

CITATION: *Police v GKE* [2010] NTMC 023

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

DELIVERED ON: 30 March 2010

DELIVERED AT: Darwin

HEARING DATE(s): 14 & 15 December 2009, 20 January 2010 and
22 March 2010

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

CRIMINAL LAW – Aggravated Assault – Discipline of Child – Weight to be given
to statement made by child.

Criminal Code ss 188; 27(b)
Evidence Act s 26E(1)

Kennon v Jimorin [2007] NTMC 046
Police v GKE [2010] NTMC 008

REPRESENTATION:

Counsel:

Prosecutor: Ms McMaster
Defendant: Mr Elliot

Solicitors:

Prosecutor: Summary Prosecutions

Judgment category classification: C
Judgment ID number: [2010] NTMC 023
Number of paragraphs: 12

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

**Judgement – (to be read in conjunction with decision of 20 January
2010)**

JENNY BLOKLAND CM:

Background to Decision

1. On 20 January 2010 I ruled the defendant had a case to answer on one count of aggravated assault. These reasons should be read in conjunction with the published reasons given at that time - [2010] NTMC 008.
2. At the further hearing of this matter, there was some discussion concerning a medical report of Dr Donald provided late to the prosecutor and therefore undisclosed until recently to the defence. Further, the Court was advised a further report from psychologist Ms Louise McKenna had been disclosed in relation to JE. The prosecutor advised that neither Dr Donald nor Ms McKenna would be called in the prosecution case. I accept the reasons provided to the Court are genuine – Dr Donald provided a further opinion on bruising based on the observations and opinions of medical practitioners already called to give evidence. Ms McMaster submitted the Court had been given the best evidence in the sense that it was evidence from medical practitioners who made direct observations of JE. Further, any evidence given by Ms McKenna by its nature would be hearsay as it concerns

discussions with JE. The defence did not point to a particular exculpatory matter that would be relied on if the evidence were called. In all the circumstances, I was satisfied with the prosecutor's explanation.

The Defendant's Case

3. The defendant gave evidence and was cross-examined extensively. His evidence was similar to the explanations he gave to police in the Record of Conversation (Exhibit P4). In essence, it was that JE was pushing the car door in a manner that looked as though her younger brother (AE) would be injured, given his legs were positioned in the way of the door. The defendant moved quickly to advert the danger. He thought AE could be squashed. He then slapped JE once or twice to the face – he demonstrated a wrist flicking motion. The defendant does not believe he caused the bruising, however, he thought it possible JE may have been bruised during the episode by contact with the car or by a fall the next day.
4. In relation to the surrounding circumstances, there are some inconsistencies in the defendant's case, however, these are not to the point that his evidence can properly be excluded. By its very nature, much of the explanation given by the defendant has by necessity been speculative – in this context, the child care workers and police obviously needed to ask about events that could have led to the bruising in a hypothetical way. The answers are given in that context and on that basis, I cannot make a finding the defendant is shifting blame elsewhere. In any event, not all of the evidence points to the bruising arising from slaps or hits to the face.

Conclusions on the Evidence

5. This case has in my respectful view been investigated and prosecuted diligently. Obviously a child as young as JE cannot be called. I permitted, over objection, the evidence of the child care worker, Ms Palavi who said JE told her "I was naughty and daddy smacked me". I admitted the evidence pursuant to s 26E(1) *Evidence Act* (NT). At the end of the evidence

however, I am left with the sense that the statement may not be as probative as it appeared at first blush.

6. After making this statement, JE was kept at child care and observed by child care workers. Without seeing either of her parents in the interim, when taken to the hospital she told doctors she had had a fall. Although a statement exculpatory of her father might be viewed with some suspicion if she had been with her parents, given her age and the particular circumstances, I can't at all conclude JE has said this out of loyalty, misplaced or otherwise. I can't rule out beyond reasonable doubt that she had a fall close to the relevant time.
7. Although the medical evidence points strongly to significant force being used by way of slaps or blows, there was also evidence that the forehead injury was an abrasion, consistent with a fall, not an open handed slap. Injuries to the back and shoulders were also said to be suggestive of falls. Although an "in-exact science", the age of the different bruises observed on JE were said to have occurred within 12 – 24 hours of each other.
8. The slaps said to give rise to the bruising have occurred some 14 – 15 hours prior to JE going to the child care centre. She went to the child care centre as usual on 14 November 2008 with her mother.
9. Although in my view the evidence raises strong suspicions that the slaps or hits perpetrated by the defendant on JE caused the bruising, I cannot be satisfied beyond reasonable doubt that that is what occurred. The time between the slaps and the observation of bruising, the evidence of abrasion consistent with a fall and the apparent explanation given by JE at the hospital lead me to the conclusion that the charge is not made out beyond reasonable doubt. As to the operation of s 27(b) *Criminal Code*, if the most that can be proven is the slaps, in the circumstances, although it may not be conduct I agree with personally, that is not the test. I agree any hit to a child's face or head area is a serious moral matter, however in the

circumstances and given the breadth of s 27(b) *Criminal Code* I cannot be satisfied that an ordinary person in the same circumstances as the Defendant would not have slapped JE for reasons of discipline.

10. This has obviously been a distressing matter for all involved. Although I have dismissed the charge on the basis of the higher criminal standard, that should be no adverse reflection on the Family and Children Service workers and investigators who by the nature of their work must work on probabilities, not beyond reasonable doubt.
11. I will request the reasons be forwarded to counsel today to be mentioned on 31 March 2010 when I will dismiss the charge.
12. I will also request when these reasons are published with the reasons of 20 January 2010, all identifying names be removed given the sensitivity of the case involving a young child.

Dated this 31st day of March 2010

Jenny Blokland
CHIEF MAGISTRATE