

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE

CRIMINAL DIVISION

Victoria Police

Applicant

v

MA

Respondent

<u>MAGISTRATE:</u>	Bowles
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	24 September – 6 October 2009
<u>DATE OF JUDGMENT:</u>	12 October 2009
<u>CASE MAY BE CITED AS:</u>	Victoria Police v MA
<u>MEDIUM NEUTRAL CITATION:</u>	[2011] VChC 7

REASONS FOR DECISION

Catchwords: Children's Court – Criminal Division – Sex Offenders Registration Act 2004 – Section 11 – requirements for child to be placed on Sex Offenders Register – Parliament's intentions regarding registration of juvenile sex offenders – non-mandatory requirement – test to be applied – duration of registration.

The application before the Court is pursuant to section 11 Sex Offenders Registration Act 2004, that is, seeking that the Court make a sex offender registration order requiring the respondent to comply with the reporting obligations of the Act. The application is opposed.

The respondent, MA, is 17 years of age, an Afghani refugee whose parents are deceased. He arrived in Australia with his siblings approximately 3 years ago. He has limited English language skills and has been assessed by Disability Services as functioning in the “moderate” range of intellectual disability¹. It is noted however that the psychologists who have provided reports to the Court, Ms LB and Dr SM are of the opinion that the validity of the assessment has to be questioned.² At the time of the commission of the offences, he was employed as a renderer in the building industry.

On 3 July 2009 the respondent pleaded guilty to the following offences :-

- assault with intent to rape
- stalking
- rape

The offences occurred over a 27 day period; being 1 February 2009 to 27 February 2009. They were committed between 12:30 p.m. and 1:30 p.m. and the complainants were females aged 16 years of age, 22 years of age and 18 years of age respectively.

The circumstances of the offending can be summarised as follows: --

On 1 February 2009 at 12:30 p.m. the 16-year-old complainant attended at a Coles supermarket. She saw the respondent on his bicycle outside. The respondent entered the supermarket and followed her down the aisles. When she would look back, he would pick up items. She went to the register and he went out the front of the shop to his bike. After she left the supermarket, he rode on his bicycle ahead of her. He pretended to tie his shoelaces and asked her for her phone number which she refused. He also said “I give you money to have babies with me.” She crossed the road and yelled at the respondent to leave her alone. He grabbed her by the shoulder and implored her “Please please.” She yelled out to him to leave her alone. A motorist intercepted and yelled at the respondent to leave her alone. The respondent left. However, he returned. He threw his bicycle to the ground and took hold of the complainant. He forced her against a fence, pushed his pelvis and thighs against her and she could feel his erect penis against the front of her vagina through their clothes. She punched the respondent in the face and pushed him hard. He fell over his bicycle and she ran away. He followed her but could not catch up with her.

The second offence, stalking, is not a scheduled offence but for completeness I will refer to the circumstances.

On 18th February 2009 at 1:30 p.m. the 22 year old complainant observed the respondent stopped on the footpath on his bicycle staring at her. She walked to the

¹ The Statement of Intellectual Disability refers to significant sub average general intellectual functioning and significant deficits in adaptive behaviour

² Neither found the respondent’s intellectual functioning was compromised. Ms LB found that MA’s presentation was “consistent” with that of a young man with limited education from a culturally and linguistically different background rather than that of a significantly cognitively impaired individual.” [12]

shops and he rode 5 to 6 m behind her. She went into the supermarket and he followed her. She bumped into someone, who was the respondent. She went to the register and he walked behind her and passed the register. He left without purchasing any items.

She was concerned by his presence and asked a female staff member to look outside the store to see if the respondent was there. She confirmed he was outside. A male staff member then escorted her to her nearby workplace. She observed the respondent staring at her whilst he was at the bicycle racks. She walked approximately 400 m to her workplace and the respondent followed her from a distance of around 100 m and kept pace with her.

The third charge was in relation to an incident which occurred on 27th February 2009 at 12:30 p.m. The 18 year old complainant was at the shops and observed the respondent at a bicycle rack watching her. After purchasing her goods, she walked along a path through the wetlands. The respondent followed her on his bicycle, rode past her and blocked her path. He asked her for a kiss and she said "No." She turned to walk back in the direction from which she had come and the respondent said he was only joking and moved his bicycle out of the way.

As she tried to walk past, he grabbed her arms, punched her chest and then pulled down the complainant's tracksuit pants and also her underwear. He inserted a finger into her vagina. She yelled at the respondent to leave her alone and said "No." She was able to break free and ran away. The respondent rode away in a different direction.

The respondent was arrested on 11 March 2009. When interviewed, he denied committing any of the offences. Bail was refused and he was remanded in custody and remained in custody until he was sentenced.

He pleaded guilty to the offences on 3 July 2009. He has no prior criminal history. He was further remanded for reports to be prepared including an assessment of him in relation to his eligibility for disability services and for an organisation to be identified to provide appropriate counselling and treatment for him, taking into account the nature of his offending, his language difficulties, background and possible disability. There were a number of organisations which indicated they could not provide counselling services for him, to which I shall refer shortly.

On 4 August 2009 I sentenced the respondent to nine months detention in a youth justice centre in relation to the offence of rape. He had served 155 days of pre-sentence detention.

In relation to the remaining charges, he was sentenced to a 12 month Youth Supervision Order. The special condition of the Youth Supervision Order was that the respondent attend and participate in counselling which relates to sexual offending but also addresses the matters in the DFAT Disability Services Report. Pursuant to s. 413(5) Children Youth and Families Act 2005 it was recommended that counselling commence as soon as possible.

The application before the Court is pursuant to section 11 Sex Offenders Registration Act 2004. The respondent has been found guilty of a registrable offence, being assault with intent to rape where the victim was a child (class 2 offence).

In addition, he has been found guilty of rape where the victim was an adult (class 3 offence).

Section 8(3) provides that a person is a serious sexual offender if s/he has been sentenced for two or more offences listed in a Schedule to the Act.

Section 34(4) provides that a person subject to a sex offender registration order is deemed if found guilty of a class three offence to have been found guilty of a class one offence. The phrase “a person subject to a sex offender registration order” has been considered by the Court of Appeal in *R v Mark James Cheetham*.³ It therefore seems that this section would apply to the respondent.

Section 34(1)(c)(ii) provides the reporting period for a person found guilty of a class one and class two offence to be for the remainder of his/her life. However, pursuant to section 35(1) the reporting periods in section 34 do not apply to a person who was a child at the time the registrable offence was committed. The prosecution and defence agreed that the relevant reporting period for the respondent in the event the application is granted is 7½ years.

Pursuant to section 11(2) it is not mandatory for the Court to make a sex offender registration order where the class one or class two offence was committed by a child. “Child” is defined in section 3 as “any person who is under the age of 18 years.” The respondent was 17 at the time of the commission of the offences.

Reports were prepared for the Court prior to sentencing from: --

- Ms LB – Clinical and Forensic Psychologist, Disability Forensic Assessment and Treatment Service, Disability Services 24/07/2009
- Mr MS – Advanced Case Manager, Disability Client Services, overview reports 12/06/2009 and 30/07/2009 and plan of services 30/07/2009
- Mr NA – Senior Case Manager, Youth Justice pre sentence report 04/08/2009
- Dr SM – Psychologist, Children’s Court Clinic assessment 23/04/09.⁴

The Court may only make a sex offender registration order if after taking into account any matter it considers appropriate, it is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons or of the community (section 11(3)). It is not necessary for the Court to be able to identify a risk to particular people, or a particular class of people (section 11(4)).

The burden of proof rests upon the Prosecution.

In *RJE v The Secretary to the Department of Justice , Attorney General for the State of Victoria and Victorian Human Rights and Equal Opportunity Commission*⁵ the Court of Appeal considered the *Serious Sex Offenders Monitoring Act 2005* (Vic).

³ [2006] VSCA 126

⁴ The Report was prepared prior to the charges having been proved. I have not in these circumstances relied upon the Report save for a reference to the respondent’s experience in custody.

⁵ [2008] VSCA 265

However, Maxwell P and Weinberg JA stated

“Predicting whether a particular person will commit a criminal offence in the future is notoriously difficult the making of such a prediction in a particular case requires expertise in observation and assessment of those who commit offences of a particular type, and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending.”⁶

Ms LB is a forensic and clinical psychologist. She has practised as a psychologist since 1996. She has specialised in the assessment and treatment of male offenders convicted of sexual and violent offences. Prior to being appointed to her current position, Manager, Clinical Services Disability Forensic Assessment and Treatment Service in September 2007, she was the Regional Co-Ordinator and Acting Manager for the Sexual Offending Programs Unit, Queensland Corrective Services. Appendix “A” to her report provides further details of her experience.

Ms LB prepared an assessment of service level report dated 24 July 2009 in which she conducted a sexual recidivism risk assessment of the respondent. In addition she gave evidence before the Court in relation to this application.

In order to assess the risk of sexual recidivism, Ms LB administered the Juvenile Sex Offender Assessment Protocol-II. The sub scales reflect both the static/historical factors to risk and the dynamic/changeable factors.

Ms LB took into account the respondent’s “atypical ethnic profile” and considered the test was valid as it includes a cross-cultural robustness of the risk factors. I am satisfied she possesses the requisite expertise in observation and assessment of those males who commit sexual offences as referred to by Maxwell P and Weinberg JA.

Ms LB's assessment was based on the presence of static (historical) and dynamic (changeable) factors. In relation to the static factors the respondent was assessed as fully meeting the criteria for the presence of moderate to high levels of sexualised aggression in his offending.

He partially met the criteria in relation to –

- two victims with whom he had contact;
- multiple offences within a brief period of time;
- a mild degree of planning evident;
- one or two changes in caregivers before he was 10.⁷

In relation to the dynamic factors, the respondent met the criteria for six dynamic items –

⁶ Paragraph 16

⁷ There are discrepancies in the Reports as to when the respondent’s parents died (for example, Page 7 Ms LB’s Report, page 5 Dr SM’s Report, page 2 Disability Services Overview Report) which could be explained by the English language difficulties and interpreting issues..

- poor responsibility taking, deflecting blame, denial and minimising of his offending;
- no internal motivation to change due to his high levels of denial and expressed unwillingness to engage in offence specific treatment;
- poor understanding of his risk factors and risk management strategies in that he is unwilling or unable to identify the triggers to his offending nor does he have insight into the attitudes that have underpinned his offending;
- little or no empathy for his victims, blaming his victims and maintaining a strong victim stance himself;
- little or no evidence of remorse for the victims and focus on the negative consequences for himself;
- evidence of attitudes justifying his offending, including blaming others and adopting a victim stance himself.

There was also partial evidence for –

- few friends and apparent limited social activity or quality relationships with peers.

In relation to the static risk factors, the respondent scored 7 out of a possible 32 which represents a relatively low risk factor. However, in relation to the dynamic risk factors, the respondent scored 13 out of a possible 14.

The factors identified by Ms LB are consistent with the observations made by Mr NA in the pre-sentence report.

Ms LB assessed the respondent as follows :

“The current structured clinical risk assessment indicates that MA represents a low to moderate risk of coercive sexual assault to young adult females, both known to him and stranger victims; primarily those from a westernised cultural background.”⁸

In addition, she stated –

“The low-level presence of factors falling in the static risk domain suggest that there is little evidence of MA being a risk of general criminality or antisocial, delinquent behaviour nor is there evidence that he manifests an entrenched pattern of sexually deviant behaviour or high levels of sexual preoccupation. These features are consistent with a low long-term risk of sexual and general criminal recidivism. However, strong evidence for factors in the dynamic domain indicates that MA is currently presenting with high treatment or intervention needs which elevate his risk over the short to medium term.”⁹

On 6 October 2009 Ms LB gave evidence before the Court. Ms LB described the test administered as a “fairly new test” and consequently there have not been sufficient sample sizes to determine the normative cut-offs.

⁸ Paragraph 30

⁹ Paragraph 38

In relation to the adult population --

- low risk is assessed at less than 10% likelihood of recidivism over five to 10 years;
- moderate to medium risk is assessed at 20 to 30% range;
- high risk is assessed at 50 to 55% range but in relation to recidivism rates for sexual offending generally the less conservative percentage of 40% + is the range.

Ms LB's evidence was that whilst acknowledging there is a risk of sexual recidivism in relation to the respondent, she has an optimistic view that the respondent's prognosis is fairly good. She does not think that he is keen to repeat the impugned behaviour again. The reasons for her optimism were that it was one brief episode of offending, representing an atypical event in his life rather than a trend of offending especially as he was apprehended quickly and suffered severe consequences for that. He has no other antisocial criminal behaviour and therefore it was not part of a pattern of general criminal activity.

She maintained her assessment of him as being at risk of sexual recidivism but she was unable to quantify the level of risk.

The dynamic factors are the changeable factors and the factors to be targeted in order for treatment and rehabilitation. The respondent's level of risk very much depends upon his actions from now on, for example, whether he engages in counselling and treatment.

Since being sentenced on 4 August 2009, whilst in custody the respondent engaged on three separate occasions¹⁰ with a psychologist, Mr PS, a professional whom Ms LB considered, having regard to the respondent's special requirements, to be eminently qualified to counsel the respondent. It is of significance that Mr PS has been located and is in a position to provide counselling for the respondent as a number of agencies indicated to Mr MS, that the respondent was not suitable for their programs.¹¹

Mr PS provided a report to the Court. In relation to the respondent's risk of reoffending he stated –

"I am not in a position to comment on MA's risk of reoffending having only approached my work with him from a therapeutic perspective, although having read Ms LB's report which made reference to a number of factors including situation, social isolation and culture, I would tend to agree that these factors would impact on MA's behaviour in the future.

I am concerned about MA's evasiveness at times but there could be many reasons for this, most notably language and cultural differences. Because of

¹⁰ 8, 16 and 23 September 2009,

¹¹ Refer to Disability Plan of Services Report page 2. These services include Disability Forensic Assessment and Treatment Service, AWARE Program managed by the South East Centre Against Sexual Assault, Male Adolescent Program for Positive Sexuality (MAPPS)

these factors and my limited involvement with MA, it is very difficult to form an opinion either way with regard to risk of reoffending.”

Mr PS is of the opinion that the respondent requires further counselling.

When the respondent was assessed by Ms LB she stated that --

“MA indicated that he did not want to undertake treatment for his sexual offending; he did not believe he needed to as he was adamant that he would never try to touch girls again or do anything similar again. He was more open and receptive to proposals of interventions that were generally educative and culturally supportive in nature.”¹²

She referred to his “limited motivation” in relation to treatment.¹³

Mr NA, the respondent’s Youth Justice worker advised that since being sentenced he has observed a shift in MA’s attitude and that MA says he now understands the importance of counselling, understands the gravity of his offending and he has agreed to fully cooperate.

Whilst these matters are noted, the following is contained in Mr PS’s report and is in my view a concern –

“I am of the opinion that MA will require further counselling. My practice is located in (location removed) and MA will be living in the (location removed) region. He is also intending to return to work and he has indicated he will be working long hours. The distance to my office and MA’s work commitments may make it quite difficult for him to continue attending. Discussions to date with MA on the subject of continued counselling indicate that these issues will be barriers to treatment.”

The Prosecution relied upon Ms LB’s report and her evidence and submitted that the Court should be satisfied that the respondent poses a risk to the sexual safety of one or more persons or of the community and grant the application.

Mr Sharkey who appeared on behalf of the respondent relied upon the following matters. He conceded that whilst Ms LB had assessed as “low to moderate” the respondent’s risk of reoffending, he urged the Court to exercise its discretion and dismiss the application for the following reasons : --

- the respondent has no prior criminal history not only in relation to sexual offending, but any offending;
- the dynamic factors are the factors which are within the respondent’s control and which, as there is every indication he is prepared to work on these factors, the risk is reduced;
- the respondent has been significantly deterred given the length of time he has spent in custody and his experience in custody. It is noted that the

¹² Paragraph 40

¹³ Paragraph 40

respondent's time in custody has been very difficult and included being targeted, bullied and assaulted by other youths. The Governor advised Dr SM that the respondent was "...doing very badly in detention. She said he had been mercilessly bullied and that he is not coping very well..."¹⁴

- whilst issues have been raised in relation to his intellectual capacity, he has been assessed as eligible to receive the support of disability services and his whereabouts are registered;
- he is unlikely to seek work with children as historically he has engaged in the building industry;
- the purpose of the Act is to reduce the likelihood of reoffending and there are safeguards in place by virtue of: --
 - Parole / Youth Supervision Order and a special condition which requires the respondent to engage in appropriate sex offending and general counselling; for which breach proceedings can be instituted in the event of non-compliance;
 - the Court has granted the application pursuant to s.464ZFB Crimes Act 1958.(retention of buccal swab)
 - he will be supervised over the next 12 months by his parole / Youth Justice officer;
- he has demonstrated a greater capacity to accept responsibility for his actions;
- he has committed to engaging in counselling;
- it is the exception to the rule for a child to be placed on the register. It would be stigmatising for the respondent;
- the respondent is a refugee, with limited education and limited English and it would constitute an additional disadvantage to him to be placed on the register.

I note Ms LB also included in her report: --

- despite the respondent's denials he said he was sorry and on a number of occasions repeated he would "not do it again," that he would never touch or go near girls again and if he did do anything like this again, the police could lock him up "forever;"¹⁵
- he appeared ashamed about the effect his offending has had on his family.¹⁶

In addition, Mr Sharkey relied upon the following matters confirmed by Mr NA, the respondent's Youth Justice worker :-

- since the respondent's release from custody on 28 September 2009, as at 6 October 2009 he had attended to the two scheduled appointments on time. He is currently required to attend twice per week which depending upon compliance will reduce overtime;
- he has returned to live with his brother's family;

¹⁴ Page 7 Dr SM's Report

¹⁵ Page 6 Paragraph 23

¹⁶ Page 9 Paragraph 37

- he is being closely supervised by his brother and is not permitted to go out by himself;
- he is due to commence work next week with a relative who is aware of the offending and he will supervise the respondent at work.

Ms LB noted that a number of factors including his return to a stable family home, employment, the level of supervision and degree of co operation were all positive factors.

Section 11(3) Sex Offenders Registration Act provides that

“The Court may only make an order under this section if, after taking into account any matter that it considers appropriate, it is satisfied, beyond reasonable doubt, that the person poses a risk to the sexual safety of one or more persons or of the community.

In the Court of Appeal decision of *RJE* which has previously been cited¹⁷ Maxwell P and Weinberg JA referred¹⁸ to Denning J in *Miller v Minister of Pensions*¹⁹ in relation to the criminal standard of beyond reasonable doubt: --

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt must not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.”²⁰

Neither the Prosecutor nor Mr Sharkey were aware of any authorities which have considered the application of the Act in relation to child respondents. During the Second Reading Speech, reference was made to the principles behind not providing for mandatory reporting obligations where the respondent is a child.

I have given consideration as to whether, if I am satisfied to the requisite standard, there is nevertheless a residual discretion vested in the Court not to grant the application. It is not necessary to finally determine this issue in this application as in my view even allowing for an overriding residual discretion, the outcome of this application is the same.

I have read the Second Reading Speech and in relation to child respondents, who are referred to as juvenile sex offenders, the following statements were made: --

“The government recognizes however that the interests of justice are such as to require the application of a differential response to juvenile sex offenders, particularly given research which suggests juvenile sex offenders are

¹⁷ Refer to footnote 4

¹⁸ Page 9 Paragraph 24

¹⁹ [1947] 2 All ER 372,

²⁰ Pages 373-374

generally more receptive to treatment and have lower rates of recidivism than adult offenders.

In these circumstances, the bill provides for a reduced reporting period for juvenile sex offenders which is to be half that of adult sex offenders or 7½ years for what would otherwise be life.”²¹

“The bill contains special consideration for young offenders where the reporting period is half that of an adult, and the court has a discretion as to whether they report at all. It is important to have this consideration for youthful offenders because they have the opportunity to change their lives and not reoffend.”²²

“In recognizing the need for a differential response to young offenders, the bill not only provides for a reduced reporting period to be half that of adult sex offenders, or 7½ years, for what would otherwise be life but also empowers the courts to exercise a discretion as to whether to require first-time juvenile sex offenders to register.”²³

“Unlike adult offenders, juvenile child sex offenders are only required to report to the sex offender register at the court’s discretion.”²⁴

My view is that there is a residual discretion but as I have said I do not consider it is necessary to finally determine this issue.

The word “risk” in section 11(3) is not quantified or qualified by such words as likely, probable or significant.

The Prosecutor initially submitted that if the Court was satisfied to the requisite standard, the application should be granted if the prosecution could establish any risk. Upon further submissions being made, the Prosecutor referred to a real or substantial risk.

In my view for the following reasons, the word “risk” means a real or appreciable risk: --

1. It is not mandatory for young offenders to be registered. Accordingly, in order to give effect to and not undermine the exercise of a discretion, it must be more than a statistical risk which necessarily arises upon a person having been found guilty of a registrable offence.
2. Such an interpretation would be consistent with the acknowledgement by Parliament of the rehabilitative prospects of young offenders.

Having considered all of the evidence and the submissions made, I am satisfied beyond reasonable doubt that the respondent poses a risk, a real risk, to the sexual safety of the community.

²¹ The Honourable Mr Haermeyer 03/06/2004 page 1852

²² The Honourable Mr Lockwood 25/08/2004 page 146

²³ The Honourable Ms Green 25/08/2004 page 149

²⁴ Mr Kotsiras MP 25/08/2004 page 139

I have had regard to the risk assessment of Ms LB and to the matters to which I have made reference. Whilst Ms LB expressed optimism in relation to the respondent's future and I accept that there are some cautious positive signs, for example, the respondent's preparedness to now accept responsibility for the commission of the offences and to engage in counselling, she maintained her risk assessment. I have considered all of the matters raised on the respondent's behalf but in my view even accepting that there is a residual discretion, it is not appropriate to exercise it in this matter.

Having regard to the seriousness of the offences, the escalation in the violence associated with the registrable offences, the inability to identify triggers for the respondent's offending, the significant dynamic factors, the relatively short period of time that he will be subject to supervision by Youth Justice in the community, his relative social isolation from peers and that whilst he was assessed as a low risk in relation to the stable factors, those factors were present when he committed the registrable offences; I am satisfied that the application should be granted. The respondent is required to be subject to the reporting requirements of the Act for a period of 7½ years. Pursuant to section 12 of the Act he is required to report within 28 days of having ceased being in custody; that is no later than 26 October 2009.

Jennifer Bowles
Magistrate
12 October 2009