CITATION:	*Police v Robert Pearce [2010] NTMC 025*
PARTIES:	LINDSAY WESTPHAL
	v
	ROBERT DAVID PEARCE
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Summary Jurisdiction – Alice Springs
FILE NO(s):	20928928
DELIVERED ON:	1 April 2010
DELIVERED AT:	Alice Springs
HEARING DATE(s):	12 and 23 February 2010
JUDGMENT OF:	Greg Borchers SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	R Micairan
Defendant:	J Munster

Solicitors:

Plaintiff:	Summary Prosecutions
Defendant:	NTLAC

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 025
Number of paragraphs:	52

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20928928

BETWEEN:

LINDSAY WESPHAL
Police

AND:

ROBERT DAVID PEARCE
Defendant

REASONS FOR JUDGMENT

(Delivered 1 April 2010)

Mr G BORCHERS SM:

1. The Defendant is charged on Information with unlawfully assaulting his two sons; Michael Jones Pearce born 11 March 1998 and Damien Pearce born 4 January 2001 contrary to s.188 (1) of the Criminal Code. Each assault is said to involve circumstances of aggravation namely that each child suffered harm, each child was under the age of 16 years and the Defendant was an adult and each child was threatened with an offensive weapon namely a stick.

2. It is agreed that both victims are under the age of 16 years and it is also agreed that an incident took place on 23 August 2009 at the family home of the Defendant and victims located at 2 Shady Court, Alice Springs.

3. The evidence of both children was in the form of a video recording of their separate police interview together with a transcript of the interview. The children were then cross-examined. A medical practitioner, Dr Marcel Zimmett was called to give evidence of the injuries suffered by the children. Several police officers also gave evidence and the defendant gave sworn evidence.

<u>Evidence of Damien Peace</u>

4. Damien Peace gave evidence that his father assaulted him in his bedroom. His father entered the room holding a stick. Damien was smacked “really hard”, then hit in the rear with the stick which was also used to strike him on the legs. Only the Defendant and Damien were in the room and he was struck five times by the Defendant. He was also bodily thrown across the room onto his bed twice. On the first occasion his head hit a supporting pole on the bunk bed and on the second his head struck the wall. The Defendant said to him “if you are going to be late again I’ll smash you again”

5. When the Defendant left his bedroom, Damien heard him enter his brother Michael’s bedroom and could hear Michael yelling. He remained in his room until his mother came and told him to come and have his dinner. His father repeated this demand when he didn’t come out of his room.

6. During the time he was assaulted his mother was in the kitchen. He thought that she could see what was happening but was sure she could hear his cries. He identified the stick as a stick covered in tape that was stored in the kitchen so it could be used to punish (“whack”) the two boys. They referred to it as the “whacking stick”. He thought that he had been assaulted because he and Michael had been late coming home.

7. Under cross-examination Damien agreed that he played physical games – football, basketball, BMX riding which included riding his bike over jumps. In addition he and Michael liked to wrestle and in fact on Sunday 23 August 2009 he and Michael play fought in front of his father, who took photos of him on Michael’s shoulders.

8. He admitted that on 23 August 2009 his mother, at the Northside Shops accused him of stealing because he had a drink secreted down his pants. He argued with his mother because she wouldn’t listen to his explanation that a friend had bought him the drink. He also admitted that his mother had also accused Michael of stealing bubblegum. He was aware that his mother was “cross” and that she told him and Michael to go home. However they didn’t. Michael and he rode off to the BMX jumps near his school. He fell of his bike while riding over the jump onto his right arm and right leg.

9. Damien agreed that his Uncle Richard, his father's brother approached him and Michael at the BMX jumps and told them to go home as their mother and father were "cross" with them. Michael and Damien didn't go home and their Uncle Richard returned a second time and told them to go home. On this occasion their Uncle appeared to be cross. He made them follow him home.

10. Damien admitted that when he and Michael went home at dusk, after being away for most of the day, his parents were angry with them for:

    (i) not coming straight home when they were told to; and

    (ii) stealing from the Northside shops.

    The Defendant told him to go straight to his room but he didn't. He talked to his brothers and sisters first and this made his father angrier. His mother was also cross and remonstrated with him for stealing at the Northside shops which again he denied.

11. Damien went to his room and his mother came in before his father. She smacked him on his back as he lay face down on his bed. He admitted that it hurt. Damien was not able to say what his mother used to hit him with. His father then entered the room and his mother closed the door and stood in front of it. Damien was trying to get out of the room and his mother was physically retraining him. His father then smacked him while he was standing.

12. About an hour later Damien came out of his room and had dinner with his brothers and sisters. He apologised to his father for coming home late and his father told him it was wrong to steal and should he continue to do so he could go to gaol.

13. Damien gave evidence that 2 days before this event Michael had stolen a new bike. Michael denied stealing the bike and said that he had been given it by an African boy who had five bikes. The Defendant was upset about this and sent Damien to his room as he accused Damien of being involved in the theft. Damien denied any involvement.

14. Damien admitted that while he was a student at Gillen Preschool he was accused of stealing a mobile phone. He was punished by being sent to his room. He

described other punishments he received from his parents as including being sent to his room, denied access to electronic games at home, having his toys confiscated including his bike and being "grounded".

15. In re-examination Damien confirmed that his father had hit him while he was on his bed and that his punishment hurt more than when he fell of his bike or when his mother hit him.

Dr Marcel Zimmet's Evidence (Damien Peace)

16. Damien Peace's evidence of the assault was said to be corroborated by the results of a medical examination undertaken at the Alice Springs Hospital on 24 August 2009 by Dr Marcel Zimmet a Paediatric Registrar. Dr Zimmet took photographs of Damien Peace in the course of his examination. His evidence was also evidence of the harm caused by Damien by the victim.

17. Dr Zimmet is not a qualified specialized paediatrician. He is a trainee and has been so since mid 2008. He expects that he will qualify as a Fellow of the Royal College of Surgeons in Paediatric in July 2011. His training includes child protection work and in order to complete his training in this area he is required to be supervised by an advanced paediatrician in respect of twenty such cases. In August 2009 he had not logged any of these cases and the Peace children represented his first two cases.

18. Dr Zimmet was aware when he examined Damien that there was an allegation that Damien had been assaulted by his father. He also knew that Damien and his sibling had been removed from the care of their parents and placed in foster care.

19. On examination Damien complained of pain to his forehead and upper buttock area. Dr Zimmet concluded that Damien was healthy, growing well and did not require any follow-up medical treatment and did not arrange for any x-rays to be taken. He did have bruises to his body which were consistent with a recent history of trauma, which Dr Zimmet defined as "an injury to the skin of any severity". He was not able to give any indication of the age of the bruises but was of the opinion that the range of bruising is not explained by the normal activities of a boy in his age group. This opinion is based upon criteria established in an

international study known as the Welsh Child Protection Study Criteria. This was not placed in evidence before this Court. I accept that Dr Zimmet's opinion in this regard is no greater than an expression of statistical probability as it does not take into account the individual circumstances pertaining to Damien's daily physical activities.

20. The corroborative nature of Dr Zimmet's evidence is his observation of multiple bruises to Damien's right rib cage area, upper right leg and knee area, upper left arm, buttocks, left shoulder and left thigh. In addition he observed a 3cm scratch to the right side of Damien's face. He was not able to say how the bruises occurred and conceded that they could have been caused accidentally although where there was bruising around an existing bruise that is a clustering of bruises suspicion was raised in his mind as to a non-accidental cause. He also expressed concern about the number of bruises while noting that Damien appeared to be a very active child.

Michael Peace's Evidence

21. Michael Peace acknowledged that he was with the police because his brother had stole from a shop but that he had been blamed by his brother for the theft. They had been caught but they rode off on their bikes being chased by some people. Their mother spoke to the boys and told them to go home but they didn't immediately go home. Michael's evidence is that shortly after they arrived home the Defendant first assaulted his brother and then came into Michael's room where he punched Michael in the head, hit him three time on the back with a stick twice near his shoulder blades and once on the bottom, threw him onto his bed, kicked him in the leg and ribs, and punched him a final time to the head. During this assault Michael said that his father grabbed him under his arm very tightly and this "really hurt because he was squeezing me really hard". He was crying and telling his father to stop.

22. He gave evidence about the stick used to hit him, specifically that it was covered in green tape and that it was kept in the house to punish him and Damien. He also gave evidence regarding the Defendant's assault upon his brother but later admitted that apart from seeing the Defendant throw his brother across the

bedroom into a wall from a distance of 2 metres he was recounting what his brother had told him.

23. Michael's evidence was that the assault by his father was punishment for stealing. His father was trying to teach him and Damien a lesson and also warned him not to tell anyone about what happened "otherwise I'm going to do the same thing to you again".

24. In cross-examination Michael agreed he and Damien had discussed what had happened on 23 August 2009 and in particular Damien had detailed his father's assault upon him and that he, Michael, had not witnessed this. He accused his brother of stealing items at the Northside Supermarket but said that his mother and uncle thought he was responsible. Although his mother told him to go home he first went to a friend's house and then to the jumps on Lackman Terrace where he "rode his bike". He was doing tricks and on one occasion he fell off his bike landing on his knee and then his back. The bike ran over his fingers. He eventually returned home when his uncle told him he should go straight home.

25. At home he saw his mother in the kitchen cooking and she was angry. She said "we are not happy with you". He went straight to his bedroom. On the way to his room he passed Damien's bedroom and saw his father throw Damien into a wall. His father entered his room holding the stick in his right arm and assaulted him with it. Afterwards they talked about stealing, why it was wrong and how it could lead to Michael being sent to gaol.

Dr Zimmet's Evidence (Michael Peace)

26. Dr Zimmet's evidence arising from his examination of Michael conducted on 26 August 2009 was to the effect that Michael was a healthy and active boy who presented with a number of bruises on his body. Photographs of these bruises were put into evidence and it is clear that there are bruises on Michael's back, between his shoulder blades, under his left arm that appear to be from being held tightly, on the shin of his right left and on his left upper thigh/groin area. Dr Zimmett did not refer Michael for any further treatment and was unable to say how old the bruises were. He was however of the opinion that the bruises were consistent with a recent history of trauma and were not consistent with normal

activity for a child of Michael's age. This opinion was based not upon the specific activity engaged in by Michael but upon statistical probability arising from the doctor's use of internationally accepted guidelines. Accordingly the doctor could not exclude the possibility that all bruises were not the result of accidents although his concern was non-accidental causes was raised due to the absence of scratches which are usually associated with bruising if a child falls from a bike and the number and clustering of bruises in the same area.

The Defendant's Evidence

27. The Defendant gave sworn evidence and a record of a conversation he had with police whilst in custody on 28 August 2009 was put into evidence. In the record of interview the Defendant indicated that his actions on 23 August needed to be understood in the context of Damien and Michael's behaviour. Police had previously been called to the home at 2 Shady Court to explain to the boys that it was wrong to steal as Michael had stolen bikes and Damien a mobile phone. Both had stolen from shops as recently as one week before 23 August. Damien had taken a pushbike form someone's front yard and two police officers had come to the house.

28. On 23 August it was alleged that the boys had been caught stealing and when they got home the Defendant's wife was upset and smacked Damien a couple of times with her hand although the Defendant wasn't in the room at the time. The Defendant also said

> "Damien was jumping over the room cos he's hard to control with Mandy; she's not as strong so I went into the room. I then _ Amanda left the room. I then gave Damo (Damien) a smack across the bum… he then laid down on the bed, I left the room."

His evidence is that he smacked Damien hard once, on "the bum" with his open hand. He denied hitting him with a stick. At the time he was angry. In cross-examination he also said he had entered Damien's room as he was concerned that his wife might loose her self control with Damien. He gave evidence of a previous incident involving his wife and the children where she had smacked the children and he was forced to intervene. This caused a difficult time in their marriage.

29. The Defendant's sworn evidence did not substantially depart from what he had told the police on 28 August 2009. He said that the boys had been asked twice by his brother to come home and when they entered the house he told them to go to their rooms. Damien complied but Michael didn't. His wife followed Damien into his bedroom and while he could not see into the room he heard his wife talking angrily and Damien crying. He entered the room and saw his wife physically struggling with Damien and she didn't appear to be in control. He rolled Damien onto his stomach on the bed and smacked him once with an open hand on his bottom. He did not kick him or throw him around the room or hit him with a stick.

30. Both parents had previously disciplined the boys for stealing by "grounding" them, prohibiting their access to electronic toys, removing their hikes and refusing to permit them racing their BMX bikes. They also had spoken to the school based constables located at both Gillen and Braitling Primary Schools and various teachers about the boy's behaviour. Unfortunately none of these disciplinary measures were effective and the boys continued to misbehave.

31. The Defendant considered he was stressed and angry with both boys. They didn't listen to their parents and were willingly disobedient. He was not proud that he had hit Damien but he did not want Damien to be "locked up" for stealing as had happened to one of his brothers when he was younger. He entered Damien's room partly because he didn't want his wife to "loose it" with Damien. Previously she had slapped one of the children on more than one occasion.

32. On leaving Damien's bedroom the Defendant saw the stick which was used to discipline his dogs. He could not clearly remember where the stick was when he picked it up. He grabbed it and intended to place it in the kitchen but at that moment Michael ran past him going towards his bedroom. They were both in a hallway with the Defendant standing in the doorway of Damien's bedroom. The Defendant decided to punish Michael by smacking him on the buttocks with the stick however he missed and hit Michael on the back. He denied any other assault upon Michael, only admitting to this one incident and denied entering Michael's room.

33. The Defendant says that he was frustrated, stressed and angry when he hit Michael as all other disciplinary measures imposed upon the two boys had had limited effect upon their behaviour. The Defendant decided to resort to physical punishment. They refused to listen to their parents. He accepted that hitting Michael on the back was not right but that was not his intention. He tried to hit him on the bottom. He apologised to Michael that evening but at the same time emphasized that there were drastic consequences that could result from stealing, his own brother had gone to gaol and been made a ward of the state. In his sworn evidence he said he did not think that he had "gone overboard" in his disciplining of both boys. He was however upset with his behaviour because his own father had been a harsh disciplinarian who physically assaulted his children and the Defendant did not want to be seen to be acting like his father. He denied threatening Michael and Damien with further physical punishment if they told anyone what had happened to them.

34. It was clear from the evidence given by both victims and the Defendant that Amanda Ralston was a material witness to both alleged assaults, but more so in respect of Damien. On the evidence she confronted both boys at the Northside Foodland on the morning of the alleged assaults and accused them of stealing and told them to go home. She was home at 2 Shady Court when they eventually returned home. She may have been in Damien's bedroom when the Defendant entered. She may have been physically struggling with Damien when the Defendant entered the room. She may have struck Damien on the backside when he was lying in his bedroom. She may have witnessed the Defendant strike Damien. She may have heard or seen the Defendant strike Michael. She had been involved in previous attempts to discipline both boys, including physically striking one or both boys. Much of this evidence arises from the prosecutor's case. In addition the prosecutor was on notice at the outset of the hearing that as a result of the opening given by counsel for the Defendant that defence was relying upon s.27 (p) of the Criminal Code. The Defendant had implicated the mother in the incidents that form the basis of these offences in his recorded record of interview to the extent that his reliance upon the statutory defence open to him was clear.

35. The prosecutor hears the responsibility of deciding whether a person shall be called as a witness for the prosecution. That decision is determined by the requirement of the prosecutor to act with fairness and detachment to ensure that the whole truth is placed before the Court so that the Defendant's trial is a fair one. (*The Queen v Kneebone* (1999) 47 NSWLD 450)

36. The duty therefore is for the prosecutor to call all material witnesses (*The Queen v Apostilides* (1984) 154 CLR 563) unless there is good reason not to do so. The fact that a witness may give an account inconsistent with the prosecution case is not a sufficient reason for not calling that witness (*Jones v Dunkel* (1959) HCA 101). However having regard to the evidence presented by both the prosecutor and defence that issue may not be one of what inference that should or should be drawn, but rather a far more basic and germaine matter, can I be satisfied beyond reasonable doubt that the Defendant assaulted his sons and in particular Damien on the evidence as presented to this Court.

37. Senior Constable Waddell gave evidence that Ms Alston was summonsed to attend Court and answered her summons on both days of the hearing. He also gave evidence that he attempted to speak to Ms Alston but she declined to speak to him. An affidavit of Special Constable John Barnes declared 19 January 2010 was put into evidence. In it Constable Barnes declared that on 19 January 2010 in the company of Senior Constable Waddell he met with Ms Alston. Ms Alston said she did not want to make a statement. She also said "I didn't see anything I was in the kitchen".

38. The reasons put forward by the prosecutor presumably arise out of the conversation that took place between the two police officers and Ms Alston on 19 January 2010. He says this meeting demonstrated that she was uncooperative and repeatedly refused to cooperate, was in the Defendant's "camp", was unreliable and was untrustworthy. None of these assertions are supported by the evidence. At best Ms Alston refused to give a statement to a simple question "Do you want to make a written statement say that?" The prosecutor was aware that Ms Alston was a material witness, a result of the material disclosed in the victim's interview taken 14 December 2009 and the Defendant's statement made 28 August 2009 and accordingly he had a duty to call Ms Alston (*R v Apostilides* (1984) 154 CLR 563

at 575-577). There is no rule of law requiring him to do so but he would have to consider when making his decision to call or not call a witness to sufficiency of the evidence and fairness to the Defendant. The prosecutor in this matter argued that although he had decided not to call evidence from Ms Alston, he made her available for the Defendant and the Defendant had also not called her. I note what was said in *Dyers v The Queen* [2002] HCA 45 per Gaudron and Hayne JJ:

> "If in a particular case, the prosecutor chooses, for good reason not to call a witness (as, for example, on the basis that the evidence which would be given by the witness would be unreliable, untrustworthy or otherwise incapable of belief) it would be quite wrong to conclude that the accused could be expected to have called that person."

39. I find that there was no good reason for the prosecutor to not call Ms Alston. Can a *Jones v Dunkel* inference be drawn from this failure, that is if Ms Alston had of given evidence, her evidence would not have supported the prosecutor's case? *Dyers v The Queen* is authority for the proposition that as a general rule a *Jones v Dunkel* inference should not be drawn against the prosecution when it has failed to call a material witness in criminal matters except in limited circumstances (see *Gaudron and Haynes JJ*). Unfortunately this general proposition has not always found support. *R v Riscuta and Niga* [2003] NSWCCA 6, Heydon JA (as he then was) rejected the proposition:

> "The argument had the following background. In *RPS v R [2000] HCA 3*; (2000) 199 CLR 620 and *Azzopardi v R [2001] HCA 25*; (2001) 205 CLR 50 the High Court, by majority, held that generally no direction of the type given in *Jones v Dunkel [1959] HCA 8*; (1959) 101 CLR 298 should he given where an accused person failed to testify. In *Dyers v R* (2002) 192 ALR 191, which was decided well after the summing up in this case, the High Court, by majority, held that no such direction should be given where an accused person failed to call a particular witness. Gaudron and Hayne JJ said at [5]:
>
> "As a general rule a trial judge should not direct the jury in a criminal trial that the accused would be expected to give evidence personally or

call others to give evidence. Exceptions to that general rule will be rare. They are referred to in *Azzopardi*. As a general rule, then, a trial judge should not direct the jury that they are entitled to infer that evidence which the accused could have given, or which others, called by the accused, could have given, would not assist the accused. If it is possible that the jury might think that evidence could have been, but was not, given or called by the accused, they should be instructed not to speculate about what might have been said in that evidence."

At [6] they said:

"Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. If follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses."

What they said in [5] represents the ratio decidendi of *Dyers v R* which related to a direction about the accused's failure to call a witness, note the prosecution's failure to call a witness. Kirby J agreed in [52] with the proposition stated in [5], but said nothing supportive of [6]. Callinan J agreed in [121]-[123] with the proposition stated in [5], but he too said nothing supportive of [6]. McHugh J, who had dissented in *RPS v R* and *Azzopardi v R*, strongly disagreed with the proposition stated in [5]: [25]-[46]. He said nothing about the proposition stated in [6].

It is wholly clear that what is said in [6] is a dictum by two justices of the High Court – no less, but no more. Decisions of single justices of

> the High Court are not binding on intermediate courts of appeal, though they are of the greatest persuasive authority. The dictum of Gaudron and Hayne JJ, though it is entitled to the greatest respect and though it is of persuasive value, is not an "appellate decision" of the High Court. It is a statement of principle, no doubt a considered one, offered as a dictum.
>
> It has been a longstanding practice in this State, dating from at least *R v Buckland* [1977] 2 NSWLR 452, that in appropriate circumstances an accused may seek and obtain a *Jones v Dunkel* direction about the failure of the Crown to call a particular witness: see Street CJ at 457-459 and Carmichael J at 470-471; *R v Newland* (1997) 98 A Crim R 455 and *R v Taufua* [1999] NSWCCA 205."

40. In Victoria in the recent case of *R v Chimin* [2010] USCA 57. The Court relied upon the propositions regarding the duties of a prosecutor as set out in *R v Apostilides* p1984] HICA 38, and conclude that the prosecutor had not breached his duty in not calling a witness. In doing so the Court noted and supported the general proposition set out in *R v Dyers* (2002) 210 CLR 285 (Gaudron and Haynes JJ at page 294).

41. While I am of the view that the prosecutor breached his duty to call Ms Alston as she was a material witness, and as there appears no good reason for not calling her, I am not sure whether I need to resolve the issue of whether a *Jones v Dunkel* inference should be drawn from that failure. The critical issue is the state of the evidence led by the prosecutor in circumstances where a material witness who could have given evidence regarding significant matters of relevance in this case was not called. This is particularly so insofar as the case against Damien is concerned. How can I be satisfied that any of the corroborative material in the form of the photographs and medical opinion was not caused wholly or partially by a person other than the Defendant? I find that I cannot be so satisfied, which leaves the prosecution case solely dependant upon the evidence of Damien. His evidence suffers from exaggeration and untruths about his actions prior to arriving home at 2 Shady Court and exaggeration in his account of being thrown against the wall of his bedroom and the support to his bunk. Therefore I cannot be

satisfied beyond doubt in regard to the assault upon Damien and accordingly Count 2 should be dismissed.

42. The prosecution case in respect of the assault upon Michael is somewhat different. Although Ms Alston could and should have given evidence regarding the context in which the events of 23 August 2009 took place, it is less likely that she witnessed the assault upon Michael. In addition there are clear admissions made by the Defendant in his record of interview that he assaulted Michael by hitting him with a stick on his "lower back" (see Record of Interview dated 28 August 2009, Exhibit P11, page 14). The prosecution case is that the Defendant not only struck Michael on his back, but also held him is such a manner that caused significant bruising under his left arm and scratched his face. The Defendant denies causing the later two injuries.

43. Michael'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 Michael's bedroom but rather the hallway. There is corroborative evidence of Michael's evidence in the form of photographs of bruising to Michael's back and rib area and the medical opinion of Dr Zimmet. In addition Damien heard his brother being assaulted.

44. The photographs taken by Dr Zimmet of the bruises on Michael's body clearly show that he was struck more than once between the shoulder blades. As the Defendant admits to striking Michael 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 Zimmet, parallel marks of fifteen centimetres in length horizontally across Michael's back, Michael 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 Michael's version. It follows that I accept the assault took place in Michael's bedroom, as heard by Damien. I also accept Michael'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 may fall under the general description of being "roughly handled". I am not suggestion that Michael concocted this aspect of his evidence. Rather there is not clarity as to these incidents. There was no consent by Michael to the assaults upon him.

45. The Defendant has raised the defence of justification as set out in s.27 (p) of the Criminal Code. That subsection reads:

> "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."

46. Unnecessary force is defined in s.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."

47. I find that the Defendant is the father of Michael Peace and as a parent has the legal authority to discipline, manage and control his son. 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. The application of force in this incident I find was not intended or likely to cause death or grievous harm. However was it not unnecessary force?

48. The Defendant argued that in relation to the first part of the definition of "unnecessary force" being "force that the user of such force knows is unnecessary for and disproportionate to the occasion" the subjective element is what the user thought at the time of the application of the force, not what the user thought in

hindsight. The Defendant, it is argued believed that physical punishment was necessary as all other forms of discipline imposed upon his sons had proved unsuccessful. The parents of the children were concerned about their behaviour, had continuously tried to impress upon their sons that they should not steal but their efforts had not prevented further offending on 23 August 2009, offending witnessed by their mother. I cannot accept this submission for three reasons. Firstly the Defendant's mental element both at the time and afterwards is relevant. In this matter the Defendant told the investigating police officers on 28 August 2009, five days after the incident:

> "Its just I'm not proud of it at all"
>
> "Cos I'm not proud of this"
>
> "Like I said in … like before to you I … an hour later had already realised that it was not the right thing to do"
>
> "I went to my kids man and I'm sorry and just explained to them you know I shouldn't have done what I done, you boys, and but you guys have gotta stop stealing"

"You think it was overboard?"

> "Yes I do"

49. Clearly within an hour of the incidents the Defendant was of the opinion he had acted inappropriately. Secondly the prosecutor argues that the Defendant acted not just with the intention of disciplining his sons but out of anger. I agree. Both Michael and Damien said in evidence that their father was "mad", meaning angry and the Defendant admitted after hitting Michael he "freaked out". Finally I have found as a matter of fact that the Defendant did not hit Michael once but rather hit him twice to the back squeezed him around the torso and generally handled him roughly.

50. The definition of unnecessary force also contains an objective test. It was put on behalf of the Defendant that in Alice Springs where youth crime is prevalent, a parent confronted with children who fail to obey their parents in circumstances

where those parents have consistently tried to discipline them using non-physical discipline would not act unnecessary if they resorted to corporal punishment. While that may well be appropriate it is a matter of degree. In *Lumb v Police* (SA) [2008] SASC 198, an appeal against a Magistrate's decision, David J was of the view "In today's society, I consider generally physical correction of the child would not be appropriate". That qualified statement possibly reflects the current position of most practitioners in the field of child and adolescent behaviour however as a legal principle it is not particularly helpful. In *R v Terry* [1955] VRR 114, Scholl J at page 16 enunciated a far more helpful text:

> "I will now tell you what the law on that subject is. A parent has a lawful right to inflict reasonable and moderate corporal punishment on his or her child for the purpose of correcting the child in wrong behaviour but there ware exceedingly strict limits to that right. In the first place, the punishment must be moderate and reasonable. In the second place it must have a proper relation to the age, physique and mentality of the child and in the third place it must be carried out with a reasonable means or instrument."

This test received some support from the Court of Appeal in Queensland when it noted in *Griffen* (1997) 94 A Crim R at page 29:

> "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 bands of what is reasonable."

51. These cases are authority of the proposition that it will be a matter of fact based upon the circumstance of each individual case as to whether the application of physical force is justified, subject to an objective reasonable test. There is no doubt on the evidence that the Defendant intended to discipline Michael when he hit him with a stick. However the manner of the application of force, by the use of a stick to Michael's back on more than one occasion causing as it did bruising, squeezing him around the torso, again causing bruises and pain and throwing him

onto a bed indicates that the Defendant went well beyond disciplining Michael. Michael was being physically punished and the strength of the blows used by the Defendant and the manner in which they were delivered was not reasonable.

52. In the light of my findings in regard to the evidence that the hits to Michael's back with the stick and the squeezing of his torso were an unnecessary application of force I find that Count 1, the unlawful assault accompanied by the three circumstances of aggravation proven beyond reasonable doubt.

Dated this 1st day of April 2010

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GREG BORCHERS
STIPENDIARY MAGISTRATE