RDP v Westphal [2010] NTSC 50

PARTIES:	RDP
	v
	LINDSAY WESTPHAL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 8 of 2010 (20928928)
DELIVERED:	22 October 2010
HEARING DATES:	19, 20 and 21 October 2010
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	BORCHERS SM

CATCHWORDS:

CRIMINAL CODE – Appeal against conviction – whether findings of fact were supported by the evidence – interpretation of s 27 of the *Criminal Code*

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	M McColm

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

RDP v Westphal [2010] NTSC 50
No. JA 8 of 2010 (20928928)

BETWEEN:

RDP
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 22 October 2010)

[1] This is an appeal against conviction. On 1 April 2010 the appellant was found guilty of the aggravated unlawful assault of his 11-year-old son MJP. On 14 April 2010 he was convicted of the offence and a good behaviour bond was imposed. In the event that the appeal against conviction is dismissed there is no challenge to the sentence.

[2] The appellant was charged with offences of aggravated assault in relation to MJP and his nine-year-old brother DP. Each assault was said to involve circumstances of aggravation, namely: that each child suffered harm, each child was under the age of 16 years and the appellant was an adult, and each child was threatened with an offensive weapon namely a stick. The assaults

were alleged to have taken place on 23 August 2009 when the appellant and the mother of the children were both angry because the children had not come straight home when told and had been stealing from local shops. The learned Magistrate dismissed the charge in relation to DP, not being satisfied as to the evidence of the child.

[3] In convicting the appellant in relation to the assault upon the child MJP the Magistrate relied upon "clear admissions made by the Defendant in his record of interview that he assaulted (MJP) by hitting him with a stick on his "lower back"". His Honour went on to observe that the prosecution case was that the appellant not only struck the child on his back, but also held him in such a manner that caused significant bruising to his left arm and scratched his face. In reaching his conclusions his Honour said:

> 43 (MJP's) evidence was that in his bedroom his father punched him in the head, hit him with a stick to his back and bottom, threw him onto his bed and kicked him in the leg and ribs. His father also grabbed him in the rib area and squeezed him "really hard". The Defendant denies all aspects of this assault except for hitting his son with a stick on his back and that this did not take place in (MJP's) bedroom but rather in the hallway. There is corroborative evidence of (MJP's) evidence in the form of photographs of bruising to (his) back and rib area and the medical opinion of Dr Zimmet. In addition (DP) heard his brother being assaulted.
>
> 44 The photographs taken by Dr Zimmett of the bruises on (MJP's) body clearly show that he was struck more than once between the shoulder blades. As the Defendant admits to striking (MJP) on the lower back with a stick, I am satisfied that those bruises are a result of that assault. I am also satisfied that as the bruises are as described by Dr Zimmett, parallel marks of fifteen centimetres in length horizontally across (MJP's) back, (MJP) was struck more than once in this area. Accordingly I do not accept the Defendant's version in respect of this assault and I prefer (MJP's) version. It follows that I

> accept the assault took place in (MJP's) bedroom, as heard by (DP). I also accept (MJP's) evidence that he was grabbed around his upper torso in such a manner that he suffered bruising under his left arm which left him in pain, thrown onto the bed, and generally roughly dealt with. I am not satisfied beyond reasonable doubt that he was punched to the head or kicked as the evidence is not clear on these matters and they fall under the general description of being "roughly handled".

Grounds 1 and 2: findings not supported by the evidence

[4] The first two grounds of appeal assert that the findings of the learned Magistrate were not supported by the evidence. Ground 1 complained that the finding that MJP was struck more than once between the shoulder blades by the appellant was not supported by the evidence. Ground 2 complained that the acceptance by his Honour of the version given by MJP of the assault in preference to the version given by the appellant was not supported by the evidence.

[5] It was submitted on behalf of the appellant that the finding that the photographs "clearly show that he was struck more than once between the shoulder blades" is not supported by the evidence. The appellant argued that the evidence of the child "appeared to say" that he was hit only once with a stick between the shoulder blades. The expert witness, Dr Zimmett, declined to express an opinion that the relevant marks were caused by more than one blow. In fact the doctor gave evidence that it "would be hard to say" whether there was more than one blow struck with a stick. He said:

> ... it would be hard to say the number of times. All I could say is that the injury would fit in with an injury consistent with an

> implement being the cause of the injury and would raise suspicions about non-accidental injury.

[6] The photographic evidence shows parallel marks or "tram tracks" which appear to be a similar distance apart as the distance between the edges of the stick. It was submitted that it is inherently unlikely that in all the circumstances two blows were delivered to the child which were both precisely parallel and this particular distance apart. There is force in this submission.

[7] There was no evidence from the appellant on the topic. A review of the evidence of the child reveals that, whilst he initially told police that he was struck "four or five times by the stick", he later modified that claim. In his later evidence he talked of being hit with the stick in a manner that suggested it was only on the one occasion. He was then asked how many times he was hit with the stick and he responded "twice ... once on the top and once down the bottom".

[8] Having reviewed the evidence of the child, and of the doctor, and having considered the photographs, I accept the submission made on behalf of the appellant that the finding that MJP was struck more than once between the shoulder blades was not supported by the evidence. Counsel for the respondent did not seek to contend otherwise.

[9] In my opinion, contrary to the submission of the appellant, the finding of his Honour that he preferred the evidence of MJP and rejected that of the

appellant, was not based "entirely" on the conclusion that two blows were struck between the shoulder blades of the child. However, this conclusion was significant in reaching the finding and the finding therefore rests upon an unsatisfactory base.

[10] In all the circumstances, the appeal on these grounds must be allowed.

Ground 3: the learned Magistrate erred by applying "an objective reasonable test" in considering whether the force used was "unnecessary force" as defined in s 1 of the *Criminal Code (NT)*.

Ground 4: the learned Magistrate erred in finding that at the relevant time the appellant knew it was unnecessary and disproportionate to the occasion to apply the force which he did to MJP.

[11] In the proceedings before the Court of Summary Jurisdiction the appellant relied upon, *inter alia*, s 27(p) of the *Criminal Code*. The section is in the following terms:

> 27. In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm:
>
> ……
>
> (p) in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child;

[12] The appellant argued before his Honour that the force applied was justified on the basis that it was not unnecessary force and was not such as was likely to cause death or serious harm. The application of force occurred in

circumstances where he was the parent of the child and the force was used to discipline, manage or control the child. His Honour found that the appellant intended to discipline MJP but his conduct went beyond disciplining the child and, in effect, that he used unnecessary force. The only live issue in relation to this submission was whether the Crown had established that the force used by the appellant was unnecessary force.

[13] The expression "unnecessary force" is defined in s 1 of the *Criminal Code* to mean:

> "... force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion."

[14] In order to establish that the application of force was not justified in the present case it was incumbent upon the Crown to establish that:

(a) the user of such force (the appellant) knew at the time of applying the force that the force was unnecessary for and disproportionate to the occasion - a subjective test focused upon the knowledge of the user of the force at the time of the alleged offending, or

(b) an ordinary person, similarly circumstanced to the person using such force (the appellant), would regard the force as unnecessary for and disproportionate to the occasion - a more objective test.

[15] It is readily apparent that his Honour had regard to the submissions made on behalf of the appellant in relation to s 27 and s 1 of the *Criminal Code*. In his reasons for decision he addressed an argument directed to the first, subjective, part of the definition of "unnecessary force". He then went on to address the balance of the definition and, in so doing, observed that, by way of contrast, the "definition of unnecessary force also contains an objective test". By reference to the standard of "an ordinary person, similarly circumstanced to the person using such force" the *Criminal Code* does adopt an objective test.

[16] His Honour referred to various authorities in other jurisdictions in which there was discussion of the right to inflict reasonable and moderate punishment on a child.[1] The legislative provisions in those jurisdictions differed from those contained in the *Criminal Code (NT)*. His Honour observed that these cases provided authority for the proposition that it will be a matter of fact based upon the circumstance of each individual case of this kind as to whether the application of physical force is justified, "subject to an objective reasonable test".

[17] Unfortunately the learned Magistrate did not, at any time, return to address the issues raised by s 27 and s 1 of the *Criminal Code*.

[18] In relation to the first part of the definition his Honour did not consider whether the appellant knew, at the time of applying the force, that the force

[1] He referred to *Lumb v Police* [2008] SASC 198; *R v Terry* [1955] VLR 114; *Griffin* (1997) 94 A Crim R 26.

was unnecessary for and disproportionate to the occasion. His Honour referred to the evidence of the appellant and concluded, correctly, that "within an hour of the incidents the Defendant was of the opinion he had acted inappropriately". His Honour also determined that the appellant acted out of anger. Although the surrounding circumstances discussed by his Honour may have informed the decision as to the knowledge of the appellant at the time of the application of the force, there was no discussion and no finding as to what the appellant knew at that time. In particular there was no consideration of whether the appellant knew, at the time of applying force to his son, that the force was unnecessary for and disproportionate to the occasion.

[19] In relation to the second part of the definition of unnecessary force the learned Magistrate did not identify the characteristics of an ordinary person similarly circumstanced to the appellant and he did not address whether such a person would regard the force used by the appellant as unnecessary for and disproportionate to the occasion. Rather, his Honour restricted himself to a consideration of whether the punishment was reasonable and moderate as discussed in the authorities to which he referred.

[20] There was a need to address these issues which were clearly raised in the proceedings and for his Honour to determine in the context of the relevant provisions of the *Criminal Code* whether the Crown had proved beyond reasonable doubt that unnecessary force had been used in all the

circumstances. In failing to address the issues error occurred and the appeal on these grounds is allowed.

[21] In the circumstances the conviction must be set aside.

[22] It was submitted on behalf of the appellant that, in the event of a successful appeal, a verdict of acquittal should be recorded rather than a rehearing directed. I have considered the matters put on behalf of the appellant and have concluded that it is appropriate to order a rehearing. It will be a matter for the prosecuting authorities whether or not to proceed.
