

CITATION: *Police v GKE* [2010] NTMC 008

PARTIES: JAMIE THOMAS O'BRIEN

v

GKE

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal Code (NT); Justices Act (NT)

FILE NO(s): 20908795

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JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

CRIMINAL LAW – Aggravated Assault – Discipline of Child – Ruling on Case to Answer Submission

*Criminal Code* ss 188; 27(p)

*Kennon v Jimorin* [2007] NTMC 046

*The Queen v Yvette Monique Saunders* SCC 9821170 Martin (BF) CJ, 13 October 1999

*Doney* (1990) 50 A Crim R 157

**REPRESENTATION:**

*Counsel:*

Prosecutor:	Ms McMaster
Defendant:	Mr Elliot

*Solicitors:*

Prosecutor:	Summary Prosecutions
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Judgment ID number:	[2010] NTMC 008
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IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20908795

BETWEEN:

**JAMIE THOMAS O'BRIEN**  
Informant

AND:

**GKE**  
Defendant

**Ruling on the Submission of No Case to Answer**

(Delivered 20 January 2010)

JENNY BLOKLAND CM:

**Background to the Ruling**

1. At the conclusion of the evidence tendered by the prosecution, counsel for the Defendant Mr Elliot made a no case to answer submission. Counsel and I had differing notes and recollections on certain answers given by the medical witnesses. Given the importance of the medical evidence in this case it was decided to adjourn the ruling and order the transcript of medical evidence. That transcript is now available and I have had the opportunity to review that part of the evidence.

**The Primary Allegation**

2. The Defendant pleaded not guilty of one count of aggravated assault contrary to section 188 of the *Criminal Code* (NT). The circumstances of aggravation alleged were that the victim JE suffered harm; that she was female and the Defendant was male; that she was under the age of 16 years, (namely 4 years), and the Defendant was an adult and that given her age she

was unable to effectively defend herself. The particulars of the alleged assault are that on the evening of 13 November 2008 JE was in the care of her father and following an incident was struck in the head and upper body more than once; that the offence came to light the next day when JE presented to her child care centre and she was taken to hospital for observation and investigation. Evidence has been given by medical practitioners on the injuries; by family and community service workers on their investigation of the matter and by persons including child care workers who saw JE on the next day after the alleged assault. A record of conversation presented on a DVD between the Defendant and police was also tendered. During the course of that lengthy conversation the Defendant admits to hitting J after an incident where JE was pushing the car door closed when her baby brother's feet and legs were between the car door and the car. He described the way he hit JE as slapping her on the face around two times, perhaps three on some of the accounts given. He said he knew that this was wrong but her behaviour was very bad.

3. The Defendant argues justification pursuant to s 27(p) of the *Criminal Code* is available. That section provides:

(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;

4. Unnecessary force is defined in s 1 of the *Criminal Code* as:

**“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.”

5. The medical evidence is relevant on whether the hits or slaps perpetrated by the Defendant on JE were the cause of the injuries observed by child care workers and medical practitioners or whether indeed there were other causes for those injuries operating at the time of their observations. Photos of the

alleged injuries, taken at the hospital are before the Court: (Exhibit P1).

Relevant also is evidence admitted that JE had stated she was playing in the cubby house and fell over and at another time stated “daddy hit me”.

6. Aside the admissions of the slaps by the Defendant, (which the Defendant emphasises in the interview to police would not have been hard enough to cause injuries), the case can fairly be described as substantially a circumstantial case. As a matter of law at this stage the test is whether there is evidence capable of supporting a verdict beyond reasonable doubt. The ruling in *The Queen and Yvette Monique Saunders*, SCC 9821170 Martin (BF) CJ 13 October 1999, is instructive where His Honour states he takes guidance from *Doney* (1990) 50A Crim R 157:

“If there is evidence, even if tenuous or inherently weak or vague, which can be taken into account by the jury, and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury.”

Also cited in *Yvette Monique Saunders* is a ruling by Coldrey J (SC)

Victoria:

“The correct test is whether the accused can lawfully be convicted; that is, whether the Crown evidence, taken at its highest, can support a verdict of guilty by a properly directed jury applying the correct standard of proof. The question whether the accused can properly be convicted is a question of law based, though it must be, on the Judges examination of the facts, but it does not depend on the Judges view of the credibility of witnesses or the existence of competing inferences. It is concerned with whether the evidence is capable of proving the elements of the charge against the accused. In a case which depends upon circumstantial evidence, the question must depend on whether, in the trial Judges view, such evidence is capable of excluding conclusions other than one of guilt.”

7. The primary matters for consideration at this stage in the proceedings are whether the evidence as it stands is capable of sustaining a conclusion of guilt. On the facts of this case this has a number of aspects to it, namely whether the medical evidence is supportive of the allegation of assault

brought by the prosecution, (and to a degree admitted by the Defendant to police), further it requires a consideration of whether a number of hypothesis consistent with evidence could be excluded beyond reasonable doubt. Those hypothesis are that the injuries were received by other means, in particular whether JE received the injuries while playing at the child care centre the day after the alleged assault or at another time and whether, in the circumstances, the defence of justification under s 27(p) of the *Criminal Code* could be excluded beyond reasonable doubt on the evidence.

### **Medical Evidence**

8. I have now had the opportunity to read the medical evidence and review the photos of the alleged injury depicted in Exhibit P1. The evidence of Dr Charles Kilburn indicated there were multiple bruises over JE's face and shoulder, particularly on her right forehead and bruising to the right side of her face including the upper part of the ear. There was also bruising on the left side of her face including the ear. There was also a bruise on her right shoulder and some bruising on the left side of her back as well as a number of individual bruises on the same side of her back.
9. Dr Kilburn said the location of the injuries suggest at least two slaps to the face. He also said the injuries indicate significant force was used given the degree of bruising. He said the bruising on the forehead was more suggestive of an extra injury. He said the injury to the shoulder and back must have been due to separate impacts. He said there would have had to have been at the very least two impacts to the face but more likely three given the nature of the bruising to the forehead; he said the bruising on the shoulder could be consistent with being knocked to the floor by one of the blows or could be a separate blow; he said the bruising on the back is also consistent with a separate blow or fall but not the same fall associated with the shoulder. He thought the bruising, particularly the facial bruising was remarkably similar but that all of the bruising would have occurred within a fairly short period of time. He also conducted tests concerning blood count

and clotting to check whether there was any bleeding disorder which may have made the bruising more impressive however those tests were negative.

10. Dr Kilburn agreed there was no medical basis for admission to hospital but that JE was there for observation and investigation. He said the bruising around the forehead did not have a scab when he saw her but he didn't know whether subsequently it had scabbed. He agreed there appeared to be a very mild abrasion depicted on the photo and that such an abrasion could be caused by a blow but he said that he did not know of an open handed slap that could have caused the abrasion. He agreed JE had told him that she had fallen near a cubby house at the child care centre. He said the injury on the forehead was consistent with a number of mechanisms including a fall.
11. He said the test performed to obtain a coagulation profile ruled out any significant bleeding disorder. Dr Kilburn said the bruises observed on JE did not fulfil the criteria for being a person who is in the category of "bruising easily". Dr Kilburn agreed the degree of bruising is not uniform across people, assuming the same mechanism causing it. He agreed there is probably some individual variation. He agreed there had to be significant force applied for this bruising to manifest itself. He said this amount of bruising on JE was more than a light application of force. He said that the force involved would need a swing of the arm rather than just a movement of the wrist and in his view that was a significant amount of force. He agreed the back and shoulder injuries were suggestive of a number of falls. In terms of the bruising to the back right and left shoulder, Dr Kilburn said it was improbable that this would have occurred as a result of a fall. He thought the bruising over the left side of the back was very consistent with being the same age as the bruising on the face. He agreed that the different bruises may have been caused around twelve hours apart.
12. Dr Chandina De Alwis gave evidence of the dimensions and descriptions of the bruises that he noted. He told the Court JE told him she fell down in the

cubby house but she did not answer further questions about the exact way in which she fell down in the cubby house. He said the photographs comprised in these proceedings as Exhibit P1 were taken at 4.30pm on 14 November 2008. He said he did not think the photos made the injuries appear worse than they actually were. He said he arranged investigations to consider bleeding disorder that were all negative. He arranged X-Rays that did not show any fractures. He said he did not think the injuries were consistent with her falling down in her cubby house because of the location of her injuries, particularly the injuries on the forehead, the cheek and the injuries around the ear. He said it was difficult to say how the injuries around the ear may have come about but he said it was possible that someone has tried to squeeze the ear or tried to apply some pressure on the earlobe. He said the injuries could be due to squeezing the ear or something like a slap with the hand. He said the injuries to the forehead could have also come from the same application of force. Dr De Alwis said if there was no bruising to the face the bruising on the back of JE would be entirely unexceptional. He said he didn't note an abrasion on the face but when he looked at Exhibit P1, (page 1), he agreed that it looked like an abrasion on the right forehead. He agreed the abrasion marks were entirely consistent with a fall. He said some of the injuries strongly suggested there had been a slap or two and some other injuries could be due to a fall. He agreed there were some children who easily bruised and some of those who easily bruise have bleeding disorders; he said there are different bleeding disorders which can cause easy bruising. He said all he was doing was testing to see if there was a condition to easy bruising.

13. Dr Anraj Khillen was working as a consultant paediatrician at Royal Darwin Hospital and cared for JE from 18 November 2008 to 20 November 2008. Dr Khillen said GKE told him that he had slapped JE once on the face and she hit the door. He said at the outset that the words he reported to the Court may not be exactly the same as told by GKE but the substance of the



conversation was correct. He said he had checked the written notes taken by the Registrar and his recollection of the conversation was based on those notes. He agreed that at the time of assessing JE he thought the different bruising was of varying ages. He said aging of bruises by observation of colour was not a particularly sensitive way to assess them. He said his impression was that all the bruises happened within 12-24 hours of each other. He agreed it was an inexact science.

14. In my view the medical evidence, if accepted is capable of supporting a finding of guilt that the injuries, in particular the injuries to the ears and facial areas around the ears of JE were caused by two or three strong blows or slaps to her face. There is evidence also at the prima facie level that in my view cannot be ruled out that the injuries to JE's right forehead were also caused by a blow or multiple blows to the face or a blow followed by a fall. Having reviewed the medical evidence taken with the other evidence, there is a prima facie case that blows or slaps inflicted by the Defendant caused the injuries suffered by JE.

**Exclusion of other hypothesis consistent with innocence**

15. Ms Heather Margaret Ryan gave evidence that she knows JE's mother (TE), who is a work colleague of hers. She usually catches the bus with TE and JE. During the bus trip on 14 November 2008 she noticed JE looked like she had a bump on her head but she couldn't really see it properly. She said it was a bump on the top of her head just above her eye and there was slight bruising around it that came down to the side of the eye. She said it was a yellowy bluey colour. She said she asked JE what happened and she said JE didn't respond. Ms Ryan said she kissed JE goodbye as she usually did and she was close to her and she didn't notice that the bruise extended down the cheek. She said JE didn't flinch or give other discomfort indication as a result of that kiss.

16. The mother of the Defendant and grandmother of Je gave evidence. Her involvement concerned a report of a conversation with her son about his description of the incident followed by a report of a visit on the Friday after the incident when she visited JE in hospital. She observed a slightly black eye and grazes down her face. She gave evidence that everyone in her family bruise easily including herself. Her son who she also said bruised easily was tested for Leukaemia when he was little like JE. She said her other children bruise in the same way. As someone who sees JE regularly she said she has seen her with bruises on her but they were the normal kid bumps one would expect to see. Recently she observed bruises on JE's legs and her arm. She said she thought JE bruised easily.
  
17. Apart from Ms Kunoth and Mr Mead who were involved in some investigations on behalf of NT Families, other witnesses called were child care workers at the child care centre the day after the alleged incident. They included Ms Deborah Anne Lee, Ms Tanya Palavi, (who was the group leader for the babies that day), Ms Theresa Diatschenko, Ms Ruth Pitia and Ms Alana Opperman who all gave evidence on what occurred at the child care centre 14 November 2008. At this stage of the proceedings I won't go through their evidence in detail but essentially at least at the prima facie level the combined effect of that evidence is that the bruising was observed very early that day at the child care centre and was noticed enough for Ms Palavi to ask JE what had happened. Her evidence was that JE said "I was naughty and Daddy smacked me" and she asked her "does that hurt" and JE said "yes". The usual routine was that JE would have gone to Theresa Diatschenko who had initially shown the bruises in any event to Ms Palavi. She said after 8.00am JE would have usually stayed in the 3-5's room doing activities until 9.30 and then would have gone outside to play. She said Ruth Pitia was looking after her. The welfare people arrived around lunchtime. She said when Debbie Lee came to work she also observed JE and Ms Pitia was told to keep an eye on JE. She said JE was not playing

outside and they were all inside on that day. She said JE did not suffer any injuries that day. Ms Palavi gave evidence that the incident book had been searched and there were no records of any incidents indicated in the book for the 14<sup>th</sup> November. In my view there is evidence capable of excluding beyond reasonable doubt the hypothesis that JE fell over that day at the child care centre and suffered injuries. In my view there is evidence at the prima facie level that could exclude the hypothesis that the injuries noted by medical practitioners to JE's face and ear area were suffered as a result of falls.

18. In relation to whether at a prima facie level I should rule that there is evidence that cannot be negated that the conduct of the Defendant was justified as discipline pursuant to s 27(p) *Criminal Code*, I decline to make such a ruling. The medical evidence indicates that the bruising to the ears and face, prima facie was delivered with some force. I am influenced by the observations of my colleague Ms Little SM in *Kennon v Jimorin* [2007] NTMC 046, on a similar issue, in particular bearing in mind this was a slap to the head/face area and that JE was only four years of age at the time.
19. I have concluded there is a case to answer. I note the matter has been relisted for 20 January 2010 at 9.15. At that time I will hear from counsel for the Defendant how it is proposed to proceed. Proceedings will be conducted at that mention by videolink as I will be in Alyangula Court.
20. I direct these reasons be forwarded to counsel prior to the mention so that consideration can be given to further dates and times that may be required for further hearing of the case.

Dated this 20<sup>th</sup> day of January 2010

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**Jenny Blokland**  
CHIEF MAGISTRATE