CITATION: *Police v Jimarin* [2007] NTMC 046

PARTIES:	IAN EDWARD KENNON
	v
	DOUG JIMARIN
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Daly River
FILE NO(s):	20530053
DELIVERED ON:	12 October 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	12 July 2007
JUDGMENT OF:	Ms Little SM

CATCHWORDS:

Aggravated Assault – Parent and Child – Whether section 27(p) of the Criminal Code justified actions

REPRESENTATION:

Counsel:

Plaintiff:	Sgt Murphy
Defendant:	Mr D Cash

Solicitors:

Plaintiff:	Summary Prosecutions
Defendant:	NAAJA

Judgment category classification:	
Judgment ID number:	[2007] NTMC 046
Number of paragraphs:	33

IN THE COURT OF SUMMARY JURISDICTION
AT DALY RIVER IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20530053

[2007] NTMC 046

BETWEEN:

IAN EDWARD KENNON
Informant

AND:

DOUG JIMARIN
Defendant

REASONS FOR DECISION

(Delivered 12 October 2007)

MS LITTLE SM:

1. The defendant is charged that on 19 August 2005 at Daly River he unlawfully assaulted Jake Jimarin and that the unlawful assault has the following circumstance of aggravation namely that the said Jake Jimarin was under the age of sixteen years namely four and that the said Doug Jimarin was an adult. This offence is pursuant to section 188(2)(c) of the *Criminal Code*. The Criminal Code in force as at that time is applicable in this hearing. The defendant pleaded not guilty and a hearing was conducted in Daly River on 12 July 2007. I reserved decision in this matter and this is now the decision. Prosecution bears the onus of proving each and every element of the offence and if any matters are raised by way of justification, authorisation or excuse prosecution must negative those matters. The burden of proof is beyond reasonable doubt. All evidence is taken into account. I will now summarise the evidence.

2. The first witness called was Bianca Warloo. She identified the defendant as her husband at all relevant times. They have two children namely Nathan

who in 2005 was three or four months old and Jake who in 2005 was three or four years old. On that day there were a number of people at their house including Cathy, Aaron, Karen and Delfius. The children were also at home and they were playing in the kitchen. The witness was sitting next to the baby. Jake was humbugging Nathan - climbing on top of him. The witness told Jake to leave Nathan alone a couple of times but Jake did not listen. She could not remember what happened next. Doug was outside and she did not know what he was doing. Doug came into the house and slapped Nathan. The witness then said that she was mistaken and that Doug had slapped Jake. This had been done because Jake had been humbugging Nathan. Jake had gone to the clinic afterwards because he was bleeding from the ear. She did not see Doug slap Jake - she had been told about it later. She heard the noise when Doug slapped Jake. Her sister Karen told her that Doug had hit Jake. She had been telling Jake not to humbug Nathan. Karen had told Doug to come and hit Jake. Doug came in and the witness heard a slap to Jake. Jake was bleeding from the ear after she heard the slap. Jake was crying and she took him to a room. She saw a little bit of blood. She told Doug to take Jake to the clinic. She heard a slap then she heard Jake crying. Nothing else was said to Doug.

3. In cross-examination she agreed it was a long time ago and her memory was no good. She agreed that Jake had been to the doctors that year. She did recall he had a cough and running nose but could not recall if he had a throat infection that year. During that period he had no other problems with his ears prior to this incident. She had made a statutory declaration to the police but she did not really understand what was in it and it had not been read to her. Jake had been humbugging Nathan in the kitchen. She did not recall where she was when she heard the slap. Jake was on the mattress. Jake was four years old and Nathan was three or four months old. She cannot explain how Jake was humbugging Nathan. Doug took Jake to the clinic. She did not know if Doug had hit Jake. It was put to her that she had

hit Jake that day and she denied that. She did not remember if anyone else had hit Jake that day. There was no re-examination.

4. The witness Bianca Warloo was extremely nervous and my assessment of her was that she was bordering on being terrified in the witness box. There is no doubt that the giving of evidence is a stressful task. Nevertheless I formed the view that this witness was extremely fearful and that this was not solely related to the giving of her evidence. Her claim that she could not recall certain matters was not convincing. I formed the view that at times she was seeking to protect the defendant. That may have been as a consequence of her relationship with the defendant or as a consequence of her perception of competing obligations. While I did not form the view that her evidence should be rejected in its entirety, care will be taken when considering her evidence.

5. The next witness was Karen Warloo also from Daly River. She knows the defendant Doug Jimarin as he is her brother in law. She also knows Jake and Nathan. On 19 August 2005 she was at the defendant's house. Other people there were Delfius, Cathy and her mother Maureen. Doug was outside fixing a vehicle. She was inside, as was Jake and Nathan. She could not recall what Jake was doing. She has no idea how old Jake was at the time and Nathan was a baby. Jake was walking at the time. Doug came inside and whacked Jake in the ears once. Doug moved his hand down and Doug was standing up and Jake was sitting down. He hit Jake sideways to the ear. Doug was standing still when he hit Jake. His hand was open and he hit Jake to the ear. She could not recall if anything was said. She had no idea why Doug hit Jake. Jake was crying after he was hit. Jake was still sitting when he was crying. Doug walked out of the house and did not say anything. She did not know why Doug had hit Jake. Jake was bleeding on the side, inside his ear. Her sister had told her that Jake was bleeding, she did not see the bleeding.

6. She was then cross-examined. She was asked “are you sure you saw Doug hit Jake” and she replied “yes”. This was in the kitchen - lounge area. She was inside that room. She agreed it was a long time ago. She agreed she had a vague memory of the situation. It was put to her she could not be sure there was a slap and she said “yes I am really sure”. Nathan was in the kitchen area and he could not walk. He was still a little one. He was on a bed and she saw Jake get on the bed. She could not recall what Jake did on the bed. She could not remember if Jake said anything. Nathan was crying when Jake was on the bed. She had not seen anything as to why Nathan was crying. Delfius, Cathy and Maureen were also in the room. They were talking. She could not remember if Bianca had got angry with Jake. The witness conducted a re-enactment in Court to demonstrate the hit that she witnessed. The hit could be described as a medium strength hit in a sideways direction with an open palm. Doug was standing up when this occurred. She agreed that Jake was hurting Nathan. She agreed that Jake was on top of Nathan and that she was worried about Nathan. She was worried that Jake may hurt Nathan. I found Karen Warloo to be an impressive witness who considered her answers and gave thoughtful responses to questions asked. At times she readily concurred with propositions put to her, but when a question was framed in a way which allowed her to answer in her own words she was a credible witness. I accept her account as a reliable account of what occurred on the day in question.

7. The next witness was Cathy Warloo who also lives in Daly River. She is a sister in law to the defendant. On 19 August 2005 she was at the defendant’s house. Her father, Bianca, Karen and Jake and Nathan were there. She remembers Doug coming into the house but ‘does not know much about that part’ to use her words. She did not see anything. She did not see any interaction between Doug and Jake. She could recall Doug coming into the house but did not know why he came in. She could not recall Nathan crying. She could not recall Jake jumping on Nathan.

8. That was the end of the prosecution case and then defence sought to put some further matters to the witness Karen Warloo. She was recalled with the leave of the Court.

9. It was put to Karen that she called out to Doug for him to come into the house because of what Jake was doing to Nathan. She denied this. She could not recall if Bianca had called out to Doug. She said that Jake was on the bed when Bianca had called out. That was the end of the prosecution case and I found there was a case to answer.

10. The defendant then gave evidence. He lives in Daly River and his wife is Bianca. Jake Jimarin is his son. He recalls that on 19 August 2005 he was in the backyard fixing his car. There were a few people inside including Karen, Bianca, Cathy, Nathan and Jake. He heard Karen call out. Karen called out "Dougie, Jake is lying on top of Nathan, can you do something". He answered that he could not do anything - that he had dirty hands. He suggested that Karen should do something. He then walked up and had to get Jake off Nathan. Jake was on top of Nathan, lying on top of him. It did not seem right the big brother on top. He thought he might kill him. He gave Jake a soft slap to the ear and then Jake got up and went to his mother. He had heard his wife growling at Jake. He heard Karen telling him to give Jake a hiding. He said he did not want to do that. Karen said to him to give Jake a slap. He told Jake not to do that again. The child then went to his mother's lap. The child walked off after he had hit the child. The witness then gave a demonstration of what happened. He told Jake to get off, he picked Jake up and stood him up. He then gave him a slap. He demonstrated the slap as being a relatively light slap. His wife had told him that the child had blood to the ear. He took the child to the clinic. He thought the child had a scratch as they had been mucking around with sticks and grass. He took him to the clinic and told them that he had a scratch to the ear. When asked why he hit the child Jake he said the child was on top of his little brother and the little brother was only a baby, three or four

months old. The baby Nathan was crying softly. Nathan was in the kitchen lying on a mattress. The child had dried blood in his ear - not much blood. He pointed to the bottom of the right ear area. There was no-one else in the room when he slapped the child. The other people had walked out in the middle of it.

11. He was then cross-examined. He heard Bianca growling at Jake. She had been saying to him to get off Nathan. He did not listen. Three times she had done that. Karen then called out to say give him a hiding, she called out after Bianca had been talking. She said words like "you give him a hiding, slap him in the ears". He agreed he was cranky with Karen. He agreed they were not doing their job and that he was cranky at Jake. It was put to him that he had not said anything to the child. He agreed he had taken Jake off Nathan, he agreed that he then hit the child. He denied that he had hit the child harder than he should have. He said he did not know if he had caused the child to bleed. He said the kids had been mucking around with sticks. He thought maybe the child had a scratch to the ear and maybe that scratch had opened up. He said that he had seen a scratch in the child's ear hole. He agreed that he had told the clinic that it was Bianca who had hit the child. He said that probably could have happened before he had hit the child. That could have happened when he was outside.

12. In re-examination he said he had first seen the cut in the ear when he had seen the child and his friend mucking around sticking grass in their ears on the same day. This was before he had gone into the kitchen. He said there were five or six kids at the house playing outside. That was the close of the defence case. Submissions were then made. Counsel later forwarded the names of relevant cases to the court.

13. I make the following findings of fact. I find that on 19 August 2005 the defendant applied force directly to Jake Jimarin. That force was a strike to the head with an open hand, connecting with the head and the left ear area.

The child was then aged between 3 to 4 years, and for the purposes of this decision I find that the child was 4 years of age. There was no consent to the application of force. I find it proven beyond reasonable doubt that there was an assault upon the child Jake Jimarin.

14. The next question is whether the assault it was an unlawful assault.

15. Section 27(p) of the *Criminal Code Act* was raised in this matter by way of justification. That subsection reads:

> Section 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 likely to cause death or grievous 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".

16. Unnecessary force is defined in section 1 of the Criminal Code as follows : "unnecessary force means 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".

17. I find that the defendant is one of the parents of the child Jake Jimarin, namely the father of the child, and accordingly is a person who can discipline, manage or control a child. An application of force is justified providing it is not unnecessary force and it is not intended and is not likely to cause death or grievous harm. I find that the actions of the defendant were not intended or likely to cause death or grievous harm.

18. There does not appear to be any case law directly on the interpretation of s 27(p) of the *Criminal Code*. I have been referred to some authorities from

other jurisdictions and I will summarise those. The first case to be discussed is *Rahman,* United Kingdom Court of Appeal reported in 1985 (81) Cr App R at 349. This was a charge of false imprisonment and related to the imprisonment by a father of his fifteen year old daughter. Questions of parental discipline came into question. It was stated at page 354:

> "The detention may be for such a period or in such circumstances as to take it out of the realms of reasonable parental discipline…Whether that stage has been reached, namely the stage of unreasonableness, is a matter for the jury to decide, if there is evidence which is proper to go before the jury for them to consider".
>
> Further the Court also held
>
> " it was for the jury to say whether they felt sure that what the appellant did was outside the bounds of legitimate parental discipline and correction". (p 354 of the decision).

19. The next case to consider is *Griffin* (1997) 94 A Crim R at p 26. That was a case where a parent disciplined a child using an electric shock. The question was whether it was reasonable force thereby excusing the behaviour of the parent. The Court of Appeal in Queensland stated :

> "The appellant chose an extremely unconventional mode of inflicting punishment, mainly a hand-operated generator which administered an electric shock. No doubt that played a part in the jury's finding that he had used more force than was reasonable…..The mood of society has turned substantially against approval of heavy forms of physical discipline but not all administering of physical punishment by a parent have been made criminal offences. That will be the result undoubtedly when a parent goes too far and exceeds the bounds of what is reasonable as the jury, quite understandably, has found was the position here". (p 29 of the decision).

20. These cases are authority for the proposition that it will be a matter of fact based on the circumstances of a particular case whether an action is justified. These cases also highlight that there is a reasonableness test to be applied. In the Northern Territory Section 1 of the Code defines 'unnecessary force' and so the cases must be considered in light of the Criminal Code.

21. The first question is whether the action was to discipline, manage or control the child? The second issue will then be whether the force was not unnecessary force. These issues raise questions of fact which must be resolved.

22. Did a situation exist that the child Jake should have been disciplined, managed or controlled? Jake was playing with his younger brother Nathan. Jake was extremely young and cannot be taken to have had any malicious intentions towards his younger brother. He was doing no more than playing with his younger brother. There was a view by adults in the room that the play was too boisterous and possibly may have been a risk to the younger child. The older child was on top of the younger child. I accept that the child Nathan was very young and given the age difference caution was warranted when he was playing with his older brother. I do not accept on the evidence before the court that the child Nathan was in real and immediate danger of harm from the actions of Jake. Had that been the case one of the adults in the room would have acted themselves. The word 'humbugging' was used to describe Jake's behaviour towards Nathan. That does not connote any real danger to Nathan. It is annoying to be humbugged, and certainly can lead to an escalation of a situation, but I do not put it as high as placing the child Nathan in danger. I find that "humbugging" is the appropriate description of Jake's actions towards Nathan. I do accept that Jake needed to be temporarily separated from Nathan. I find that the defendant did separate the two children by lifting Jake up and away from Nathan. Any possible risk of harm to Nathan (which I find was at the lower end of possible harm) immediately ceased at that time. I do not regard that the child Jake needed to be any further "managed or controlled" to use the words in section 27 (p) of the Criminal Code.

23. Was there the need to discipline Jake at this stage? I find that there was no need to discipline the child Jake after the children had been separated. While the behaviour may have been annoying to the adults in the room, and

causing some distress to Nathan, Jake was four years of age and playing, albeit in a boisterous fashion. What the child needed was some direction in the appropriate way to play with his younger brother. That could be achieved verbally and in the absence of the child taking notice of verbal directions, by some time being separated from the child Nathan. I find that this was not an appropriate case for there to be discipline in the form of an application of force. That finding being made, there is no need to consider the other aspects of section 27(p) of the Criminal Code. Nevertheless, in the event that it is found that I erred with respect to this question I will consider the next issue, namely whether the force was "not unnecessary" force.

24. The action of a parent striking a child with an open hand is not an action which, in all circumstances, will be seen as unnecessary force. There are a variety of factors which will impact on whether such a strike will be regarded as unnecessary force and in particular these include :

    (a) the age of the child,

    (b) the area struck using the open hand, and

    (c) the force of the blow or strike.

25. I will deal with these matters in turn in the context of the factual situation of this case. First is the question is the age of the child. In this case the child is aged four years. Whilst not the most tender of years the child is still extremely young. The younger a child the more restraint should be shown in any form of parental discipline involving an application of force.

26. The next matter to be considered is the location of the blow. In this case the blow is to the side of the head and ear area. The centre of the area struck was the ear. This area of the body is one of the least appropriate areas for a blow to be struck, especially when an adults hand is being used to strike a child's head. The side of the head and ear area includes the temple area. The risk of head injuries is a principle reason for children of this age not

playing organised contact sport and for having modified rules in contact sport. At four years of age there is still significant neurological development taking place. The location of the blow is at the upper end of seriousness for blows to the body of a child (and indeed an adult).

27. The final issue is the strength of the blow. The witness Karen Warloo demonstrated the blow in Court on a chair. Her hand moved in a sideways motion in a moderately fast speed with a medium strength hit. The defendant also conducted a re-enactment and the slap he demonstrated was a lighter slap than the witness Karen Warloo's. There is a factual dispute to be resolved with respect to the strength of the hit. There was no dispute that the defendant was standing up when he inflicted the blow. On the question of the strength of the blow the following matters are noted – the child immediately cried out after the blow, the child immediately went to his mother for comfort, shortly thereafter there was blood seen to be coming from the ear and the mother of the child Bianca Warloo heard a sound which she took to be the blow inflicted. Based upon all the evidence before the Court on this question, I find that the blow was as described by the witness Karen Warloo and that the blow was of a moderately fast speed and a medium strength hit.

28. I find a strike of this strength; to the head of a 4 year old child is such force that an ordinary person similarly circumstanced would regard it as unnecessary for and disproportionate to the occasion. That is a finding with respect to the objective aspect to the definition of 'unnecessary force' in section 1 of the Criminal Code. That definition has an objective and a subjective aspect to it and they are in the alternative. I have found that the objective aspect of the definition has been negatived by prosecution and accordingly it is not necessary to consider the subjective aspect of the definition. In the event that I am shown to have been wrong with respect to the finding on the objective aspect of the definition I will now consider the subjective aspect of the definition.

29. The subjective part of the definition is that the force used is such that the user of such force knows is unnecessary for and disproportionate to the occasion. The findings of fact stand with respect to the strength, location and force of the blow at the child Jake. I find that the defendant has sought to exculpate himself with respect to this incident both in court and outside of court. He has said in court that the bleeding to the ear has probably come from when the children where mucking around putting sticks and grass into their ears earlier in the day. There is no evidence that the child's ear was bleeding or had a cut in it before the blow struck by the defendant. When he took the child to the clinic, he told the clinic that it was Bianca who had hit the child - that is he has said it was the mother of the child who hit him. In the context of the findings made in this case and in all the circumstances of the case, these explanations lead to a finding that the user of the force (the defendant) knew that the force he used on the child was unnecessary for and disproportionate to the occasion.

30. In all the circumstances of the case I find that the blow was unnecessary force and that section 27(p) of the Criminal Code does not justify the actions of the defendant.

31. Defence has submitted that defensive conduct under section 29 of the Criminal Code is also open on these facts and that the actions of the defendant are justified on that basis. This is defence of another and in particular the child Nathan. I have already made findings with respect to the child Nathan and I reiterate that I do not regard he was in real and immediate danger of harm from the actions of Jake. I have found that "humbugging" is the appropriate description of Jake's actions towards Nathan. I accept that separation of the two children was wise, as a precaution. I do not regard the situation as warranting the child Nathan to be any further 'defended'. The defendant's evidence is that he thought that Jake may 'kill' the Nathan. I take this to mean that the defendant had real fears for the child Nathan's safety and welfare. The defendant separated the two

children, immediately ending the danger that the child Nathan was perceived to be in. It also ended any danger the child Nathan may have actually been in. The defendant applied force to the child Jake by picking him up off the child Nathan. That action was justified. The action of striking the blow to the child's head was not a reasonable response in the circumstances as the defendant reasonably perceived them. He had separated the two children. Jake was no longer playing on top of Nathan. There was no longer need for the child Nathan to be defended, even if it existed before Jake was picked up. I find that prosecution has negatived section 29 of the Criminal Code.

32. In light of the findings above and the evidence in the matter, I find that the act, namely the strike to the head was intended by the defendant as a possible consequence of his conduct, namely moving his hand towards the head of the child in a moderately fast speed and with medium strength. I accept that the defendant did not intend to cause the ear to bleed.

33. I find that the blow to the head was an unlawful assault and I find the charge as laid is proven beyond reasonable doubt.

Dated this 12th day of October 2007. _____

Melanie Little
STIPENDIARY MAGISTRATE