

CITATION: *Police v Kerinauia* [2010] NTMC 032

PARTIES: SCOTT RUSSELL

v

BRENDAN JOHN PETER KERINAUIA

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20944141

DELIVERED ON: 11 May 2010

DELIVERED AT: Darwin

HEARING DATE(s): 21 April 2010

JUDGMENT OF: Ms Fong Lim SM

**CATCHWORDS:**

Criminal Law – young witness – reasonable discipline – section 27(p) Criminal Code

*R v MTP* [2002] VSCA 81

*Police v Pearce* [2010] NTMC 025

**REPRESENTATION:**

*Counsel:*

Plaintiff: Mr Tierney  
Defendant: Ms Ninkovic

*Solicitors:*

Plaintiff: Director of Public Prosecutions  
Defendant: NAAJA

Judgment category classification: C  
Judgment ID number: [2010] NTMC 032  
Number of paragraphs: 37

IN THE COURT OF SUMMARY JURISDICTION  
AT NGUIU IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20944141

BETWEEN:

SCOTT RUSSELL  
Plaintiff

AND:

BRENDANT PETER JOHN KERINAUIA  
Defendant

REASONS FOR JUDGMENT

(Delivered 11 May 2010)

Ms FONG LIM SM:

1. Mr Kerinauia is charged with one count of aggravated assault on his daughter Brendalia Kerinauia. The circumstances of aggravation are that Brendalia was only 12 years old at the time and she was a female and her father a male. There is no dispute about those circumstances of aggravation. A further circumstance of aggravation pleaded is that a weapon was used in the assault being a metal pole and that is disputed. Mr Kerinauia claims he hit the child with a thin stick and was disciplining his child raising a defence under section 27(p) of the Criminal Code.
2. The Court heard evidence from Ms Kantilla, Mr Kerinauia's partner and Brendalia's mother, Brendalia, Ms Fernando, Brendalia's grandmother and Mr Kerinauia.
3. It is agreed that on the day in question Brendalia took her uncle's pushbike for a ride. When she returned the uncle was upset with her and he was yelling and swearing and hitting the house with his walking stick. The uncle challenged Mr Kerinauia's parenting skills and Mr Kerinauia became angry.

4. The evidence then diverges as to what happened. Ms Kantilla says Brendalia was hit six times to the head with the pole, Brendalia says she was hit once to the back and once to the head with a metal pole and Kerinauia says he hit Brendalia once to the bottom with a thin stick. The only independent evidence of any injury arising out of this alleged assault is from Ms Fernando who confirmed she saw a lump on her granddaughter's head the next day corroborating Brendalia's head had suffered some sort of impact that day.
5. The Prosecution bears the burden to prove all of the elements of the offence beyond a reasonable doubt for the Defendant to be found guilty of unlawful assault. Each of the circumstances of aggravation must also be proved beyond a reasonable doubt. The Prosecution must also negative beyond a reasonable doubt any defence raised by the Defendant on the evidence, in this case the Prosecution must prove beyond a reasonable doubt that what Kerinauia did was not reasonable discipline of his child.
6. **Did Kerinauia assault his daughter?** On his own evidence Kerinauia has struck his daughter with a stick that is the direct application of force without her consent and therefore an assault. On the evidence of Kantilla and Brendalia the assault was with a metal pole.
7. **Was the assault on Brendalia unlawful?** Kantilla's evidence of six hits to Brendalia's head must be viewed with caution. The evidence of injury from both Brendalia and Kantilla was that there was a cut to the left hand side of the top of her head and some blood. The grandmother saw a lump on Brendalia's head at the same site as indicated by Brendalia in cross-examination. Brendalia states that after the bleeding stopped she had some pain and there was no mention of a lump. If the Defendant had hit Brendalia in the manner suggested by Kantilla then a more severe injury would be expected. Kantilla was clearly exaggerating in her recount of the assault, she has exaggerated the number of hits and the force at which Brendalia was hit.

Her exaggeration gives her evidence less credibility however does not mean I should disregard her evidence completely.

8. Kerinauia denies hitting Brendalia on the head at all. The grandmother's evidence goes some way to corroborating Brendalia had received a recent blow to the head.
9. Kerinauia denies the instrument he used was a metal pole yet both Kantilla and Brendalia claim the instrument used was metal and even though they were inconsistent in where the pole came from they were consistent that it was made out of metal.
10. Given the competing versions of how Brendalia was hit is not for me to decide who I believe. I must assess the evidence as it has been produced to the court and to disregard anyone's evidence. I must have good reason to disregard that evidence.
11. I have already made some comment on the reliability of Kantilla's evidence.
12. Defence counsel suggests I should place very little weight on the evidence of Ms Kantilla because she was motivated by keeping herself in a good light with Family and Children Services. Defence counsel submits it wasn't until after Family and Children Services became involved she decided to report the incident to the police. It is also submitted that another reason for the later report of the incident is that Ms Kantilla was not really concerned about what had happened between her partner and her daughter.
13. Ms Kantilla denied she was motivated by the involvement of Family and Children Services. She stressed she was worried about the safety of her child at the time.
14. Defence counsel also suggested that Kantilla should be disbelieved because there were rumours of Kerinauia having an affair and she was making this story up to get him into trouble because of jealousy, however there was no

evidence of that jealousy or the cause of it and Kantilla denied such jealousy.

15. Apart from the exaggeration about how many times Brendalia was hit, she corroborated the main details of Brendalia's complaint that she was punished by her father by being hit with a metal pole. Kantilla confirms Kerinauia was at first calm when talking to Brendalia but quickly lost his temper and picked up the pole and hit her with it. Kantilla's evidence confirms Kerinauia's motivation for this behaviour was to punish Brendalia for her bad behaviour. While I view Kantilla's evidence with caution I do not completely disregard it.
16. I turn to the evidence of Brendalia. I warn myself as to the potential unreliability of the evidence of a 12 year old. I must warn myself of the possibility that a child may let their imagination run wild and make up stories.
17. I note after some preliminary questioning by myself I was satisfied that Brendalia knew the difference between truth and lies and the serious consequences should she lie in court.
18. Brendalia is a young person who gets into mischief sometimes. She perhaps tells lies when caught out doing something wrong eg saying that her uncle had given her permission to take his bike. However telling lies to get herself out of trouble and telling lies to get her father put into gaol are two vastly different things.
19. Brendalia was subject to vigorous cross-examination, such cross-examination which was particularly tough on a person of such a youthful age. During cross-examination she became more and more closed in her demeanour, she clearly found the cross-examination intimidating and uncomfortable. Defence counsel did not adjust her style of cross-examination to take into account she was dealing with a young person. It

was during that cross-examination that a concession was made by Brendalia. She was asked “Your dad had a branch not a pole?” to which her answer was “yes”. She was then asked “It’s true he hit you once on the bum” she answers “Yeah he hit me on the bum and on the head”. However Brendalia then stated later in cross-examination “he didn’t hit me with a branch it was metal”. I am of the view that her answer to the question of what was used must be considered in light of the possibility of gratuitous concurrence. The majority of her answers were “yeah” to questions in cross-examination prior to the question about what was used to hit her, the yes to the proposition that it was a branch and not a pole, cannot be given much weight considering her self correction while still in cross-examination.

20. Brendalia was also strong in cross-examination that she was also dragged by the hair by her father on the verandah. She was not shaken in this evidence.
21. Defence counsel submit that I should disregard Brendalia’s evidence where it conflicts with her father’s because she was inconsistent. I disagree with Defence counsel’s assessment of Brendalia’s evidence. Brendalia was steadfast in her evidence that she was hit twice, once on the head with an instrument. She was also asked if her mother or grandmother had told her what to say and she was adamant that was not the case. She stood up to vigorous cross-examination which in parts was particularly fierce considering her age. The only question she had difficulty answering was when she was asked “you were angry because he told you off?” she did not respond to that question. Defence counsel would have me infer from that non response that Brendalia was being evasive. Given her age and the cross-examination she was subject to I am not prepared to make that inference. Her non response could have been because she thought she would get in trouble if she admitted to anger at her father or a myriad of other reasons, in any event the fact that Brendalia might be angry at her father for telling her off is not that significant. Defence counsel would have me infer that because of that anger Brendalia has made up her story that inference cannot be made.

22. Apart from that one instance Brendalia gave her evidence in a straightforward manner and she was clear that she had not been told by others what to say and she did not follow her mother's exaggeration of the incident. One of the most telling responses Brendalia gave was in her answers to my questions to establish her understanding of the seriousness of telling the truth. She was asked who she could get in trouble with if she told lies in her evidence and she immediately answered "my dad". She is a child who sees her father as an authority figure and accepts his role as an authority figure. Accepting that role she is unlikely to make up stories about his actions to get him into trouble. I found Brendalia to be a reliable witness.
23. Defence counsel suggests that there was possible collusion between the witnesses for the prosecution and Kerinauia suggested that his mother in law had something against him intimating she was telling lies although he could not give any details of that grudge nor was the grandmother questioned about her possible motivation. I do not accept there was any collusion between the witnesses if there were collusion between the witnesses it was clearly not very well done given the inconsistencies between them on matters such as what time it was when they were all at the shop, where the metal pole came from and how many times Brendalia was struck.
24. Apart from Kantilla's exaggeration as to the number and nature of strikes the evidence of Kantilla corroborates Brendalia's evidence that Kerinauia was angry and had hit her over the head with an metal pole while she was behind her mother. A hit to the head is corroborated in some way by the grandmother observing a lump on Brendalia's head.
25. The fact that Kantilla and Brendalia were not consistent in where the pole had come from is not fatal to their evidence as it is understandable in the highly emotional situation they were not sure where the pole came from and that there would be some inconsistencies in their evidence.

26. Some criticism was made of the prosecution that they did not call the uncle who was apparently present for the incident. The Prosecutor's response to that criticism was that he could make some inquiries but apart from that he could not make any submissions about the failure to call the uncle. The Defence counsel submitted I infer from the failure to call the uncle that his evidence would not have assisted the prosecution case and in these circumstances I am prepared to make that inference. The prosecution is obliged to produce all witnesses who could give significant relevant evidence and there is no evidence that the uncle had been spoken to and assessed as an unreliable witness, it seems that no approach has been made of the uncle at all. However that inference does not assist the Defendant in any significant way if I am satisfied beyond a reasonable doubt of each of the elements of the offending on the evidence before the court.
27. Kerinauia's evidence is internally inconsistent his says he "did not go off my head at that time" yet in cross-examination he admitted he was "very angry". He says after he hit Brendalia once on the bottom he only gave her a stern talking to when she was standing behind her mother yet he also states he apologised to her about hitting her. If he really was of the opinion that he had just treated his daughter to reasonable disciplinary action then why did he feel the need to apologise? Kerinauia also expressed more indignation at the uncle's behaviour than the fact that his daughter had taken the bike, he was indignant that the uncle was hitting their new house with his stick and accusing him of not disciplining his children properly. He took to his daughter with a weapon to prove himself to the uncle not to discipline his child.
28. When asked about dragging the child by the hair the Defendant denied doing that and stated he only held her by the wrist yet his physical action in evidence was to hold his arm directly out in front of him with his fist clenched and the fist pointed downwards which is more consistent with holding someone by the hair and not by the wrist.



29. I find the Defendant's version of the events to be not credible and I reject his evidence that he only hit the child once on the bottom, he reacted to the situation in a fit of anger and the punishment meted out to the child was beyond what was reasonable (see *Police v Pearce* [2010] NTMC 025).
30. The evidence of Brendalia in her child forensic interview and her responses in cross-examination were in the most relevant parts corroborated by her mother and the grandmother and I find her evidence to be credible and reliable. I am satisfied beyond a reasonable doubt that
1. The Defendant became angry with Brendalia for taking her uncle's bike and angry at the uncle's abuse.
  2. He hit his daughter once to the bottom and once to the head with a metal pole resulting in a lump to her head.
31. **Was the assault a reasonable discipline of child by a parent?** Kerinauia raises the defence under section 27(p) of the Criminal Code. Section 27(p) provides where the application of force is not unnecessary or intended to cause death or serious harm it is justified in certain circumstances. One of those circumstances is when:-
- “(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;”
32. Kerinauia says he was attempting to discipline his child and it is clear that was part of his motivation of the assault on Brendalia. Was his application of force unnecessary? “Unnecessary force” is defined in the Criminal Code as force which an ordinary person similarly circumstanced would have regarded as unnecessary for and disproportionate to the occasion or that the Defendant knew was unnecessary or disproportionate. Having found Kerinauia hit Brendalia with a metal pole once on the bottom and once on the head I find that there is unlikely to be any circumstance where a strike to the head of a 12 year old child with a metal pole (or any weapon) could be found to be proportionate to the occasion.

33. Even if I had found that the instrument used was a stick a strike to the head it is still unlikely any strike to the head could be found to be reasonable discipline.
34. In this particular case the child had taken her uncle's bike for a ride she had not stolen it or damaged it. The child was adamant about seeking permission. The uncle was upset and agitating for Kerinauia to discipline his child. The uncle was also banging his walking stick on Kerinauia's new house. Kerinauia lost his temper picked up the first implement he could find and attacked his daughter with it.
35. Kerinauia in his apology to his child acknowledged that his actions were not appropriate. He knew that the application of force was disproportionate to the occasion.
36. I find the prosecution has negated the defence raised by Kerinauia under section 27(p) of the Criminal Code.
37. In all of these circumstances I find Kerinauia guilty of the charge and the aggravating circumstances as read. I will hear the parties on sentencing.

Dated this 11<sup>th</sup> day of May 2010

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**Tanya Fong Lim**  
STIPENDIARY MAGISTRATE