate period of detention to reflect the entire criminality in each case.

In relation to you, [NY], balancing the relevant considerations in your case and to reflect the entire criminality, I make the following orders-

In relation to the count of rape (that is, count 16 on the indictment), I order that you be detained for five years. On each of counts 2, 5, 8, 15, 10, 11 and 20, I order that you be detained for 18 months. Those terms are to be served concurrently.

In relation to you, [ACA], in relation to the count of rape (that is, count 18 on the indictment), I order that you be detained for five years. On each of counts 1, 2, 4, 7, 9 and 12, I order that you be detained for 18 months. In relation to the count of robbery in company, I order that you be detained for six months. Those terms are to be served concurrently.

In relation to you, [DBT], balancing the relevant considerations in your case and to reflect the entire criminality, I make the following orders-

In relation to the count of rape (that is, count 17 on the indictment), I order that you be detained for five years. On each of counts 2, 3, 6 and 13, I order that you be detained for 18 months. Those terms are to be served concurrently.

In relation to you, [HMM], balancing the relevant considerations in your case and to reflect the entire criminality, I make the follow orders-

In relation to the count of rape (that is, count 19 on the indictment), I order that you be detained for four and a half years. On count 14, I order that you be detained for 18 months. Those terms are to be served concurrently.

The nature and circumstances of the rape incident place it in the more serious category identified by the Court of Appeal in *R v KU & Ors; ex pate [sic] Attorney-General (Qld)* [2008] QCA 154, where it was said that the recording of a conviction was the 'irreducible minimum'.

Taking that and the matters in s 184 of the Act into account, I record a conviction in each of your cases on each of the charges, other than [ACA]'s robbery, as they form part of a related series of serious sexual activity. No conviction is recorded in relation to the robbery offence.

I am satisfied that in each case the matters for mitigation and the fact that you will serve part of the period of detention in an adult jail

warrant the exercise of the discretion to order that you be released after serving 50% of the period of detention."

Application for leave to appeal by NY

[94] It is convenient to firstly deal with the following related specific errors before considering the other grounds raised by NY:

(a) The learned sentencing judge failed to consider all other sentencing options reasonably available before imposing the sentence of detention;[45] and

(b) The learned sentencing judge failed to have adequate regard to the Charter of Youth Justice Principles.

[95] Section 150 of the Youth Justice Act states:

"**150 Sentencing principles**

(1) In sentencing a child for an offence, a court must have regard to—

(a) subject to this Act, 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

(g) if the child is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the child's community that are relevant to sentencing the child, including, for example—

(i) the child's connection with the child's community, family or kin; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

(h) any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the *Penalties and Sentences Act 1992*, section 179K; and

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45 Leave was granted to amend the grounds to include this ground at the hearing before the Court of Appeal.

(i) a sentence imposed on the child that has not been completed; and

(j) a sentence that the child is liable to have imposed because of the revocation of any order under this Act for the breach of conditions by the child; and

(k) the fitting proportion between the sentence and the offence.

(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

(d) a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and

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

(3) In determining the appropriate sentence for a child convicted of the manslaughter of a child under 12 years, a court must treat the victim's defencelessness and vulnerability, having regard to the victim's age, as an aggravating factor.

(4) If required by the court for subsection (1)(g), the representative must advise the court whether—

(a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or

(b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the child or victim.

(4A) In sentencing a child for an offence, a court may receive any information, or a sentencing submission made by a party to the proceedings, it considers appropriate to

enable it to impose the proper sentence or make a proper order in connection with the sentence.

(6) In this section—

sentencing submission, made by a party, means a submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose."

[96] Section 208 of the Youth Justice Act provides:

"Detention must be only appropriate sentence

(1) A court may make a detention order against a child only if the court, after—

(a) considering all other available sentences; and

(b) taking into account the desirability of not holding a child in detention;

is satisfied that no other sentence is appropriate in the circumstances of the case."

[97] Further, s 209 provides:

"**Court's reasons for detention order to be stated and recorded**

(1) A court that makes a detention order against a child must—

(a) state its reasons in court; and

(b) cause the reasons to be reduced to writing and kept by the proper officer of the court with the documents relating to the proceeding.

(2) Subject to subsection (3), a court's failure to comply with subsection (1) does not affect the sentence order.

(3) A court considering the sentence order on appeal or review must take into account a failure to comply with subsection (1)(a) and give the failure the weight it considers appropriate."

[98] In the sentencing remarks the sentencing judge carefully considered the particular circumstances of the offending and concluded that "it is a very serious example of the offence of rape".[46] His Honour had the benefit of, and carefully considered and made reference in the sentencing remarks to, the pre-sentence reports which included extensive details about the personal circumstances of the applicant.

[99] His Honour did not specifically refer to ss 208 or 209 of the Youth Justice Act in the sentencing remarks or expressly undertake a consideration of the sentencing options. Other than to record that counsel for NY considered that a conditional release order was an appropriate sentence in respect of NY (and also, counsel's submissions in relation to DBT), there is no reference in the sentencing remarks to a conditional release order under s 220 of the Youth Justice Act.

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46 AB page 104.

[100] Whilst the sentencing judge is obliged to give a real consideration to all sentencing options before imposing a sentence of detention, and to give reasons for the sentence imposed, a failure to set out in those reasons why a conditional release order would not be adequate to serve all of the purposes of punishment will not vitiate the sentence imposed if, having regard to the seriousness of the offence and its circumstances, the imposition of a conditional release order could not serve the requisite purposes of sentencing under the Act.

[101] *R v SCU* is not authority to the contrary. Sofronoff P in *R v SCU* [2017] QCA 198 stated:

> "[81] It is incumbent upon a judge, who is considering imposing a sentence of detention, to give consideration, based on the materials before the court, as to whether a conditional release order would be adequate to serve all of the purposes of punishment. This would have to involve a consideration of the facts and opinions contained in relevant reports of the nature and content of the "structured program" in which the child would be released and the nature and possible effectiveness of the conditions that could be imposed to prevent reoffending.
>
> [82] The consideration of the adequacy of conditions to prevent reoffending is a familiar task that judges commonly have to undertake. It is performed when considering whether to grant bail and also when a court is considering whether to make an order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003. Not infrequently, bail applications resolve into debate about whether particular conditions would or would not be likely to ensure that a person will not reoffend.
>
> [83] If a conditional release order could be made that would serve the purposes of preventing reoffending and the development of the child into a law abiding adult, then detention could only be justified if the requirement to deter others from committing similar crimes or the retributive element of sentencing, or both of these together, outweigh the otherwise overwhelming weight which the Act says that a court *must* give to the aspects of personal deterrence and rehabilitation.
>
> [84] It will be recalled that s 150(2)(e), s 208 and Youth Justice Principle 17 had been contained in the Act in its original form. These provisions, in the form into which they had evolved in the renamed *Youth Justice Act*, were repealed by the *Youth Justice and Other Legislation Amendment Act* 2014. They were reinserted by the *Youth Justice and Other Legislation Amendment Act (No. 1)* 2016. The injunction in the Act that detention is to be regarded as a sentence of last resort, to be imposed only when the court is positively satisfied that there is no other possible alternative, is, therefore, not merely a platitude or a bromide. It is an emphatic parliamentary order enacted with express deliberation." (Footnotes omitted)

[102] The observations of the President, in relation to the need to give specific consideration to whether a conditional release order would be adequate to serve all

of the purposes of punishment, specifically concerned circumstances where a conditional release order could be made "that would serve the purposes of preventing reoffending and the development of the child into a law-abiding adult."[47]

[103] His Honour's general reference to the provisions of the *Youth Justice Act* 1992 contained a summary of the requirements for sentencing under s 150. From the reasoning set out in his Honour's sentencing remarks it is apparent that his Honour worked through the various sentencing options available before deciding upon a detention order. This can be seen through his consideration of the comparable sentences that are relevant to the context of sentencing of juveniles, the offence of rape carrying 10 years imprisonment as the maximum and the considerations of community protection. His Honour also considered the particular aggravating circumstances of the offences and the criminality to be reflected in the head sentence.

[104] In the present case, considerations of both personal and general deterrence from committing similar crimes, together with the retributive element of sentencing, outweighed the personal facts and circumstances of the appellant and the opinions contained in the relevant reports, such that a sentence of detention was the only appropriate sentence. These factors overwhelmed the weight that must be given to aspects of personal circumstances and rehabilitation such that a conditional release order could not be made, in a proper exercise of the sentencing principles.

[105] Whilst it would have been preferable for the sentencing judge to have specifically expressed the conclusion that a conditional release order was not an appropriate option, a consideration of the sentencing judge's reasons amply supports a conclusion that the sentencing judge did properly reflect, in those reasons, his conclusions for determining that the only appropriate sentence for such abhorrent, persistent sexual and related offending was detention.

[106] As the sentencing judge rightly observed, whilst the youth justice principles and sentencing principles give primacy to a sentencing option that promotes rehabilitation, and a detention order should be imposed only as a last resort and for the shortest period possible, the protection of the community remains a relevant principle. Having regard to the criminality involved, the rape of the second complainant alone involved such a serious example of sexual offending as to warrant a significant period of detention.

[107] That offence was premeditated; was committed after the complainant was misled as to the true position and notwithstanding her obvious terror and lack of consent; and was committed against a helpless and vulnerable complainant in the context of offending by multiple young men adopting a pack mentality. Her humiliation would have been obvious.

[108] This occasion of offending also included the complainant being threatened with a knife to compel her silence and threats to share a video of her engaging in a sex act if she were to complain to police. That conduct exhibited a complete and callous lack of concern for her welfare.

[109] At the hearing of this application, counsel for NY was unable to take the court to any authority in support of a conditional release order as being appropriate in the circumstances of this offending.

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47 [2017] QCA 198 at [83].

[110] There is a good reason there is no comparable authority. As Keane JA, in his reasons in *R v PZ; Ex parte Attorney-General (Qld)* [2005] QCA 459, with whom McMurdo P and Chesterman J agreed, said:

> "[26] The Act provides that a detention order should only be made against a child as a last resort (*Juvenile Justice Act* 1992 (Qld), s 208). It does not follow that a period of detention is never an appropriate sentence for a juvenile, particularly when a serious offence such as rape is involved. The maximum penalty for an adult found guilty of rape is life imprisonment (*Criminal Code* 1899 (Qld), s 349(1)). The Act provides that a juvenile found guilty of an offence for which the punishment is life imprisonment may be detained for up to 10 years (*Juvenile Justice Act* 1992 (Qld), s 176(3)(a). A sentence up to and including life imprisonment may still be imposed if the offence involved violence and may probably be regarded as being particular heinous: *Juvenile Justice Act* 1992 (Qld), s 176(3)(b)).
>
> [27] In *R v C* ([1996] QCA 014; CA No 436 of 1995, 13 February 1996) Fitzgerald P and Mackenzie J said:
>
> > 'It was pointed out that the policy of the Juvenile Justice Act is that, if some other course is open, a juvenile should not be detained in custody, and then only for the shortest possible period. Even so, rape is ordinarily a crime of violence which commonly has serious consequences for the victim, in this case a teenage girl, and the sentencing judge was correct in concluding that a period of actual detention was called for.'
>
> [28] In *R v E; Ex parte Attorney-General (Qld)* ([2002] QCA 417 at [19]; (2002) 134A Crim R 486 at 490), Williams JA, with whom Helman J agreed, said:
>
> > 'There are a number of cases where juveniles have received sentences in the range of three to five years detention for a single episode of rape without any gratuitous violence being involved. It is sufficient to refer to the recent case of *R v A* [2001] QCA 542. There, a 16 year old was initially sentenced for the offence of raping his grandmother to 12 months' detention with an immediate release order requiring participation in a rehabilitative program. No conviction was recorded. This court on appeal recorded a conviction and ordered the offender to serve four years detention to be released after serving 50% of that term.'
>
> [29] More recent decisions of this Court in *R v MAC* ([2004] QCA 317; CA No 118 of 2004, 3 September 2004), *R v S* ([2003] QCA 107; CA No 445 of 2002, 13 March 2003) and *R v JAJ* ([2003] QCA 554; CA No 321 of 2003, 12 December 2003) confirm that a range of three to five years detention is appropriate in the case of juvenile offenders who commit rape and plead guilty to the offence.

> [30] … What is clear is that, even after making all allowances that might be made for a plea of guilty, the absence of any prior offending and a dysfunctional upbringing, a 16 year old who is convicted of rape should, unless the circumstances are truly exceptional, be sentenced to a substantial period of time in detention.
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> …
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> [32] There is nothing about this case, whether in terms of prospects for rehabilitation or the respondent's personal circumstances that, when compared to the circumstances of other cases to have come before this Court, could be said to be so remarkable or extraordinary as to warrant a sentence that did not involve a substantial period of actual detention. Accordingly, it falls to this Court to resentence the respondent."

[111] In resentencing the respondent in that case, Keane JA recognised:

> "[34] … a deterrent sentence involving a substantial period of actual detention was required. There is no decision of this Court which could be said to support the decision of the learned sentencing judge to allow the respondent to be released forthwith under the supervision of the Chief Executive."

[112] These grounds fail.

Other grounds of appeal by NY

[113] The other grounds of appeal raised by NY are:

(a) The sentence was manifestly excessive in all the circumstances.

(b) Convictions ought not to have been recorded (including that the learned sentencing judge failed to properly consider that the prima facie position under the Youth Justice Act is that a conviction is not to be recorded and failed to properly consider the factors in s 184(1)(b) and (c) in the Act in deciding to record convictions).

(c) The learned sentencing judge failed to give adequate weight to the resultant cancellation of the applicant's refugee visa pursuant to s 501(3A) of the Migration Act.

[114] I will deal with these grounds in turn.

Sentence manifestly excessive

[115] The general approach for appeals against sentences on the ground that the sentence is manifestly excessive was described in *House v The King* (1936) 55 CLR 499 at 504 – 505 per Dixon, Evatt and McTiernan JJ as follows:

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there

> has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

[116] In *AB v The Queen* (1999) 198 CLR 111, Hayne J elaborated as to the difference between an error in sentencing and a sentence that is manifestly excessive. At 160 [130], commenting on the quote above in *House v The King*, Hayne J stated:

> "…in the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed."

[117] In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ stated:

> "Reference is made in *House* to two kinds of error. First, there are cases of specific error. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons. It follows that for a court to state what *should* be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which will justify a sentence within the specified range. It is those assumptions that may reflect or embody relevant principle, not the result."

[118] The submissions focus on the head sentence in respect of the rape offence against the second complainant. At the sentencing, it was accepted that the approach in *R v Nagy*[48] was appropriate to be applied here with the entire criminality reflected in the head sentence for the most serious offence: namely, the rape offending.

[119] A number of cases were referred to by the applicants and the respondent in their submissions. None of the cases are directly comparable. However, as submitted by the respondent, a review of the cases does show that "sexual offences can be committed by juveniles in a wide variety of ways, ranging from experimentation to public predation".[49] The cases also show that the diversity of offending means that there are differences in sentencing which are dependent on their individual facts, which may be difficult to reconcile as entirely consistent.

[120] The exercise of analysing all of the cases identified in submissions does not assist much, other than to confirm the conclusion reached by Holmes J, as the Chief

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48 [2003] QCA 175.

49 Respondent's submissions at [8.25].

Justice then was, in *R v DAU; Ex parte Attorney-General (Qld)* [2009] QCA 244, at [22]:

> "As to larger questions of sentencing approach, those cases do not mandate a sentencing range between three and five years detention for an offence of rape committed by a juvenile. Indeed, *R v KU & Ors; ex parte A-G (Qld)* describes a range from 'lengthy probation orders to significant periods of detention…'."

[121] The offending currently being considered had many aggravating features. Many of the cases, while dealing with sexual offences or rape by juveniles with a plea of guilty, do not assist with the unique factors present here: namely, the applicants engaging in group sex with a child followed by the group rape of another child.

[122] The group nature of the offending, with the second complainant being subjected to four acts of rape in quick succession is also not fully reflected in some of the comparator cases. Only a few of the cases provide some actual assistance and these are considered below.

[123] In *R v PZ; Ex Parte Attorney-General (Qld)* [2005] QCA 459[50] the 15 year old respondent pleaded guilty to a number of offences, including two counts of rape, in relation to incidents that occurred at a party. The respondent was resentenced by the Court of Appeal to a period of three years detention to serve 50 per cent.

[124] The respondent and the complainant were consensually kissing when the respondent asked the complainant for oral sex. When she refused, he pushed her head against a wall. He subsequently approached her and put a large knife to her throat, preventing her from leaving the party. He placed his hands on the complainant's shoulders and pushed her to the floor. Subsequently, the complainant was struck in the head by a weights dumbbell causing her pain and a contusion. He forced her to smoke cannabis by, among other violent acts, taking her to a room where there were a number of other males and threatening that she would have to perform oral sex on all of them if she did not smoke the cannabis. She complied and, while under the influence of the drug, the respondent lay on top of the complainant, twice digitally penetrated her vagina and then pushed a beer bottle into her vagina. This was done in the presence of others who also sexually touched the complainant.

[125] There are some similarities between *PZ* and the present case. In particular, *PZ* includes sexual offending where other males were present and also sexually touching the complainant. However, *PZ* is not an example of the predatory offending in the present case. The gang rape of the second complainant in the present case was planned in advance; it was part of continuing and escalating conduct; it was concocted with the primary aim of sexual gratification in mind. In short, the conduct here is more serious on a number of fronts.

[126] In *R v KU & Ors; Ex parte Attorney-General (Qld)* [2008] QCA 154[51] nine offenders were charged with rape in relation to a ten year old girl. Of the six juvenile offenders, three of the offenders aged 14 or 15 were given probation orders

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50 Referred to in the respondent's submissions at [8.6], the submissions on behalf of DBT at [10(e)], the submissions on behalf of ACA at [30] to [33] and the submissions on behalf of HMM at [14].

51 Referred to in the respondent's submissions at [8.17], the submissions on behalf of DBT at [9], the submissions on behalf of ACA at [34] to [37] and the submissions on behalf of HMM at [14], [32] and [35].

for a period of three years with convictions recorded; the remaining two offenders, aged 13 and 14, were sentenced to three years' detention respectively, to be released after serving 50 per cent, with conviction recorded. In re-exercising the sentencing discretion, the Court of Appeal distinguished the two sets of sentences because the first group of juveniles had made significant progress in rehabilitation while the latter group presented significant risk of recidivism.

[127] In resentencing the juvenile offenders in the related appeals, the Court recorded a conviction in each but imposed sentences ranging from three years' probation with specific conditions through to detention for three years to be released after serving 50 per cent of that term. These sentences were arrived at taking into account the particular circumstances and mitigating factors in this case including that the offending did not involve violence, threaten violence or breach of trust. The Court noted that in respect to all the juvenile offenders, apart from one, there was no hint of coercion or pressure placed on the victim by the offenders; she was not actually overborn.

[128] The offending in *KU* occurred in an economically disadvantaged indigenous community. Each of the offenders had entered early pleas of guilty. They were said to have suffered "serious personal disadvantage".[52] The nature of the offending included an incident where six of the offenders had sexual intercourse with the complainant in turn while the others waited in other rooms of the house. Three of the juveniles were involved in this offending. The other juveniles were involved in sexual intercourse with the complainant at other times in May to June 2006. The agreed statement of facts suggested that, notwithstanding she was ten years old, the complainant agreed with and sometimes instigated the sexual activity.

[129] The circumstances in *KU* can be compared to the current case in that both involve multiple offenders against the same complainant. In particular, there was one incident in *KU* where multiple offenders were present at the same house waiting their 'turn' with the complainant. However, the present offending includes elements of coercion that do not appear in the facts of *KU*. This includes tricking the complainant into attending the abandoned house, extortion of the complainant through recording the offending (involving some but not all of the applicants) and threats of violence.

[130] In submissions, attempts were made to distinguish the current offending from cases where there was a greater level of actual violence. In this regard reference was made to *R v A; Ex parte Attorney-General (Qld)* [2001] QCA 542.[53] In that case the 16 year old applicant was resentenced by the Court of Appeal to four years detention, to serve 50 per cent with a conviction recorded, for the rape of his grandmother. The offence was violent, with the applicant hitting the complainant and restraining her hands and wrists. He had been drinking.

[131] *A* is of little assistance apart from illustrating that four years' detention and recording a conviction was the appropriate sentence on the particular circumstances of the case. There is little similarity with the offending in the present case. *A* might be described as including 'gratuitous' violence and might therefore be described as more serious than the present offending. However, as the sentencing judge noted, in the current case there was "no need for gratuitous violence because the complainant was overwhelmed by the threat and menace of [the applicants'] combined

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52 [2008] QCA 154 at [149].

53 Referred to in the respondent's submissions at [8.19], the submissions of DBT at [10(b)] and the submissions of ACA at [23].

presence."[54] The presence or otherwise of overt violence is not necessarily a reliable indicator of the seriousness of the offending, or in fact the brutal and violent nature of the offending as was present in the current case.

[132] *R v LAO* [2019] QCA 222[55] is the most recent authority provided by any of the parties and involved an offence against a single complainant. The applicant, who was 17, pleaded guilty to a single count of rape. He was sentenced to four and a half years of detention, with a conviction recorded. The rape occurred while the applicant broke into the complainant's house to steal, included violence and was 'stranger rape'. This was considered an aggravating factor. The learned sentencing judge noted that the offending could not be considered opportunistic because the applicant had been in the house for 20 minutes before the rape occurred, indicating some degree of planning.[56] The applicant had a criminal history and community protection was seen as vital. The Court of Appeal found that the sentence was not manifestly excessive.

[133] *LAO* did not include the same predatory conduct as in the present case. While there was violence used in *LAO*, in the present case (as previously identified) no actual violence was required given all of the aggravating circumstances. Further, *LAO* does not include the escalating and repetitive nature of the current offending, which only appears to have stopped because the complainants came forward.

[134] In *R v MBU* [2012] QCA 349[57] the applicant was sentenced to eight years detention, to serve 70 per cent with a conviction recorded, for one count each of rape, deprivation of liberty, stealing, grievous bodily harm, assault occasioning bodily harm, and assault with intent to rape. There were three incidents that made up the offending. The first, which constituted the rape offence, was an attack in public in the early hours of the morning that included violent physical assault and death threats. The second was against a 75 year old complainant and included a violent assault, which constituted grievous bodily harm, but was non-sexual in nature. The third was against a 19 year old female who was attacked while walking home at about 1.45 am. She was beaten and strangled but screamed to attract attention, causing the applicant to flee. The Court of Appeal, which did not disturb the sentence, noted that the applicant's conduct "comprised a series of brutal attacks on women who were seemingly chosen at random and solely for the purpose of satisfying the applicant's own desires."[58]

[135] Violence was a feature of the attacks in *MBU*. However, there are some similarities between *MBU* and the current case, especially with regard to the predatory nature of the conduct. Similarly, the applicants in the present case also set out primarily to satisfy their own sexual desires and did so on multiple occasions. A difference between *MBU* and the present case is that some of the applicants here knew the complainants and specifically targeted them.

[136] The nature and circumstances of the current offending was brutal and premeditated. It was coercive, threatening, violent and intimidating in nature. While submissions

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54 AB page 104.

55 Referred to in the respondent's submissions at [8.22] and the submissions on behalf of HMM at [17] to [18].

56 *R v LAO* [2019] QCA 222 per Davis J at page 5.

57 Referred to in the respondent's submissions at [8.24]. Not referred to by any of the applicants.

58 Per Daubney J at [31].

were made that there were no acts of "gratuitous violence", the very acts of the offending were aggressive and menacing. There was no need for additional violent acts as the second complainant was helpless and vulnerable, particularly when confronted with the "force" of the presence of the four applicants. The group nature of the offending is a crucial element of the offending: this is recognised in the various pre-sentence reports.

[137] It is the group element which heightens the confidence and dominance of the offenders and it is this element which renders the second complainant compliant without the need for additional brute force. This is a very serious example of the offence of rape. Each of the applicants was involved as a principal offender in what colloquially would be described as a "gang rape". The second complainant found herself isolated and alone at an abandoned house as a result of a premeditated plan to lure her there through misleading statements. The true intentions of the applicants became quickly apparent but by then it was too late for the second complainant to be able to safely escape.

[138] Submissions were also made that there was not a great age disparity between the applicants and the second complainant. The second complainant was, in fact, older than the youngest applicant, DBT. But this misses the point that the second complainant was a child herself. She was terrified, helpless and vulnerable. She did not consent to the acts in respect of the rape offending. The acts of rape were physically painful and brutal. The acts occurred in an abandoned house. The acts occurred in a way that ensured the humiliation of the second complainant. There was a complete lack of concern for the welfare of the second complainant. The sentencing judge described this aptly: "You used and abused her".[59]

[139] Further, there is no suggestion any of the applicants desisted from their predatory behaviour. This is aggravated by the fact that this was not an isolated "aberration": a pattern of predatory behaviour culminated in this offending.

[140] It is relevant to consider the rape offending in relation to what has earlier been described as the second incident relating to the first complainant. Shortly before the rape offending the second incident occurred, also pursuant to a "common plan". Each of the applicants was involved in acts of unlawful carnal knowledge of the first complainant who was 15 and a half years old at the time. The first complainant was lured to an abandoned house, also by misleading statements, and then each of the applicants subjected the first complainant to sexual acts or sexual intercourse in succession.

[141] There was also an earlier incident (first incident) which only involved NY, ACA and DBT engaging in group sexual acts and sexual intercourse also with the first complainant. NY videoed some of these acts and subsequently threatened to distribute it in an attempt to extort further sexual activity with the first complainant. This also involved sending some of the material to the first complainant.

[142] All of these factors support a conclusion that the total criminality of the rape offending is at the higher, serious end. From the cases, the more serious offending with at least some of aggravating circumstances has seen sentences of upwards of four years, including one of eight years. The maximum penalty is 10 years.

[143] In *Lowe v The Queen* (1984) 154 CLR 606, Gibbs CJ stated:

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[59] AB page 104.

> "The true position, in my opinion, may be briefly stated as follows. It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account."

[144] The following specific factors were relevant to the sentence of NY included:

(a) NY filmed the acts perpetrated against the first complainant and he threatened to release the footage to her mother unless she agreed to meet with them again.

(b) NY filmed the acts perpetrated against the second complainant and threatened to release the footage unless she agreed to meet again.

(c) Following consensual sexual activity with the second complainant, the second complainant told NY that she was scared and wanted to leave. NY replied "You're not leaving until all of us have nutted". Then DBT, ACA and HMM joined them and this was repeated. The second complainant said they couldn't force her to do anything she didn't want to do. NY laughed and said he would "force it however I want". All four of the applicants then surrounded the second defendant and she felt very scared.

(d) During the rape of the second complainant NY said he was going to do "anal" with her. The second complainant said no but NY persisted. The complainant was crying and telling NY that it hurt. NY then vaginally raped the second complainant while she continued to cry. When he was done, NY yelled "who's next?" before leaving the room.

[145] The sentence of five years in respect of the rape offence, to serve 50 per cent, was clearly within the range of the sentencing judge's discretion taking into account the particular characteristics of the offending and the aggravating features. The ground that the sentence was manifestly excessive fails.

Recording a conviction

[146] NY also raises a ground that a conviction should not have been recorded, particularly having regard to the factors in s 184(1(b) and (c) of the Youth Justice Act.

[147] His Honour's reference to the "irreducible minimum" in *R v KU & Ors; Ex parte Attorney-General (Qld)*, in context, was not an expression that the court was bound by a precedent to record a conviction. It was a conclusion reached following the evaluation of the appropriate sentence in this case as requiring a detention order and that in the circumstances, a recording of a conviction was appropriate to reflect the entire criminality. It was part of the comparative analysis undertaken to determine the sentence as part of the "instinctive synthesis and balance of competing considerations".

[148] The recent decision of the Court of Appeal in *R v Patrick (a pseudonym); R v Patrick (a pseudonym); Ex parte Attorney-General (Qld)* [2020] QCA 51 considered the relevant principles in relation to the recording of a conviction. In

that case, the applicant challenged a conviction being recorded. The Attorney-General also brought an appeal which was successful and the Court of Appeal considered the applicant's submissions about whether a conviction should have been recorded in the context of considering the appropriate sentence that should be imposed by the Court of Appeal in light of the successful appeal by the Attorney-General.

[149] Sofronoff P at [41] stated:

> "The difficult issue that has been presented by this case lies in the need to resolve the conflict between the objective circumstances of the offending, which are so grave, and Patrick's youth and personal circumstances, which, while incapable of negating the gravity of the offending, raise mitigating considerations."

[150] In undertaking the exercise to resolve that conflict, Sofronoff P further recognised:

> "[52] Section 184(1) provides that, among any other relevant circumstances, when considering whether to record a conviction, a Court shall have regard to the nature of the offence, the child's age and previous convictions as well as the 'impact' that the recording of a conviction will have on the child's chances of rehabilitation or finding or retaining employment.
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> [53] The nature of the offence, including the objective circumstances that have been described, place this particular offending in the category of very serious offences for which a child might be held responsible. In that context, the absence of previous convictions means little.
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> [54] Part of Patrick's rehabilitation must involve, as Principle 8(a) requires, him accepting responsibility for what he has done and what harm he has caused. Acceptance of responsibility is much more than an offender's verbal acknowledgement of personal fault. It must involve an actual appreciation and acknowledgement of the community's revulsion at the crime and its consequences. That revulsion is partly manifested by the public record that is a conviction. It is true, as counsel for Patrick urged, that the recording of a conviction may affect Patrick's future employment prospects but in a case like the present, that does not outweigh the justification for recording, as a conviction, the community's denunciation of the offending act, notwithstanding that it was committed by a child in the circumstances in which Patrick found himself."

[151] Given the serious nature of the current offending, recording a conviction was a proper exercise of the sentencing judge's discretion and this ground fails.

Inadequate weight to cancellation of refugee visa

[152] NY raises an additional ground that the learned sentencing judge failed to give adequate weight to the resultant cancellation of the child's refugee visa pursuant to s 501(3A) of the Migration Act.

[153] In *R v UE* [2016] QCA 58, Philippides JA, adopting the decision of the Victorian Court of Appeal in *Guden v The Queen* (2010) 28 VR 288, observed at [16]:

> "It is undoubtedly correct that, in an appropriate case, the prospect of deportation may be a relevant factor, personal to the offender, to be considered in mitigation of sentence. The prospect of deportation may affect the impact of a sentence of imprisonment, because it makes the period of incarceration more burdensome, and also because upon release, the fact of imprisonment will resolve in the defendant being deprived of the opportunity of permanent residence in Australia. While the prospect of deportation may be a relevant mitigatory factor, the sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender. Proof that deportation will in fact be a hardship for a particular offender will be required."

[154] As NY is not an Australian citizen, he is at risk of deportation to Iran upon the completion of his sentence. Under s 501(3A)(b) of the Migration Act, NY's protection visa was at risk of being cancelled as a result of him having been found guilty of a sexual offence involving a child where he is serving a full time custodial sentence. NY therefore faces deportation at the conclusion of any term of detention unless he is able to get a revocation of the Minister's decision cancelling the visa. It was submitted that NY could be held in immigration detention for an unknown period pending the outcome of any application.

[155] At the hearing of the application, NY sought leave to adduce further evidence in the form of documents exhibited to an affidavit of Nathan Bouchier sworn on 30 March 2020, in the event that leave to appeal is granted and the applicant is to be re-sentenced.

[156] The affidavit exhibits the following documents:

(a) Submission to the Australian Parliamentary Joint Standing Committee on Migration, Inquiry into Review processes associated with Visa Cancellations made on Criminal Grounds, Supplementary Submission 29.1;

(b) Australian Border Force, Immigration Detention and Community Statistics Summary, 31 December 2019;

(c) Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates 26 & 27 February 2018 – Question No. AE18/084; and

(d) Country Information Report for Iran, Department of Foreign Affairs and Trade.

[157] This further information is general in nature and does not add much to the submissions that were originally made at the sentencing hearing. Given the general nature of the new material, little weight could be given to it. In particular, it does not address in any level of specificity the prospects or impact on NY in particular.

[158] The sentencing judge expressly took into account NY's refugee status, the prospect of him being held in immigration detention and the prospect of NY being deported following his release from detention.[60] Further, he took into account the potential

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60 AB page 97.

hardship this would cause NY and the effect on his family.[61] In balancing the various factors, the sentencing judge also noted that these potential consequences are subject to the exercise of executive power and the court is not to attempt to pre-empt or avoid the effects or consequences if that executive power is in fact exercised.[62]

[159] No error has been made out in respect of the approach of the sentencing judge and the ground fails. In these circumstances, leave to adduce further evidence is not granted in respect of the affidavit of Nathan Bouchier sworn on 30 March 2020.

Application for leave to appeal by ACA

[160] ACA's application for leave to appeal against his sentence raises three grounds:

(a) In exercising discretion to record a conviction, proper consideration was not given to the individual features of [ACA]'s case with regard to s 12 of the *Penalties and Sentences Act* 1992 (Qld).

(b) In sentencing [ACA], proper consideration was not given to the varying levels of criminality existing between the co-accused.

(c) The sentence imposed was manifestly excessive.

[161] The discussion in respect of NY above regarding the issues relevant to the grounds of appeal of recording a conviction and the sentence being manifestly excessive apply equally here.

[162] In relation to the rape offending there is no distinction between the applicants in terms of criminality. It was brutal, premeditated, peer associated predatory conduct. The acts occurred despite her saying "no" on several occasions and crying while obviously terrified at the horrific acts that she was being subjected to.

[163] The following specific factors were relevant to the sentence of ACA:

(a) Shortly after the first incident, the applicants followed the first complainant walking home from school and ACA put his arm around her and guided her back to the abandoned house.

(b) Following the third incident with the second complainant, ACA threatened the second complainant with a switch blade.

(c) ACA's involvement in the separate robbery incident did not add significantly to his overall criminality.

(d) The pre-sentence report noted that ACA engaged in denial, minimisation and victim blaming.

[164] The sentencing judge carefully considered the conduct of ACA and the criminality involved. The sentence of a period of five years detention to serve 50 per cent with a conviction recorded was within the range of the sentencing judge's discretion. These grounds fail.

[165] In respect of the additional ground of failure to give proper consideration to the varying levels of criminality between the co-accused, this also must fail. The

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61 Ibid.

62 Ibid.

sentencing judge had the benefit of a very detailed statement of facts which set out in considerable detail the involvement of ACA and the other applicants. The sentencing judge also had a pre-sentence report specifically addressing the factors relevant to ACA. No error has been made out in respect of the sentence in relation to the varying levels of criminality between the co-accused.

Application for leave to appeal by DBT

[166] DBT's application for leave to appeal against sentence relies on the following grounds:

(a) That the sentences were manifestly excessive in all of the circumstances.

(b) Convictions ought not to have been recorded.

[167] The discussion in respect of NY above regarding the issues relevant to the grounds of appeal of recording a conviction and the sentence being manifestly excessive apply equally here.

[168] The following specific factors were relevant to the sentence of DBT:

(a) DBT was the youngest offender.

(b) DBT initiated the meeting with the first complainant prior to the first incident and had her meet him under a false pretext that only he would be present.

(c) DBT also initiated the meeting with the second complainant prior to the third incident and had her meet him under a false pretext that she was meeting only with DBT for consensual sex; he did not disclose that the other three offenders would be present.

(d) In respect of the first incident, DBT yelled "round two" and DBT, NY and ACA engaged in further sexual acts against the first complainant after the initial offending.

(e) During the third incident involving the second complainant, when the second complainant was crying and asking how she could get out of the situation, DBT proposed that she perform oral sex on each of them and she agreed thinking this was her only way out of the situation. The applicants then proceeded to take turns raping the second complainant.

(f) The pre-sentence report observed that DBT engaged in rape supportive attitudes and victim blaming.

[169] The sentencing judge carefully considered the conduct of DBT and the criminality involved. No error has been made out in respect of the sentence. The sentence of a period of five years detention to serve 50 per cent with a conviction recorded was within the range of the sentencing judge's discretion. These grounds fail.

Application for leave to appeal by HMM

[170] HMM's application for leave to appeal against sentence raises the following grounds:

(a) That in all of the circumstances the sentence imposed is manifestly excessive;

(b) The learned primary judge erred by failing to apply the "parity principle"; and

(c) The learned primary judge erred in recording a conviction against the applicant.[63]

[171] The discussion in respect of NY above regarding the issues relevant to the grounds of appeal of recording a conviction and the sentence being manifestly excessive applies equally here.

[172] In respect of the additional ground of failing to apply the "parity principle", the sentencing judge had the benefit of a very detailed statement of facts which set out in considerable detail the involvement of HMM and the other applicants. The sentencing judge also had a pre-sentence report specifically addressing the factors relevant to HMM.

[173] The following specific factors were relevant to the sentence of HMM:

(a) HMM was not present during the first incident involving the first complainant.

(b) HMM was involved in the second incident involving the first complainant and caused abrasions on the first complainant's face, elbows and knees.

(c) In respect of the third incident involving the second complainant:

(i) HMM was not wearing a condom when he raped the second complainant.

(ii) HMM caused the second complainant pain as a result of fast thrusting at the encouragement of NY who was standing at the door.

(iii) When the second complainant could not support her weight on her arms anymore and slouched forward, HMM had pushed down on her lower back and told her to arch her back.

(iv) The second complainant said "no" several times and told HMM that it hurt. She also said that she did not want to do it. NY at the door said "You're a bitch if you stop" several times. Throughout this HMM continued to rape the second complainant.

(d) The pre-sentence report observed that HMM's account of the offences suggested refutation and victim blaming.

[174] The sentencing judge imposed a four and a half year sentence, rather than five years, to take account of the fact that HMM was not involved in the first incident. This was within the sentencing judge's discretion and takes into account the specific circumstances of HMM's offending, including those identified above.

[175] No error has been made out in respect of the sentence. This ground fails.

Conclusion

[176] It is ordered:

In CA No 251 of 2019: R v DBT (first applicant)

The application for leave to appeal is refused.

In CA No 262 of 2019: R v HMM (second applicant)

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63 Leave to amend the application to include this to further grounds was granted at the hearing.

The application for leave to appeal is refused.

In CA No 266 of 2019: R v ACA (third applicant)

The application for leave to appeal is refused.

In CA No 271 of 2019: R v NY (fourth applicant)

1. The application for leave to adduce further evidence is refused.
2. The application for leave to appeal is refused.