

IN THE CHILDREN'S COURT OF VICTORIA

CRIMINAL DIVISION

R

v

M and others

<u>JUDGE:</u>	GRANT J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	31 <sup>st</sup> January 2008
<u>DATE OF SENTENCE:</u>	12 <sup>th</sup> February 2008
<u>CASE MAY BE CITED AS:</u>	R v M and others
<u>MEDIUM NEUTRAL CITATION:</u>	[2008] VChC 4

REASONS FOR SENTENCE

Sentencing principles applicable in the Children's Court – plea of guilty to serious offences – lack of prior convictions – assessment of suitability for participation in MAPPS – differences between probation order and youth supervision order – whether order should be with or without conviction.

<u>APPEARANCES:</u>		
For the Crown	Ms M. Williams SC	
For the Accused	Mr Miller for LM Ms Broughton for SS Mr D. Annett for JM	

---

HIS HONOUR:

- 1 LM, JM and SS you have each pleaded guilty to the four following offences –
  - That you did at (location removed) “location 1” between the 1<sup>st</sup> of June 2006 and the 30<sup>th</sup> of June 2006, by intimidation procure FS to take part in an act of sexual penetration with JR;
  - That you did at location 1 between the 1<sup>st</sup> of June 2006 and the 30<sup>th</sup> of June 2006, by intimidation procure FS to take part in an act of sexual penetration with RM;
  - That you did at location 1 between the 1<sup>st</sup> of June 2006 and the 30<sup>th</sup> of June 2006 assault one FS;
  - That you did at (location removed) between the 1<sup>st</sup> of June 2006 and the 30<sup>th</sup> of June 2006 make child pornography namely a film which depicts a minor under the age of 18 years engaging in sexual activity.
- 2 These are serious offences. The procuring offences carry a maximum term of imprisonment under the Crimes Act 1958 of ten years imprisonment. The offence of common law assault carries a maximum penalty of five years jail and the make pornography offence carries a maximum of penalty of ten years jail. These are penalties that are potentially available to adult offenders.
- 3 You have pleaded guilty to these offences in the Children’s Court. The most severe order that can be made in the Children’s Court is an order for detention in a Youth Justice Centre. Where the Court is dealing with offenders who are over 15 and there is more than one offence the Court can impose an aggregate sentence of detention of three years.
- 4 The offences are charged on a representative basis. This means that each charge is representative of a broader and more systematic pattern of

- criminality. The sentence for a representative offence can reflect the fact that the offence occurred in a wider context. It allows the court to take account of the whole of the “circumstances” of the offending as it relates to the particular charge.
- 5 On the common law assault and make child pornography charges it is said by the prosecution that you acted in concert and/or aided and abetted each other in the commission of the offences. The position is different for the procurement charges. Each of you are fully responsible for the offences of procure sexual penetration by intimidation. You admit through your pleas of guilty that your behaviour intimidated the victim into engaging in acts of sexual penetration with JR and RM.
  - 6 The prosecution opening referred predominantly to the material contained in a DVD that was made by a co-offender, DP. He has been sentenced for his involvement in these matters. The DVD resulted from the filming of your criminal behaviour at the time it was occurring.
  - 7 FS is the victim of your criminal behaviour. She was aged 17 at the time these offences were committed. Her father is concerned to ensure her circumstances are not misrepresented. In the victim impact statement provided to the court Mr S describes his daughter as “mildly delayed in her intellectual development.” During the investigation of this matter Ms S was assessed by a Forensic Paediatrician. No intellectual disability was identified but the paediatrician noted Ms S “appeared eager to please and the overall impression was the complainant was functioning at an intellectual age less than 18 years of age.”
  - 8 In March of 2006 Ms S met two co-offenders, SB and RM. She exchanged telephone numbers with SB. Over the next two months there was contact at various times with some of the co-offenders. Some of these contacts led to Ms S engaging in sexual acts with some of the co-offenders who have already

been dealt with by this Court. Certainly, SB, NO and RM had all engaged in some form of sexual activity with Ms S prior to the day of the offending. Those involved with Ms S at this time capitalised on her generosity and requested her to purchase phone credits, clothing and other items

9 On a date between the 1<sup>st</sup> of June 2006 and the 30<sup>th</sup> of June 2006 Ms S was contacted by NO and SB. I am not satisfied that JM was part of that initial contact. Ms S was encouraged to attend the location 1 area. I am satisfied that SB and NO had an expectation that she would engage in sexual acts with them. It is clear from the material that each of you became aware from one source or another that Ms S was to attend at location 1 railway station. Ms S believed she was meeting “SB, NO and maybe H as well.” She had no idea that she would be met by the large group present at the station.

10 That afternoon you three were part of a group of at least eleven young men that met Ms S at the location 1 railway station. SS, you have disclosed to the MAPPS assessor that on the day of the offence you were not sure what was planned but knew that it was expected that FS would do “sexual stuff.” You thought Ms S expected a small group rather “than the larger group that were present and that she had no idea that she was to be filmed.” LM you told the MAPPS assessor that you had heard about FS and that there was talk that some of the males were “to receive oral sex from FS.” It is clear that both of you had knowledge of Ms S prior to this day and when you attended at the railway station you did so anticipating that you would participate in or witness sexual acts. JM you maintain that prior to the day of the offending you had not met FS and did not believe you had heard of her from others. Whether this is true or not the DVD reveals your understanding of how Ms S would be treated by your group. As the filming commences and after members of the group had commenced treating Ms S with contempt and calling her “the victim”, you make comments such as “you gotta feel sorry for her. Watch what ....does to her now.”

- 11 When the large group of you left the station you all walked with Ms S to the (name removed) River area. As you walked along a path near the river DP started to film what was happening. The group encircled Ms S. Some in your group began shouting and chanting “the victim”. This was not an isolated one off chant. It was loud and taken up by a number of voices. It was clearly indicative of the group’s attitude to Ms S at that time and what you expected to occur. This was the start of a shocking period of behaviour towards Ms S. It is the commencement of a period of sustained sexual and physical assault.
- 12 The prosecutor has described in paragraphs 17 to 60 of her opening what the camera recorded. It is an accurate account of what occurred and I attach the opening as an appendix to this judgement.
- 13 All of you have pleaded guilty to serious criminal offending. Offending that has shocked the community. You treated Ms S in a cruel and callous manner. Your behaviour was cowardly, brutal and above all else, a serious breach of the criminal law. It was, as the prosecutor said, a sustained attack by a pack of young men upon a vulnerable young woman.
- 14 I have been provided with victim impact statements from the victim and her family. Ms S has suffered significant emotional and psychological trauma as a result of your criminal behaviour – “shocked that these did this to me and then made a DVD and sold it for \$5....I was angry that they could do this to someone let alone me .....I was really emotional about what happened couldn’t really talk about it to anyone without getting really upset ....” And also “my life has changed forever because I can’t walk down the street without people forgetting about what happened to me ....people harass me.” This last statement recognises what is a particularly nasty aspect of your offending. The offending on the day in question is shocking enough. You compound the harm to the victim by encouraging and participating in the recording of your behaviour. A DVD is made by DP and it is distributed throughout the local community. I will have more to say about this shortly. Fortunately Ms S did

- not suffer any lasting physical injuries. Ms S does acknowledge that “it has been easier on my family and me since some of the boys have pleaded guilty.”
- 15 The victim impact statement of Mr S was tendered to the Court. It was apparent that he and his wife have suffered significant economic loss as a result of your offending. The whole family has suffered major emotional trauma. It is true that Mr S identifies how some media outlets have added to that emotional distress. In the case of some outlets the desire to “run” the story has worked against the wishes of the victim and her family. However, the fact that the story developed in the way that it did is a consequence of DP’s filming the criminal behaviour, producing the DVD and facilitating its distribution.
- 16 I note the statement by Mr S that “things have lifted for me since the boys pleaded guilty and freed my daughter from having to give evidence.” It is apparent from the material presented by the Crown that Mr S has a strong view that, notwithstanding the seriousness of your criminal behaviour, your youth and pleas of guilty should lead to a sentence that focuses on your rehabilitation. His attitude is remarkably forgiving. He does not desire that you be sentenced to a period of detention.
- 17 I have spent some time on the circumstances of the offences and the impact on the victim and her family. I move now to the other matters that are important for the Court to consider when determining an appropriate sentence.
- 18 When the offences were committed you were all under 18 years of age. As a general principle the law has always recognised the importance of rehabilitation as a sentencing principle for the young offender – particularly the young first offender.

- 19 The fact that you were all under 18 means that the charges can be heard and determined in the Children’s Court.
- 20 We have a Children’s Court because we accept, as a community, that young people should be dealt with differently to adults. The difference between the adult system and the system established for young offenders was discussed by Vincent J in the case of R-V-Evans (2003) VSCA 223. When speaking of the regime established for dealing with the young offender His Honour said – “Underlying this system is the attribution of considerable significance to the generally accepted immaturity of the young people who appear before the Children’s Court and the need, in the interests of the community and the young persons concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage of their lives. These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals.” (My emphasis).
- 21 The Children’s Court in determining which sentence to impose on a child, must, under the provisions of section 362 of the Children, Youth and Families Act 2005, as far as practicable, have regard to –
- a) The need to strengthen and preserve the relationship between the child and the child’s family;
  - b) The desirability of allowing the child to live at home;
  - c) The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
  - d) The need to minimise the stigma to the child resulting from the Court determination;
  - e) The suitability of the sentence to the child;
  - f) If appropriate, the need to ensure that the child is aware that he or

she must bear a responsibility for any action by him or her against the law; and

g) If appropriate the need to protect the community, or any person, from the violent or wrongful acts of the child.

22 Your age, your lack of prior convictions and your personal circumstances (which I will refer to shortly) are all important factors for me to consider in determining the appropriate sentence. As I said when dealing with your co-offenders, these facts may not, if they stood alone, have persuaded me to avoid a sentence of detention for this offending. The offending here is so serious that, in the absence of a plea of guilty and your willingness to participate in an appropriate treatment regime, you would have been at significant risk, had you been found guilty after trial, of being detained in a Youth Justice facility. It follows from what I have just said that I give great credit to your pleas of guilty. They are so significant because they relieve the victim of the burden of giving evidence. She is not compelled to re-live these terrible events.

23 Importantly, your pleas of guilty also indicate your remorse. The pleas of guilty indicate your understanding of the importance of accepting responsibility for what you have done. In addition, you have all been assessed as suitable to participate in the MAPPS program. That positive assessment is crucial. It means I am able to make an order that enables you to remain within the community (with all the attendant benefits to you), whilst making you accountable for what you have done and, in the long term, protecting the community.

24 I need to make some comments about the MAPPS program. MAPPS is the Male Adolescent Program for Positive Sexuality. It is based within the Adolescent Forensic Health Service of the Royal Children's Hospital. It is a program that is run for young males aged 10-21 who have been found guilty

of a sexual offence. The program “places emphasis on the young person accepting responsibility for his offending behaviour and for making the necessary changes so that he can lead a life that doesn’t include offending.” The program is held in high regard. Independent evaluation has shown it to be very successful in protecting the community by ensuring young men cease offending and change their attitudes and behaviours. It is not an easy option. You and your family will be engaged in various aspects of treatment. The treatment will be tailored to your individual needs as assessed by MAPPS. The average period for treatment is nine months.

25 In a general letter to the Court accompanying the individual assessment reports for your co-offenders, Ms Lancefield, a clinical consultant at MAPPS stated, “The offences, involving the sexual and physical assault, exploitation and degradation of a vulnerable female, committed by these young men are viewed as very serious. All of the young men require rehabilitative interventions to address their offending and reduce the risk of further anti-social behaviour.” I agree with those comments.

26 MAPPS works with Youth Justice. The MAPPS report to the Court recommends a supervisory order. It is recommended that there be a special condition of the order that you participate in the MAPPS program.

27 I do intend to give you young men the opportunity to remain within the community, to be supported on a community based disposition with a condition to participate in the MAPPS program. You have all been assessed as suitable to participate in the program, you have all expressed a willingness to do so and it is acknowledged that you have good prospects for rehabilitation.

28 You have been given this opportunity to remain within the community because you were under 18 at the time of the offending, you have no prior convictions, you have pleaded guilty and you are suitable to participate in a program that

will strongly focus on individual treatment for your rehabilitation. I accept that each of you have positive protective factors in your lives which, when viewed with your lack of priors, pleas of guilty and willingness to engage in treatment indicates that you are good prospects for rehabilitation.

29 The prosecution submits that the Court should impose a supervisory order that contains a special condition for participation in MAPPS. It is conceded that the order against SS could be an order without conviction. The Crown maintains that LM and JM should be convicted.

30 A probation or youth supervision order in the Children's Court can be made with or without conviction. Fox and Freiberg in their book on Sentencing describe the consequence of conviction as follows –

“The recording of a criminal conviction is a significant act of legal and social censure. It is a judicial act by which a person's legal status is officially and, under present Victorian law, irretrievably altered. The alteration effected by a conviction is a diminution of the offender's legal rights and capacities. These follow automatically from the fact of conviction and are not necessarily tied to the particular sanction that follows.”

31 The fact that the general consequences of conviction are in the nature of a penalty is a relevant matter for a court to take into account. It is also relevant in those cases where there are particular, identifiable consequences arising from conviction in the individual circumstances of an offender.

32 The Children, Youth and Families Act 2005 is silent on the type of matters the Court should take into account in exercising its discretion to record a conviction or otherwise. I have been referred to section 8(1) of the Sentencing Act 1991 which provides –

“In exercising its discretion 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 character and past history of the offender; and

(c) The impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.”

I accept these factors must apply when considering the exercise of discretion in the Children's Court with appropriate recognition of the matters referred to in section 362 of the Children, Youth and Families Act 2005.

33 I now move on to the personal circumstances of each of you and also explain what orders I intend to make for each of you.

34 I will commence with LM. You are a young man without prior convictions. At the time of the offending you were 17 years old. You come from a good family which has been shocked by your behaviour. You have been assessed as suitable to participate in the MAPPS program in collaboration with Youth Justice.

35 LM, you live at home and have strong family support. Up until your involvement in this criminal offending your life was, to quote your counsel, normal and unremarkable. You left school at the end of 2005 after completing year 10. In 2006 you completed a certificate in engineering fabrication while working part-time in your brother's business as a roof tiler. In 2007 you commenced full-time work for your brother as an apprentice roof tiler. You have completed the first year of a three year apprenticeship. Obviously, if you complete the apprenticeship you have very good employment prospects in the future. I am satisfied that you are a good prospect for rehabilitation.

36 The most appropriate order in your case is a youth supervision order. You were an active participant in the offending behaviour. The DVD shows that on

one occasion you approached Ms S and spat on the back of her head. On another occasion you used a stick to push the victim in the back of the head. Near the end of the period of criminal behaviour you approached the camera with a cup of liquid. You then ran at the complainant and threw it over her back. Some in your group believed this was urine. I am advised by your counsel that it was water from the (name removed) River. It was an act that was designed to add to the victim's humiliation at the hands of your group. You went beyond encouraging and supporting others, you became an active participant. Although you were not involved directly in an act of sexual penetration you engaged in behaviour which procured sexual penetration by intimidation. These acts of penetration take place on a large number of occasions. I accept you played no part in the production of the DVD or its distribution.

37 The seriousness of the offending warrants a youth supervision order. Given your active participation in this serious offending and consistent with orders made for other similarly involved co-offenders, the order will be with conviction. You will be convicted on all the charges and released on a youth supervision order for a period of twelve months. There will be a special condition that you participate in and complete the MAPPS program. In a moment I will explain to you the general conditions of the order and what would happen if the orders were to be breached. I will do that after announcing the orders to be made for the other offenders.

38 I now move to JM. You were 17 years old at the time you committed these criminal offences. You have no prior convictions. When your father became aware of your involvement in these matters he immediately contacted the police. This was an appropriate response. You attended for interview at the St. Kilda Road police complex and provided the police with the names of other participants in the group. That is to your credit.

- 39 I am satisfied you have strong family support. Your parents have been distressed by what you have done and sought family therapy from the Bouverie Centre. Character references have been tendered on your behalf. A letter from your aunty explains that you resided with her for a four week period following threats you had received from people who had become aware of your involvement in this offending. Your counsel has highlighted your identification as the “public face” of the group of offenders and how this has impacted on your life.
- 40 You are currently employed in the “electrics field” but your ambition is to work as a real estate agent. You have passed the relevant exams and done work experience. You are worried about the impact of a conviction on your ability to work in that area. Your counsel has referred me to the requirement of the Business Licensing Authority for an agent to be of “good character” and a “fit and proper person”. It can reasonably be assumed that an order with conviction will be regarded more seriously by the Authority than an order without conviction.
- 41 You did not engage in an act of sexual penetration and you did not have any direct physical contact with Ms S. What you did do is provide an occasional and offensive commentary to camera. Twice at the commencement of the offending behaviour you approach the camera and make nasty comments. Later you again approach the camera to have your say. Apart from these incidents your involvement in the offending is as part of the group that intimidates the victim and cheers and supports others as they engage in the various sexual and physical assaults. Ms Williams also highlights an incident involving the use by you of a mobile phone and suggests you may, at one stage, have been filming what was happening. I am unable to say that you were in fact doing so.
- 42 JM, I intend to release you on a probation order which will last for a period of twelve months. I will make this order without conviction. I accept that your

offensive and insulting comments to camera place you in a different category to JS (who has been dealt with on an order without conviction) and SS ( who the Crown concedes may be dealt with by a without conviction order). On the other hand, unlike those offenders who have been convicted, you did not engage in any direct physical or sexual contact with Ms S. This fact on its own would not be enough to warrant an order without conviction. The factors personal to you are particularly persuasive. I am satisfied you have very good prospects for rehabilitation. You have strong family support. Your family reacted appropriately from the moment they became aware of your involvement in this offending. When you attended at the police station you co-operated by identifying others who participated. The MAPPS report is highly favourable. It notes your involvement, with your family, at the Bouverie Centre. The writer of the MAPPS report notes – “When asked to attribute responsibility for the offence JM stated all of the co-offenders were equally to blame and was adamant FS bore no responsibility.” Later the report states – “JM’s presentation on assessment indicated a range of factors both historical and in relation to the offence that ameliorate the need for treatment interventions. These include: prosocial cognitive processing and emotional expression, recognition of the abusive nature of his behaviour, positive engagement in employment, and a supportive prosocial family.” You have an ambition to work in the real estate industry and a conviction is more likely to prevent that from occurring. JM, for these reasons I have determined that a conviction should not be recorded against you. You will be required as a special condition of the probation order to participate in the MAPPS program as directed by Youth Justice in consultation with MAPPS.

- 43 SS you were aged 16 when these offences occurred. You are the eldest of three children and you reside with your father. You are keenly involved in sport. As a result of your involvement in this offending you were asked to leave the Western Jets football team, you lost your job as a pool attendant and you were asked to leave the school you were attending. On leaving school

you enrolled in TAFE to do an apprenticeship. You are now employed as an apprentice electrician. You should do all you can to make sure you complete the apprenticeship and obtain the qualification that could establish your future.

44 You knew Ms S prior to this day and you admit that on the day of the offending whilst you were not sure what was planned you knew that “FS would do sexual stuff.” On the day in question you became one of the group that encouraged and supported the offending. You did not directly engage in any physical or sexual assaults on Ms S. The MAPPS report is favourable and indicates that the risk of future offending is low.

45 I do not intend to convict you. I will extend to you the same opportunity that has been given to JS and JM. In your case a probation order is the appropriate order. On all charges you will be placed on probation, without conviction, for a period of twelve months. You will be required to participate in the MAPPS program as directed by Youth Justice in consultation with MAPPS.

46 I conclude this matter by explaining to each of you the conditions of the orders that have been made. (Conditions read to defendants.) If the orders are breached by further offending or by non-compliance, you will be returned to Court and dealt with again for these offences. It would be very difficult to avoid a sentence of detention if a breach was proved.