

SUPREME COURT OF QUEENSLAND

CITATION: *R v BFJ* [2026] QCA 199

PARTIES: **R**
v
BFJ
(appellant/applicant)

FILE NO/S: CA No 238 of 2025
CA No 281 of 2025
DC No 66 of 2024

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: Childrens Court at Cairns – Date of Conviction: 9 September 2025; Date of Sentence: 13 October 2025 (Fantin DCJ)

DELIVERED ON: 13 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2026

JUDGES: Mullins P, Boddice JA, Henry J

ORDERS: **1. Appeal against conviction dismissed.**
2. Application for leave to appeal against sentence refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – POINTS AND OBJECTIONS NOT TAKEN BELOW – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – JUDGE’S SUMMING UP – DIRECTIONS AS TO PARTICULAR MATTERS – IDENTIFICATION EVIDENCE – PHOTOGRAPHS – where the appellant was convicted after trial of rape and sexual assault – where the grounds of appeal relate to the adequacy of directions on identification evidence – where the trial judge’s summing up included general and specific directions on identification evidence – where defence counsel expressed satisfaction with the summing up – whether the degree of exposition on certain identification evidence in the trial judge’s summing up resulted in a miscarriage of justice – whether the directions in respect of the photo board were sufficient

CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to three years detention for rape and a conviction was recorded – where the applicant seeks

leave to appeal his sentence on the ground that the recording of a conviction for rape was manifestly excessive – where the sentencing judge appropriately complied with the requirements under s 184 *Youth Justice Act 1992* (Qld) in deciding whether to record a conviction against the applicant – whether the recording of that conviction is manifestly excessive

Youth Justice Act 1992 (Qld), s 184

Alexander v The Queen (1981) 145 CLR 395; [1981] HCA 17, cited

Brawn v The King (2025) 99 ALJR 872; [2025] HCA 20, applied

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, explained

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, cited

MDP v The King (2025) 99 ALJR 969; [2025] HCA 24, cited

Pitkin v The Queen (1995) 69 ALJR 612; (1995)

130 ALR 35; [1995] HCA 30, explained

R v Gould (2014) 243 A Crim R 205; [\[2014\] QCA 164](#), explained

R v MBQ; ex parte A-G (Qld) [\[2012\] QCA 202](#), cited

COUNSEL: C J Grant KC, with J M Hine, for the appellant/applicant
M B Lehané for the respondent

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

[1] **MULLINS P:** I agree with Henry J.

[2] **BODDICE JA:** I agree with Henry J.

[3] **HENRY J:** The appellant was convicted of having raped and sexually assaulted a 16 year old girl at night in a park when he was 15. The identification of the offender was the issue at trial. He was sentenced to three years' detention with a conviction recorded.

[4] He appeals his conviction, alleging various inadequacies in the summing-up as it pertained to identification, despite making no complaint about them at trial. He also seeks leave to appeal his sentence on the ground it was manifestly excessive to record a conviction against him for the offence of rape.

[5] There is no substance to his grounds of appeal or his application for leave to appeal sentence.

PART A: CONVICTION APPEAL

[6] On the night in question many Aboriginal and Torres Strait Islander people had attended a party at a suburban home in Cairns. The complainant, who attended with her cousin SU and his friend MI, was introduced to the appellant for the first time at

the party. They shook hands. The party had a red and white theme. The appellant was wearing a distinctive red hat with a white NY emblem, which his brother JY had lent him.

- [7] As the party later shut down, many attendees, including the complainant, moved into nearby parkland, where two bridges were located. The complainant, SU, MI, the appellant and JY were at various times present in the vicinity of the bridges. At one stage the appellant's brother JY spoke with the appellant and complainant about the fact they were from the same island and were related. There came a time when the complainant was seated at the well-lit second bridge and indicated she wanted to go to the toilet. She testified the appellant offered to take her and that he walked her away from the bridge into a dark bush area near a creek.
- [8] Once there, and despite the complainant's resistance, he removed her lower clothing and inserted his penis into her vagina against her will. He also pulled her shirt up over her face and lifted her bra up and sucked on her right breast.
- [9] He then fled and the complainant returned to the bridge where she reported what had happened. Others returned with her to the scene to look for her phone. It was found near there, along with the distinctive red hat, which SU, MI and JY all recognised as the hat the appellant had been wearing. When JY asked the appellant where his hat was, the appellant responded he had 'lost it... down the creek'.
- [10] DNA later detected on the complainant's right internal bra cup was found to be greater than 100 billion times more likely to be that of the appellant than another member of the populace. It will be recalled the offender had sucked the complainant's right breast during the attack. The defence strained credulity at trial, arguing the appellant's DNA may have found its way inside the complainant's right bra cup in some unknown and innocent chain of transference after the complainant and appellant had shaken hands. The obvious and far more realistic explanation for its presence was that the offender had deposited his DNA on the complainant's right breast when he sucked on it, and the DNA transferred directly onto the right bra cup when the complainant lifted her bra back over her right breast immediately after the attack.
- [11] The complainant also later identified the defendant as the offender by identifying him in a photo board lineup, though in any event the effect of her evidence was that she had met the appellant earlier that night and knew him to be the person who escorted her from the bridge into the bush where she was raped. There was no suggestion in her evidence of any breach in continuity of the physical proximity near her of the person who escorted her from the well-lit bridge, into the dark bush area and raped her there.
- [12] The appellant did not give an interview to investigating police. Nor, in the face of this strong prosecution case, did he adduce any evidence at his trial (as was his right). He now appeals his conviction.

The complaints on appeal all relate to the adequacy of directions on aspects of the identification evidence

- [13] At trial, prior to summing-up the case, when inviting counsels' submissions about directions, the learned trial judge informed them of the substance of her Honour's proposed directions regarding identification. This included general directions about

the need for caution in respect of identification evidence, as well as a list of the evidence supporting the identification and a list of the weaknesses in the evidence of identification.

- [14] While defence counsel expressed satisfaction with her Honour's list of weaknesses, he went on to highlight other evidence, implicitly requesting that her Honour highlight it. In summary, that was evidence to the effect the appellant's brother had seen the appellant hug and kiss another girl in the park and that neither SU nor MI testified to seeing the complainant walk off with the appellant and did not see the appellant until much later. Her Honour agreed to include reference to that evidence when summing-up on identification and did so.
- [15] Defence counsel also reminded her Honour that of all the persons shown on the photo board, the appellant was the only individual with braids and the only person who had been at the party. Her Honour confirmed she would include reference to that in her summing-up and did so.
- [16] After the summing-up, defence counsel did not seek any redirections. There were several redirections sought by the jury during their deliberations, but none related to the issue of identification.
- [17] Notwithstanding that background of apparent defence satisfaction at trial with the identification directions, the conviction appeal complains in various ways about the learned trial judge's directions regarding the identification evidence.
- [18] The grounds of appeal, and the arguments in support of them, are these:

Ground 1(a): *The learned trial judge erred in law by failing to direct the jury that the photo board evidence should be approached with caution due to its composition.* In support of this ground, it was argued there was a lack of direction in respect of some specific alleged deficiencies in the composition photo board.

Ground 1(b): *The learned trial judge erred in law by failing to direct the jury as to the inherent dangers of photo board identification.* In support of this ground, it was argued the directions were inadequate regarding the general dangers of photo board identification.

Ground 2: *The learned trial judge failed to adequately sum up the identification evidence to the jury, such that it was unfair to the defendant and resulted in a miscarriage of justice.* In support of this ground, it was argued there had been inadequate exposition of the evidence of SU and MI as compared to the complainant about whether they were present when the complainant left the bridge with the appellant.

- [19] It is convenient to deal with the issue raised by ground 2 first.

Did the summing-up's degree of exposition of the evidence of SU and MI, as compared to the complainant about whether they were present when the complainant left the bridge with the appellant result in a miscarriage of justice (as alleged by ground 2)?

- [20] The specific argument advanced in support of ground 2 falls for consideration in the context of ground 2's allegation of a failure to adequately sum up the identification

evidence to the jury, such that it was unfair to the defendant and resulted in a miscarriage of justice.

- [21] The narrow focus of that ground as argued reflects the challenging reality for the appellant that the learned trial judge's directions in connection with identification were extensive. They occupy four pages of transcript, beginning with the following passage:

Now, because identification and the complainant's evidence of identification are particularly important in this case, I will mention some parts of the evidence which you may think are relevant to the issue of identification.

The issue of identification is one for you, the jury, to decide as a question of fact. The case against the defendant depends to a significant degree on the correctness of visual identification of the defendant by the complainant, which the defendant alleges to be mistaken. I must therefore warn you of the special need for caution before convicting in reliance of the correctness of that identification.

The reason for this is that it is quite possible for an honest witness to make a mistake in identification. Notorious miscarriages of justice have sometimes occurred in such situations. A mistaken witness may nevertheless be convincing. The powers of observation and of recollection of observation are fallible, and the risk of mistake is especially great with fleeting encounters.

So you must carefully examine the circumstances in which the identification by the witness was made. How long did the witness have the person said to be the defendant under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the defendant before? If so, how often? If only occasionally, had the witness any special reason for remembering the defendant? What time elapsed between the original observation and the subsequent identification to police? Was there any material discrepancy between the description given to the police by the witness when first seen and the evidence the witness has now given?

The evidence of each individual witness, while important in itself, should not be regarded by you in isolation from the other evidence adduced in the trial. Other evidence tending to implicate the defendant may be highly relevant and may justify a conviction, while the evidence of identification, if it stood alone, would be insufficient. Where evidence is given by someone who is a casual acquaintance to the defendant or someone who has met the defendant only briefly, you should treat the evidence of identification with care. You should be cautious about concluding the identification has been established in such a case, and you should be scrupulous to be satisfied first that the identifying witness is not only honest in her evidence but also accurate.

- [22] These were orthodox general directions. They were consistent with the need, identified by the High Court in *Domican v The Queen*,¹ to warn the jury of the dangers

¹ (1992) 173 CLR 555.

of convicting on identification evidence where its reliability is disputed. No complaint is made about those directions.

[23] After those general cautionary directions, her Honour continued:

I am going to give you some examples of evidence that might assist you in considering this issue now. The evidence capable of supporting the identification of the defendant includes the following evidence.

Her Honour then summarised the pieces of evidence collectively relied on in support of the identification of the appellant as the offender.

[24] Importantly, her Honour then continued:

However, I must remind you of the following specific weaknesses which appeared in the identification evidence or you might think are matters which undermine the reliability of the identification evidence, and I am going to give you some examples.

Her Honour then reminded the jury of various aspects of the evidence with the potential to weaken or undermine the reliability of the identification evidence.

[25] This was also in conformity with *Domican*. The High Court there explained that a warning in general terms is not sufficient and nor is mere reference to counsel's arguments. The trial judge should go on to 'isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence'.² The learned trial judge did just that.

[26] The argument in support of ground 2 is that in doing so, her Honour did not say enough in identifying an arguable inconsistency in the evidence of the complainant, SU and MI about the stage when the complainant left the bridge with the appellant.

[27] For this ground to succeed the inadequacy complained of falls into the category, identified in *Brawn v The King*,³ of a non-fundamental error or irregularity of such a nature that it could realistically have affected the jury's reasoning to a verdict of guilty. For the reasons which follow, there was no error or irregularity in how the learned trial judge directed on this issue.

[28] The direction which was given needs to be understood in its factual context.

[29] On the complainant's evidence, she had, after the party, walked in the park with others and walked with SU and MI to the second bridge. On her account, she spoke to MI while SU left to go for a walk and he returned with the appellant. It was after that, that she announced she needed to go to the toilet. The appellant offered to take her and they walked off into the bush where the offending occurred.

[30] MI did not give evidence of observing the appellant at the bridge. His recollection was that, upon SU returning, he had left to use the bathroom and on his return the complainant was gone. As for SU's recollection of events at the bridge, he recalled he had told MI to wait with the complainant while he went to buy cigarettes, which he did. His recollection was that, on his return, the complainant was standing with

² *Domican v The Queen* (1992) 173 CLR 555, 562.

³ (2025) 99 ALJR 872, 876.

MI but he could not remember if he saw the appellant there prior to the complainant leaving to use the toilet.

- [31] The arguable divergence in accounts therefore, was that the complainant testified to walking off away from the bridge with the appellant at a time when SU was nearby and MI may have been nearby, whereas neither MI nor SU testified to having seen the complainant walk away from the bridge, from which it follows they did not testify to seeing the appellant walk off with the complainant.
- [32] The appellant's counsel on appeal argued the evidence of MI and SU directly contradicted the evidence of the complainant. That overstates the position. There was an arguable inconsistency as between the accounts of MI and SU and of the complainant, but it is a stretch to contend that variations of the kind mentioned above constituted unequivocal contradictions. It is not as if the complainant could testify to what MI or SU would have noticed, particularly in an environment in which an array of people were apparently milling about. What the jury was to make of this arguable inconsistency was very much a matter for argument, indeed defence counsel made the argument during his closing address. However, it was not the role of the trial judge to express an opinion on the merit of such an argument to the jury.⁴
- [33] Her Honour fairly summarised the effect of the argument in a latter part of the summing-up when recapping the main arguments of counsel. But more than that, during her lengthy directions about identification, when listing features of the case which her Honour introduced as 'specific weaknesses' in, or 'matters which undermine the reliability of', the identification evidence, her Honour said:

Neither [SU] nor [MI] gave evidence that they saw the complainant walk off with [the defendant]. They say they did not see [the defendant] again from about the first bridge until well after the alleged offences.

- [34] In light of the context in which that direction was given, the direction did more than neutrally highlight the absence of any evidence from SU or MI that they had witnessed the complainant walk away with the appellant. It elevated the absence of such corroborating evidence to the level of a weakness undermining the reliability of the identification evidence. On one view this was unduly favourable to the defence position in that, as just explained, this feature of the evidence was an arguable inconsistency, rather than an unequivocal contradiction.
- [35] In any event, by squarely identifying the absence of corroborating observation from SU and MI of the complainant's departure from the bridge as a weakness undermining the reliability of the identification evidence, her Honour amply exposed this aspect of the case and its significance.
- [36] The summing-up as it related to this aspect was fair and adequate. That it attracted no request for redirection below is consistent with that conclusion. Ground 2 has failed.

Was there a lack of direction in respect of some specific alleged deficiencies in the photo board (as alleged by ground 1(a))?

- [37] Ground 1(a) alleges the learned trial judge erred in law by failing to direct the jury that the photo board evidence should be approached with caution due to its

⁴ *McKell v The Queen* (2019) 264 CLR 307.

composition. The argument in support of this ground is that there was a lack of direction in respect of some specific alleged deficiencies in the composition of the photo board.

[38] Four specific deficiencies in the composition of the photo board were advanced before this Court in support of that argument. They were:

1. the fact that none of the other photographs were of someone who had been at the party;
2. the unique hairstyle of the appellant;
3. the size of the appellant's photograph in comparison to the other 11 photographs on the photo board; and
4. the lighting behind the appellant's photograph in comparison to the other 11 photographs on the photo board.

[39] It will be recalled the first two of those features were identified by defence counsel, and her Honour agreed to refer to them in the summing-up. Her Honour referred to them in recapping defence counsel's main arguments in her summing-up. More importantly she referred to them in her directions about identification, to which I will shortly return.

[40] Before that, it is useful to explain how the appellant's argument here tries to draw upon reasoning in *R v Gould*.⁵ In that case, a rape complainant participated with police in the construction of a 'COM-FIT' image of her assailant. Months later, she was shown a photo board line-up in which Gould's photograph was the only photograph closely matching the COM-FIT image and, moreover, was on a different type of background from the other photographs. Muir JA, with whom Fraser JA and Peter Lyons J agreed, in concluding that the trial judge's direction was inadequate in this context, considered the jury should have been warned that the photo board's composition needed to be approached with particular caution because its composition was capable of suggesting a particular identification.

[41] His Honour went on to note that this problem was compounded by the possibility the COM-FIT image would have supplanted or interfered with the complainant's originally recollected image. His Honour observed:

The warning that the trial judge is required to give in circumstances such as those under consideration does not need to follow any particular formula but it must be "cogent and effective", "appropriate to the circumstances of the case" and the jury's "attention should be drawn to any weaknesses in the identification evidence". Reference to counsel's argument is insufficient.⁶

[42] The present case is different than *Gould* because the photo board in the present case does not contain an objectively suggestive array of photographs.

[43] The photo board was in evidence and has been viewed by this Court. The defendant's photograph, in photograph 7, does not stand out in comparison to the other 11 photographs in the photo board.

⁵ (2014) 243 A Crim R 205.

⁶ *R v Gould* (2014) 243 A Crim R 205, 212 (citations omitted).

- [44] There is no substance to the newly advanced alleged features of different photograph size and different background lighting. There is significant variation in background lighting as among all of the photographs. As to photograph size, the perimeter edge of the appellant's photograph is larger than most but so too is photograph 2's. Moreover, there is such variability in head size across all the photographs that one's eye is not particularly drawn to the size of the perimeter edges of the photographs.
- [45] Even the point, which was raised below, that the appellant was the only person on the photo board with braids, lacks force when one views the photo board in light of the known facts of the case. The complainant did not, in her testimony, describe the defendant as having had his hair in braids. Moreover, she described him as wearing a hat, removing the prospect of identification of him by reference to his hair. Further, there is no consistency about the hairstyles of the remaining 11 persons in the photographs, to make the defendant's hairdo stand out to any greater or lesser extent than the varied hairdos of those in the other photographs (at least one of which appears to involve partial braiding).
- [46] Objectively speaking, the only concerning feature of the photo board evidence is that the complainant had, on any view, seen the defendant amongst the people who had been at the party. The point arising is that because the appellant's photograph was the only photograph on the photo board of a person who had been at the party, the complainant may have been influenced into selecting his photograph, it being the only one in the array of someone who had been at the party. The force of that point is blunted by the practical reality that there were many people at the party and, more particularly, that the complainant had actually met the appellant at the party. In any event her Honour did direct in connection with the point.
- [47] Her Honour dealt with the photo board identification twice during the abovementioned lengthy direction regarding identification evidence. The first time was in the course of summarising the pieces of identification evidence relied on, when her Honour said:
- Another piece of evidence that tends to be capable of supporting the identification of the defendant is that, two days after the alleged offence, on the 13th of March 2023 at 5.53 pm, the complainant was given a photo board and identified photo number 7 on that photo board identification, saying that was the person who raped her, and you have evidence that photo number 7 is the defendant. ...
- [48] In the course of argument before this Court the appellant's counsel submitted that the police questioning in that identification process was highly suggestive. That submission must be rejected. It relied upon an isolated passage without regard to preceding context and was revealed to be unsustainable on a review of the whole of the process, which was recorded. The recording shows the identification of the appellant was not the product of suggestive questioning and was clear and unambiguous.
- [49] The second ensuing reference to the photo board identification was when her Honour proceeded to list what she described as 'specific weaknesses which appeared in the identification evidence' or which the jury might think were 'matters which undermine the reliability of the identification evidence'. In directing the jury in that context her Honour said:

With respect to the photo board identification, there is evidence that the defendant was the only person in the photo board – or a submission that the defendant was the only person in the photo board who had braids, and there were – there is evidence that there were no other persons in the photo board from the party. That is, the defendant was the only person in the photo board who was present at the party.

- [50] That reference to those features was as part of a direction which had warned the jury of the need for caution before convicting in reliance upon the evidence of identification of the appellant and which directed the jury those features were weaknesses undermining the reliability of the evidence of identification.
- [51] Ground 1(a)'s complaint of a failure to direct the jury that the photo board evidence should be approached with caution due to its composition is therefore unsustainable. Ground 1(a) has failed.

Were the directions inadequate in regard to the dangers of photo board identification?

- [52] Ground 1(b) complains the learned trial judge erred in law by failing to direct the jury as to the inherent dangers of photo board identification.
- [53] It was explained in *Pitkin v The Queen*,⁷ that evidence of the selection of a photograph to identify an offender may carry dangers prejudicial to an accused and for that reason such evidence should be subject to careful scrutiny before being accepted as constituting positive evidence of guilt. Trial judges should bear in mind the need to counteract the risk of such prejudice in weighing what direction is required additional to whatever warning may otherwise be appropriate in a case where the reliability of identification evidence is disputed.⁸
- [54] This was not a case in which the appellant was likely to suffer prejudice merely because the police had a photograph of him, for the jury heard the investigating police had already taken the appellant's photograph during their investigation and prior to presenting the photo board to the complainant. Nor was it a case in which the detail of the act of identification was clouded by doubt as to how it occurred – the process was recorded and the recording played to the jury.
- [55] It of course remains that the two-dimensional quality of the image identified in a photo board is unlikely to generate as reliable an identification as the three-dimensional quality of a physical lineup of people. Likewise, the very nature of an exercise in which police invite a witness to view an assembly of people's photographs encourages the making of a positive identification because the witness will expect that a photograph of the person suspected by the police is among the photographs. However, it is not the law that a jury must always be warned about such considerations.
- [56] As explained earlier, a direction in respect of a photographic identification does not need to follow any particular formula but must be cogent, effective and appropriate to the circumstances of the case.⁹ In the circumstances of this case the concerning

⁷ (1995) 130 ALR 35, 38-39.

⁸ *Alexander v The Queen* (1981) 145 CLR 395, 413.

⁹ *R v Gould* (2014) 243 A Crim R 205, 212.

prejudice, of which defence counsel below was obviously conscious, was the risk of the appellant being identified because he was recognised as having been at the party – his being the only photograph of a person who had been at the party. This aspect of the case was the subject of a specific direction. That direction was given as part of a broader direction warning the jury of the need for caution before convicting in reliance upon the evidence of identification of the appellant. Moreover, the direction specifically identified the fact that the defendant's photograph was the only photograph in the photo board of a person who had been at the party, as a weakness undermining the reliability of the evidence of identification.

[57] Considered in context, the direction pertaining to the photo board identification was sufficient for the circumstances of this case. There was no error.

[58] Even if that conclusion is incorrect and it was a wrong decision on a question of law not to give some more generalised direction about the inherent dangers of photo board identification, this ground would still fail. Such a wrong decision would not have been a failure to observe the requirements of the criminal process in a fundamental respect, with the consequence the ground could only have succeeded if the omission of a general direction about the inherent dangers of photo board evidence could realistically have affected the reasoning of the jury to the verdict of guilty.¹⁰ It could not have. There was very strong evidence of the appellant's guilt without the photo board evidence. The complainant had, on the night of the offences, identified the offender as the person she had earlier met. More significantly, the evidence about the DNA and the distinctive red hat combined to constitute a powerful circumstantial case against the appellant. When those features are considered along with the fact the jury were directed about the main concerning feature of the photo board evidence in this case, the absence of some more generalised direction about the inherent dangers of photo board evidence could not realistically have affected the outcome of this case.

[59] Ground 1(b) must fail.

[60] No ground having succeeded the appeal against conviction must be dismissed.

PART B: APPLICATION FOR LEAVE TO APPEAL SENTENCE

[61] The applicant was sentenced for the offence of rape to three years' detention, to be released after serving 50 per cent of that time, and a conviction was recorded (the sexual assault attracted a reprimand and no conviction was recorded for it, but no issue is taken about that outcome).

[62] The applicant seeks leave to appeal his sentence on the ground that the recording of a conviction for the offence of rape resulted in a sentence that was manifestly excessive.

[63] It is unsurprising there is no complaint of identifiable error. The following extracts of the sentencing judge's remarks demonstrate her Honour was astute in having regard to the nature of the offence, the applicant's age and previous convictions, and the impact the recording of a conviction would have on the applicant's rehabilitation and employment, consistently with the requirements of s 184 *Youth Justice Act 1992* (Qld):

¹⁰ *MDP v The King* (2025) 99 ALJR 969.

I turn now to the topic of whether to record convictions for count 1 or count 3. In considering count 1, the rape, I must apply section 184 of the Youth Justice Act, and I must have regard to all of the circumstances of the case, including, firstly, the nature of the offence. Here, this is an extremely serious example of an offence of rape for all of the reasons I have identified, including those that are aggravating. In my view, it weighs in favour of a conviction being recorded for count 1, the rape, being the minimum level of denunciation required for an offence of rape of this level of gravity, using the language in *R v KU, ex parte Attorney-General (No 2)* [2008] QCA 154 at paragraph 214. That is despite the fact that recording a conviction for an offence of rape would make you a reportable offender under the *Child Protection (Offender Reporting) Act 2004*.

...

Other matters which tend in favour of the recording of a conviction for the offence of rape include that you were convicted after a jury trial at which the complainant or victim had to be pre-recorded and cross-examined, your absence of remorse an unwillingness to take responsibility, and that you committed further property and bail offences while on bail for this offending, which demonstrate a disregard for the law and mean that caution should be exercised in considering your prospects of rehabilitation.

Your age at 15 when you committed the offences and your lack of previous convictions tend against recording a conviction for the rape. I accept that recording a conviction against you for the rape will or would have an adverse impact on your chances of rehabilitation generally or finding or retaining employment but that is not the only consideration. It has to be balanced against the other matters I have referred to.

...

[I]n this case I am comfortably satisfied that the matters I have referred to, which tend in favour of recording a conviction for the offence of rape, do warrant the discretion being exercised in this case in favour of recording a conviction.

- [64] The proposed ground's complaint of manifest excess is effectively a complaint that it was so unreasonable or plainly unjust to exercise the discretion to record a conviction that it may be inferred there must have been some error in its exercise.¹¹ The applicant has no prospect of sustaining such an inference.
- [65] Any offence of rape is inherently serious. In this case the learned sentencing judge correctly noted the offence was aggravated by the following considerations:
- the offence involved the penile-vaginal rape of a young girl in a public place at night;
 - the complainant was especially vulnerable because she was affected by alcohol;

¹¹ *House v The King* (1936) 55 CLR 499, 505.

- the applicant acted opportunistically but also in quite a predatory way to take advantage of the complainant when she said she wanted to go to the toilet, and he used that time when she was isolated from the rest of the group to offend against her;
- the applicant used additional force over and above the violence inherent in the act of rape itself;
- the applicant tried to prevent the complainant from seeking assistance or help by calling out;
- the applicant persisted in raping the complainant despite her crying and telling him it was hurting and telling him, “No”;
- the applicant sought to conceal his intentions and conduct by telling the complainant to turn off her phone and also putting her shirt over her face.

[66] There was a broad discretion vested in the primary judge as to whether to record a conviction.¹² Of course the applicant’s youth, historical absence of previous convictions and the likely adverse impact of recording a conviction upon his rehabilitation and employment prospects were significant considerations weighing against recording a conviction. However, this was not a case in which the pre-sentence report exposed any other weighty relevant considerations personal to the applicant. Further, the inherent seriousness of the nature of the offence was a powerful countervailing consideration. Other relevant circumstances of the case weighing in favour of recording a conviction were that the applicant exhibited no remorse, and, despite his absence of previous convictions, he had committed further offences while on bail.

[67] It was well open to the primary judge to record a conviction for the offence of rape. The proposed appeal against sentence has no prospect of success and leave to pursue it should be refused.

ORDERS

[68] In light of the above conclusions the orders of this Court should be:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.

¹² *R v MBQ; ex parte A-G (Qld)* [2012] QCA 202.