

SUPREME COURT OF QUEENSLAND

CITATION: *R v Spicer* [2026] QCA 25

PARTIES: **R**
v
SPICER, Adam Leslie
(applicant)

FILE NO/S: CA No 178 of 2025
DC No 386 of 2025

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 25 June 2025
(Grigg DCJ)

DELIVERED ON: Date of Orders: 19 February 2026
Date of Publication of Reasons: 24 February 2026

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2026

JUDGES: Mullins P, Boddice JA, Doyle JA

ORDERS: **Date of Orders: 19 February 2026**

- 1. Application for leave to appeal against sentence granted.**
- 2. Appeal allowed.**
- 3. The sentences imposed by the sentencing judge on 25 June 2025 are varied as follows:**
 - (a) substitute 10 months for 12 months for the sentence of imprisonment for count 1 and delete the order for suspension of the sentence;**
 - (b) substitute 10 months for 12 months for the custodial component of the sentence of three years' imprisonment for count 2 and reduce the operational period applicable to the suspension of the sentence for count 2 from four years to three years.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty in the District Court to sexual assault (count 1) and rape (count 2) – where the applicant was sentenced to 12 months' imprisonment for count 1 and a concurrent sentence of three

years' imprisonment for count 2 with each sentence being suspended after serving 12 months' imprisonment for an operational period of four years – where the sentencing judge applied the common law principle that the impact of a sentence on family was only relevant in exceptional circumstances and not s 9(2)(fb) of the *Penalties and Sentences Act 1992* (Qld) – where the sentencing judge made an error of law – where re-sentencing was required

R v Keevers; R v Filewood [2004] QCA 207, considered
R v RUJ (2021) 7 QR 765; [2021] QCA 114, considered
R v Smith [2020] QCA 23, considered

COUNSEL: A J Kimmins for the applicant
 R J Marks for the respondent

SOLICITORS: Hakim and Associates for the applicant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **THE COURT:** At the conclusion of the hearing of the application, the Court made orders granting the application for leave to appeal against sentence, allowing the appeal and varying the sentences that had been imposed by the sentencing judge. These are the reasons for the making of those orders.
- [2] The applicant pleaded guilty in the District Court to sexual assault (count 1) and rape (count 2). Both offences were committed against the same complainant on 31 December 2021. On 25 June 2025, the applicant was sentenced to 12 months' imprisonment for count 1 and a concurrent sentence of three years' imprisonment for count 2. Each sentence was ordered to be suspended after serving 12 months' imprisonment for an operational period of four years. The applicant applied for leave to appeal against sentence on the grounds:
1. the sentence was manifestly excessive;
 2. the sentencing judge acted upon a wrong principle by mischaracterising the offending;
 3. the sentencing judge proceeded on the erroneous assumption that family responsibilities can only be taken into account where they are exceptional.
- [3] Paragraph (fb) was inserted in s 9(2) of the *Penalties and Sentences Act 1992* (Qld) (Act) (which sets out the factors to which a sentencing court must have regard) with effect from 18 March 2024. It therefore applied to the sentencing of the applicant. Paragraph (fb) provides:
- “regardless of whether there are exceptional circumstances, the probable effect that any sentence imposed would have on—
- (i) a person with whom the offender is in a family relationship and for whom the offender is the primary caregiver; and
 - (ii) a person with whom the offender is in an informal care relationship; and
 - (iii) if the offender is pregnant—the child of the pregnancy; and”

- [4] This paragraph intentionally modifies the common law as to the approach to the family responsibilities of a prisoner being sentenced. Although the sentencing judge referred to the possibility of taking into account the best interests of an offender's children pursuant to s 9(2)(r) of the Act as another relevant circumstance, the sentencing judge then referred to the authorities of *R v Stewart* (1994) 72 A Crim R 17 at 21 and *R v Chong; ex parte Attorney-General (Qld)* [2008] QCA 22. The sentencing judge noted that "the hardship caused to an offender's children ... may be taken into account [where] ... the degree of hardship that imprisonment will involve is exceptional or where the offender is the mother of young children or they will be deprived of parental care, but it will depend on the circumstance". The sentencing judge referred to the statement in *Chong* at [30] that "the hardship to an offender's children cannot be allowed to overwhelm all other considerations in sentencing". In relation to the applicant's children, the sentencing judge noted "that the children will be deprived of you but there is [a] submission made that they will be living with family members in the event that you are incarcerated". The authorities of *Stewart* and *Chong* reflect the common law that the hardship to the children of an offender had to be exceptional before that was taken into account as a mitigating circumstance on sentence. It is apparent from the sentencing remarks that the sentencing judge recognised that the applicant was the primary caregiver of his children but that the hardship they would endure as a result of his imprisonment was not an exceptional circumstance.
- [5] Neither counsel had drawn the sentencing judge's attention to the change of law effected by paragraph (fb). As the Explanatory Note for the Bill enacted as the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) explains, paragraph (fb) "is explicit in stating that this requirement will operate regardless of whether exceptional circumstances exist which is intended to override the common law principle that any hardship suffered by the person's family and dependants can only mitigate a sentence in 'exceptional circumstances'".
- [6] The failure to apply s 9(2)(fb) of the Act was an error of law that was not insignificant in the sentencing. The application therefore succeeded and the appeal was allowed on ground 3. It was therefore necessary for this Court to re-sentence the applicant. It was unnecessary to consider grounds 1 and 2.

Circumstance of the offending

- [7] The applicant, his then partner and their children were staying at the complainant's house for a couple of days around New Year's Eve 2021. The applicant, his partner and the complainant were drinking alcohol into the night. The applicant's partner went for a walk and the applicant moved his chair next to the complainant. He put his hand on the inside of her left upper thigh and she indicated that nothing was going to happen. When he moved his hand up her thigh, she pushed him away. When he persisted, the complainant made it very clear to the applicant that nothing was going to happen. There was no charge in respect of that conduct. Its relevance was that the complainant conveyed her attitude to the applicant about not engaging with him in any sexual activity. When the complainant walked into the kitchen, the applicant followed her and squeezed one of her buttocks (count 1). She did not say anything to him. The complainant left the kitchen, went into her bedroom and went to sleep. She woke up to the applicant in her bed with his fingers inside her vagina (count 2). He moved his fingers in and out roughly and the complainant felt pain. He used his other hand to rub the outside of her vagina. Both his hands were down the front of her

shorts and underwear. The complainant jumped up and told the applicant that he could not do that. He sat up and replied “Really?”. The complainant told him to get out of her bed. The applicant and the complainant had a conversation the next day when the applicant acknowledged that he was in the complainant’s bed and said “that wasn’t cool”. The complainant responded that it was inappropriate and she felt violated.

- [8] On 3 January 2022, the complainant messaged the applicant’s partner and disclosed the offending. The complainant and the applicant had a text exchange on 6 January 2022 when the complainant explained that she was struggling mentally with what the applicant did to her. The applicant acknowledged that it should never have happened and apologised. The complainant made a complaint to the police in April 2022. She provided a formal statement in May 2022. The police attended on the applicant on 7 June 2023 when he asserted that his touching on the complainant’s groin was consensual and he denied any penetration occurred. He participated in an interview on 19 June 2023 when he maintained the touching was consensual. He declined to comment about squeezing the complainant’s buttock and denied using two hands to touch the complainant in the bedroom or that he penetrated her vagina.

Applicant’s antecedents

- [9] The applicant was 36 years old when he offended. He had an irrelevant criminal history. Although it did not affect the criminality of the offending, he was abusing alcohol and illicit substances at the time he offended. He subsequently relocated and desisted from that lifestyle which enabled him to show he was underway with his own rehabilitation by the sentencing date. References were tendered at the sentence from the applicant’s mother, new partner and sister that confirmed that the applicant had worked hard to remain drug and alcohol free and was providing a loving and stable home for his three children who lived with the applicant and not their mother who lived in a different area of Queensland. A letter from his employer showed that he had been in full time employment since 20 January 2025. The applicant provided a letter to the sentencing judge which expressed his remorse for the offending and explained that he had been sober and drug free for 12 months (that was supported by a pathology report negative for drugs) and gave some detail of his children’s needs.
- [10] The indictment containing counts 1 and 2 was presented in June 2024. Submissions were sent on the applicant’s behalf that were rejected by the prosecution. Ultimately the applicant entered pleas of guilty to the indictment on 12 March 2025. The prosecution accepted that the guilty pleas were timely.

What is the appropriate sentence?

- [11] There are not many recent comparable authorities in this Court for sentences for rape constituted by digital penetration while the relevant complainant was asleep. A frequently cited judgment is that of *R v Keevers; R v Filewood* [2004] QCA 207 in which the offender Mr Filewood was unsuccessful in his application for leave to appeal against the sentence imposed after trial of imprisonment for two and one-half years suspended after nine months’ imprisonment for an operational period of three years. The offender was aged 24 years and returned to the unit where his male friend lived who also returned to the unit accompanied by his girlfriend who was the complainant. The complainant and her boyfriend fell asleep on his bed. Mr Filewood entered the bedroom. The complainant was asleep. She woke when she felt she was

“getting punched in the vagina”. She saw Mr Filewood at the bottom of the bed removing his right hand from her vaginal area. When Mr Filewood was interviewed by the police he claimed what he did was consensual.

- [12] The offender in *R v Smith* [2020] QCA 23 pleaded guilty to five counts of sexual assault and two counts of rape which were all committed while the complainant who was a friend of the applicant was asleep. For each of the counts of rape which involved digital penetration the offender was sentenced to three years’ imprisonment. Lesser concurrent sentences were imposed for the other offences and the parole eligibility date was set after serving nine months in custody. The offender was 23 years when he offended. The complainant had made it clear to the offender that she did not want a relationship with him and had no sexual interest in him. The applicant had a depressive disorder and a schizotypal personality disorder which had a large genetic component which affected his social relationships. His guilty pleas were early. The admissions he made to police enabled the prosecution to bring counts 2, 4 and 6 which included one of the rapes. Morrison JA (with whom Holmes CJ and McMurdo JA agreed) noted (at [51]) the serious nature of the offending that “calls for a sentence that reflects the need to deter others who might be inclined to violate a woman sleeping in her own bed” but had to be balanced with the mitigating factors in the offender’s favour. The appeal was successful. For each of the rapes, a sentence of imprisonment for two and one-half years with a suspension as from the date of the decision of the Court of Appeal (approximately six and one-half months after the date of sentence) for an operational period of two and one-half years was imposed.
- [13] The offender in *R v RUJ* (2021) 7 QR 765 was convicted after trial of rape and attempted rape for which he was sentenced to concurrent terms of four years’ and two years’ imprisonment, suspended after 20 months. He unsuccessfully appealed against the convictions and the sentences. The offender’s daughter’s friend was the complainant. She became intoxicated and went to sleep in a bedroom in the offender’s house. She awoke when the offender entered the room and assaulted her. He penetrated the complainant’s vagina with two fingers and began trying to insert his penis into her vagina. She was telling him to stop and, when she said she was going to scream, he stopped and left the room. In rejecting the application for leave to appeal against sentence, McMurdo JA (with whom Sofronoff P and Mullins JA agreed) stated at [54]:
- “The appellant could well have been given a lighter sentence, because of the absence of any significant criminal history and his otherwise good character. However, he was a mature man, who took advantage of a vulnerable woman who was asleep in his house and recovering from being heavily intoxicated. He persisted in his attempts to have penile intercourse with her, notwithstanding her struggles and protests, over a period of some time. He did not have the mitigating circumstances of someone who had admitted his offending, pleaded guilty and thereby demonstrated remorse.”
- [14] The offending in *RUJ* was overall more serious than the applicant’s offending and the sentence of four years for the digital rape imposed after trial.
- [15] These comparable authorities support the conclusion that the head sentence of three years’ imprisonment selected by the sentencing judge was an appropriate sentence to

reflect the criminality of count 2 and to take into account the additional criminality of count 1 and should apply on the re-sentencing. Because of the applicant's age, the nature of the offending for count 2 and that the rape was committed whilst the complainant was asleep in her own home after the complainant had made it clear that she did not wish to engage in sexual activity with the applicant, some part of the sentence had to be served in actual custody. Denunciation of the applicant's conduct and deterrence (both general and specific) are important purposes for sentencing for this type of offence. There was no issue before the sentencing judge that a suspension of the sentence was the appropriate form of order for the applicant's release from custody. The point at which the sentence for count 2 should be suspended must reflect the applicant's guilty pleas, lack of criminal history, the expressed remorse at the sentencing (reduced by the lack of remorse shown by his initial denials to the police of the offending and claims any sexual activity was consensual), the rehabilitation he had undertaken since offending, and his responsibilities as primary caregiver of the two children who were still under the age of 18 years. The applicant has already served 239 days of the sentence which is almost eight months.

- [16] When the additional factor in the applicant's favour of his family responsibilities is taken into account, suspension of the sentence imposed on count 2 after 10 months already served in custody is appropriate. The period of 10 months is also an appropriate sentence for count 1. In view of the rehabilitation undertaken by the applicant before being sentenced, the operational period for the suspended sentence for count 2 does not need to be longer than the head sentence for count 2.
- [17] There was also an error in the sentence imposed by the sentencing judge for count 1 as a suspension is not appropriate when it is ordered to take effect after the sentence has been completely served.

Orders

- [18] The orders which were made at the conclusion of the hearing were:
1. Application for leave to appeal against sentence granted.
 2. Appeal allowed.
 3. The sentences imposed by the sentencing judge on 25 June 2025 are varied as follows:
 - a. substitute 10 months for 12 months for the sentence of imprisonment for count 1 and delete the order for suspension of the sentence;
 - b. substitute 10 months for 12 months for the custodial component of the sentence of three years' imprisonment for count 2 and reduce the operational period applicable to the suspension of the sentence for count 2 from four years to three years.
 4. Reasons to be published at a later date.