

CITATION: *Sanderson v Pluto* [2019] NTLC 001

PARTIES: Melissa SANDERSON

V

Christopher Bob PLUTO

TITLE OF COURT: LOCAL COURT (NT)

JURISDICTION: CRIMINAL

FILE NO(s): 21829314

DELIVERED ON: 7 January 2019

DELIVERED AT: Borroloola Local Court

HEARING DATE(s): 14 November 2018

JUDGMENT OF: Deputy Chief Judge MORRIS

CATCHWORDS:

CRIMINAL LAW -- DEFENCES -- AGGRAVATED ASSAULT --
JUSTIFICATION -- PARENT OR GUARDIAN OF A CHILD -- PERSON IN
THE PLACE OF SUCH A PARENT OR GUARDIAN -- DISCIPLINE,
MANAGE OR CONTROL A CHILD

CRIMINAL LAW -- DEFENCES -- JUSTIFICATION -- UNNECESSARY
FORCE

WORDS AND PHRASES -- PARENT OR GUARDIAN -- DISCIPLINE,
MANAGEMENT OR CONTROL, GROWL

Criminal Code Act (NT), s 1, s 11, s 27(p), s 32, s 188(2)

Police v Jimarin [2007] NTMC 046, *Police v Robert Pearce* [2010] NTMC
025, *Police v Kerinauia* [2010] NTMC 032, *R v R, WD* [2005] SASC 191
considered

REPRESENTATION:

Counsel:

Crown: Helena Blundell
Defendant: Julian Murphy

Solicitors:

Crown: Director of Public Prosecutions
Defendant: NAAJA

Judgment category classification: B
Judgment ID number: 001
Number of paragraphs: 57

IN THE LOCAL COURT
AT BORROLOOLA IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21829314

BETWEEN:

Melissa Sanderson
Informant

AND:

Christopher Bob Pluto
Defendant

REASONS FOR JUDGMENT

(Delivered 7 January 2019)

JUDGE: Deputy Chief Judge Morris

Events of 1 June 2018

1. Christopher Pluto lives at Campbell Springs. It is a small family outstation, numbering about 20 adults and 25 children. Two of these children include B and D. B was 8 years of age in June 2018 and D was 9 years. Campbell Springs is 15 to 20 kilometres from Borroloola.
2. It is not in dispute that on 1 June 2018 Mr Pluto struck B and D with a stick of some kind. As a result of a police investigation, on 14 June Mr Pluto was issued with a notice to appear in the Borroloola Court for Aggravated Assault. On 14 November 2018 he entered pleas of not guilty

to charges that on the 1st of June 2018 at Borroloola in the Northern Territory of Australia he:

1. unlawfully assaulted BL:

And that the said unlawful assault involved the following circumstance of aggravation, namely:

- i. That the said BL suffered harm:
- ii. That the said BL was under the age of 16 years, namely 9 years and said Christopher Pluto was an adult:
- iii. That the said BL was unable to effectively defend himself due to age:
- iv. That the said BL was threatened with an offensive weapon, namely a piece of wooden stick, contrary to section 188(2) of the Criminal Code (NT).

And that he:

2. Unlawfully assaulted DR

And that the said unlawful assault involved the following circumstance of aggravation, namely:

- i. That the said DR suffered harm:
- ii. That the said DR was under the age of 16 years, namely 9 years and said Christopher Pluto was an adult:
- iii. That the said DR was unable to effectively defend himself due to age:

- iv. That the said DR was threatened with an offensive weapon, namely a piece of wooden stick, contrary to section 188(2) of the Criminal Code (NT).
3. The evidence called by the mothers of the boys indicated that at the time of the incident, B was 8 and D was 9. Whilst the information records both as 9 years of age, this is an inconsequential typographical error and causes no unfairness to the Defendant.
4. Witnesses called at the hearing included Brenda Larsen, Geraldine Larsen and Priscilla Pluto. A hand drawn map of the area was tendered. After the close of the Crown case Mr Pluto chose to give evidence and also tendered a hand drawn map. Consideration of the evidence leads me to make the following findings of fact:
 5. On 1 June 2018 Mr Pluto took various family members to Heartbreak Hotel in a vehicle. Heartbreak Hotel is a licensed premise at Cape Crawford, about 105 kilometres from Borroloola. Due to the wider range of alcohol permitted for sale there, both for on premise and takeaway alcohol sales, it is a common trip for residents of the area who wish to purchase alcohol. Mr Pluto says he took family because they wanted to “go and get drunk a bit”.¹
 6. Mr Pluto denied that he drank himself, he claimed he wanted to stay sober as he was driving and didn’t want to lose his licence again. However other witnesses say he “might have been, bit drunk”² and thought he was drunk at the time.³
 7. Sometime that afternoon Mr Pluto returned to Campbell Springs. Again the evidence diverges as to what occurred next. Ms Brenda Larsen, who is B’s mother and who describes Mr Pluto as her ‘cousin-brother’ heard a car

¹ Transcript at page 26

² T. at 7

go past real fast, heard a car door slam and then saw Chris (the Defendant). He said to B and D to 'come here' in an angry voice. She then saw him grab a stick, describing it as about a metre long and 8 to 10 cm thick. He then hit the two boys with the stick, firstly a big hit on D, the blow landing on his back, then B on his bum. She described the second hit "I would say he hit him strong, yeah"⁴. Both children cried immediately. Ms Brenda Lansen shouted at Mr Pluto and recalls Mr Pluto then swearing at her.

8. She saw bruising and swelling of B's back, which she treated with cold water and ice. She noticed that he couldn't stand properly and he continued to cry. She noticed similar bruising and swelling on D, which she similarly treated.
9. Ms Brenda Lansen did not give permission for Mr Pluto to hit B nor to 'growl' him if he had done something naughty. She did admit that sometimes adults did 'growl' other people's children at Campbell Springs.
10. Ms Geraldine Lansen saw Mr Pluto drive in that afternoon. She heard him call for B and D to come to him. She saw him pick up a metre long wooden stick and hit D to the lower back region with a 'strong'⁵ hit that made D scream and cry. She then saw him do the same thing to B, who also screamed and cried. Mr Pluto then yelled out to 'control your kids' and started swearing at Ms Lansen. He was aggressive and loud and she thought he was drunk. She saw B limping afterwards. She did not see the two boys doing anything wrong before Mr Pluto hit them. Ms Geraldine Lansen said that she would not hit her nephew in that manner because 'first of all he's not mine, he's only my nephew, my sister's'. And the only thing she may do is 'growl him' to keep him in line if he is doing something wrong.

³ T. at 20

⁴ T. at 6

⁵ T. at 19

11. Whilst it is probable in my view, given the circumstances of the day and his subsequent behaviour and demeanour noted by the other witnesses, that Mr Pluto had consumed alcohol; I cannot be satisfied beyond Reasonable doubt that this was the case. None of the other witnesses were close enough to him to provide further evidence of intoxication and their opinion may well be influenced by their knowledge of his trip to Heartbreak.
12. Ms Priscilla Pluto, D's mother gave short evidence to confirm that it was not okay by her for Mr Pluto to hit D with a stick, but it was okay for him to growl her son if he did something wrong.
13. Mr Pluto also gave evidence. He said he hadn't been drinking that day. When he got home after taking the other family to Heartbreak, his daughter and son called him over and told him that D and B were at his place teasing his dog, that they had told them not to, but were ignored. This upset him. He then found the boys, called them over and asked them "why are you not listening to J (his son) when telling you the dog will bite? Why are you teasing my dog?" He then "grabbed them by one hand, lifted the hand forward. I found this little bamboo stick on the ground. I don't know whether it was a spear before, the bamboo stick. And I lift the hand up and...and I had it own on my hip and I just went smack. I said, "Don't go teasing my dog. If he bites you the policeman will come out and shoot my dog"⁶ and he did the same to both children.
14. He described the force as 'just a normal smack how you give (a) kid'.⁷ He indicated that he lifted the child's hand so the child couldn't put his wrist or hand behind him to block the blow of the stick. He described the stick as 'spear length' that is about 2.5 metres long and broom handle thickness. He indicated a spear that is mounted in the Borroloola Court

⁶ T. at 28

⁷ T. at 28

room on the wall. I am satisfied from all the evidence that the stick was only about one metre long and roughly a broom handle in width. Even on Mr Pluto's own evidence, a 2.5 metre long stick would have been too unwieldy or even impossible to wield in the manner that he describes. I accept the evidence of the other witnesses on this point.

15. Mr Pluto said he grew up receiving discipline from his Uncles. This included being smacked with a hand, a sweeping stick or a strap or belt. He sees some of the parents of the community smacking their kids but not all the time. He says he believed he could growl the kids of the wider family and that he could smack them.

“And does that mean that you can growl at those kids? – Yes.

Does that mean you can smack those kids? --- Yeah.

Does that mean you can smack them with a stick? --- Well, if that dog would have bite them, you know, I would have been the one getting into trouble.

What would happen to the kids if the dog bit them? ---Well, there's a few things would happen. You'd get rabies, might end up in stitches, could be in hospital getting a needle...”⁸

16. Mr Pluto's evidence was that after he struck the children he was sworn and shouted at by Geraldine and Brenda Larsen. They in their evidence indicate he was swearing and shouting insults at them. Some of his comments were about parents not looking after their kids. Brenda Larsen gave evidence she did yell at him when she saw what had happened. This would have happened in very short compass and is perhaps not important as to who was yelling at whom first. Mr Pluto then went over to his own house.

⁸ T. at 30, 31

Defences Raised

17. It is clear from the evidence at the hearing that parental discipline has been raised as a defence. Section 27 of the Criminal Code (NT) provides a justification for certain actions, provided

‘...it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm: ...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;’

18. Mistake of fact, section 32 of the Criminal Code (NT), is not precluded from consideration when parental discipline is being considered. Section 32 provides;

“A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist.”

19. The onus lies with the Crown to prove each of the elements of the offence, and the test of proof is beyond reasonable doubt. Once a defence has been raised, it is for the Crown to negative that defence beyond reasonable doubt.

Parent or Guardian

20. Mr Pluto was not a parent of either of the two boys. That is, he was not either child’s biological father, nor was there any evidence to suggest

that he was regarded as a parent under Aboriginal customary law or tradition.⁹

21. It was put by his Counsel that he was however, in the position of ‘Guardian’. This was because of his familial relationship to them as “Uncle”. Guardian is not defined in the Criminal Code (NT). It is not defined either in the *Guardianship of Infants Act* (NT). Various legal dictionaries describe a guardian as;

“A person having the right and duty of protecting the persons, property or rights of one who is without full legal capacity or otherwise incapable of managing his own affairs”¹⁰, and;

“In relation to a child, a person who has been granted legal custody of a child or has had long term responsibility for the child’s welfare....The guardian of a person has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents...that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity.”¹¹ And;

⁹ Whilst ‘parent’ is not defined in the Criminal Code (NT), some assistance can be obtained from the definition in the *Care and Protection of Children Act*, s17

17 Parent of child

(1) A parent of a child is the child's father, mother or any other person who has parental responsibility for the child.

(2) A parent of an Aboriginal child includes a person who is regarded as a parent of the child under Aboriginal customary law or Aboriginal tradition.

(3) However, any of the following must not be regarded as a parent of a child:

(a) the CEO;

(b) a person who has responsibility for the care of the child only on a temporary basis;

(c) a person, such as a teacher or childcare worker, who has responsibility in relation to the child because of a professional relationship.

¹⁰ Osborn’s Concise Law Dictionary 11th Edition

¹¹ Lexis Nexis Australian Legal Dictionary 2nd Edition

“One who has the legal authority and duty to care for another’s person or property, esp. because of the other’s infancy, incapacity, or disability.”¹²

22. In *R v R*, WD [2005] SASC 191, Justice Besanko considered the definition of the term ‘guardian’ as used in the *Criminal Law Consolidation Act (SA)*, where there was no legislative definition. After determining that there was not much in the context of the section that provided an indication of the meaning of the word he turned to the meaning at common law.

“In the first edition of Halsbury’s Laws of England, vol 17, the guardianship of the person and estate of an infant is discussed in Part 7. The learned authors state (I omit footnote references):

The disabilities of an infant and his legal incapacity to manage his own affairs render it necessary that for the protection of his interests and the management of his property he should have a guardian of his person and property, to who he stands in the relation of ward (*k*). A person may be the guardian of an infant either (1) in socage; (2) by nature in the case of an heir-apparent; (3) by custom; (4) for nurture; (5) naturally, or by parental right; (6) by parental appointment, or (7) by appointment by a court of competent jurisdiction (*l*)”

23. The evidence before this Court does not support any of the above meanings. Mr Pluto as an Uncle, was not a guardian by nature (genetically), custom (practice and culture) or nurture (having the daily care and responsibility of a child), there being no evidence that he had this special responsibility for the protection of the children through custom

¹² Black’s Law Dictionary 8th Edition

or because he had ‘grown them up’.¹³ Nor is there any evidence he fell within the other categories.

24. The approval by a parent to ‘growl’ a child does not necessarily confer guardianship over a child. It is clear from the evidence that the term ‘growl’ (a particularly ideophonic word in my view) as used by the witnesses means to verbally chastise or correct. Many members of a community may have permission to growl a child, and permission itself is not necessarily needed or required, ‘growling’ not being a criminal offence. For example if an unknown child was poking a stick through the fence at a dog, the dog owner may well tell the child to stop and move on.
25. I am satisfied that the Crown have proved that Mr Pluto was not a parent or guardian of the children.
26. Section 27 (p) does extend the class of persons however by use of the words ‘a person in the place of’. Was Mr Pluto then a ‘person in the place of such a parent or guardian’? It appears to me that the term ‘a person in the place of’ has a meaning similar to if not a direct translation of, ‘in loco parentis’. That is, a person who acts in place of a parent (or guardian). This could be either temporarily as a school teacher may do, or indefinitely, as a step parent may do. Black’s Law Dictionary also includes in the definition of loco parentis ‘a person who has assumed the obligations of a parent without formally adopting the child’.¹⁴ An example could include a babysitter or child carer, appointed by a parent, to care for a child whilst the parent was away. However if there is a parent or guardian, that is, a person who has the rights and responsibilities and power to take and make decisions on behalf of a child, then a person could not act ‘in the place of’ unless they had explicit or implied permission or

¹³ ‘Grown them up’ being a common phrase in the Northern Territory describing a person who has been responsible for the day to day care and supply of the necessities of life of a child throughout much of their childhood, including love and nurture. This person may or may not be genetically related.

sanction from the parent to do so. To be otherwise would be to usurp the power of the parent, which could not be done without statutory intervention and/or legal authority.

27. The evidence does not show that Mr Pluto was a person in the place of such a parent or guardian at the time of this assault. He had not been minding the children nor supervising the children that day. Neither parent had delegated their parental authority to him; indeed their evidence was he did not have permission to hit the boys, even if he may have had permission to growl at least one of them. Mr Pluto in his own evidence answered:

“Are you telling the court that Brenda and Geraldine have told you it’s okay to hit those boys with a stick? --- No, not hit them”¹⁵

28. Whilst being an Uncle to a child is a close familial relationship and carries with it in most communities within Australia special duties, including that of guidance and mentorship, there is no evidence before me that it usurps the parent or guardian of a child. Indeed the evidence is to the contrary. Of course at times an Uncle may at times be a guardian or be a person in the place of a parent. This would turn on the facts of the case being determined.

“..the question I asked was in Campbell Springs who is responsible for controlling the kids? ---It’s the mother’s responsibility or parents and whoever’s looking out for them kids. Sometimes it’s a family member when they get left behind, when their parents are drinking.”¹⁶

¹⁴ Black’s Law Dictionary 8th Edition

¹⁵ T. at 35

¹⁶ T. at 30

29. That was not the evidence in this case. Mr Pluto was not the one left behind to look after the kids, he had only just returned to Campbell Springs after having gone for a trip with other family members.

30. Even if there was an expectation or inference on a role such as ‘Uncle’, which could mean allowing to discipline, manage or control a child, the law does not allow the extension of that discipline to the application of force in order to do so. There can be discipline, management and control without the application of force. Mr Pluto uses the example of yelling at the kids if they are out playing at night in the sand, ‘that they have to go to school, go to sleep for school in the morning.’¹⁷ Of course that is not a criminal offence, nor an aggravated assault. A familial duty (as opposed to a parental justification) to growl or chastise does not extend by law to the application of force.

31. The Criminal Code (NT) also provides at s 11

“A person who may justifiably apply force to a child for the purposes of discipline, management or control may delegate that power either expressly or by implication to another person who has the custody or control of the child either temporarily or permanently...”

32. There is no evidence that there was a delegation of this power to Mr Pluto by either parent. Also the evidence does not support that Mr Pluto had the custody or control of the children either temporarily or permanently, having just arrived back after his trip away. Even if there was some sort delegation of the power to ‘growl’ the children, there was no delegation of the power to *apply force* for their discipline, management or control.

33. I am satisfied that the Crown has proved that Mr Pluto was not a parent or guardian, or a person in the place of such a parent or guardian.

¹⁷ T. at 30

Thus the defence under s 27(p) has been negated beyond Reasonable doubt, that only being open to that class of persons. However I intend to further examine the evidence should I be wrong about that.

34. Did Mr Pluto mistakenly believe that he was a parent or guardian? There is little evidence to support either of these contentions, and if he did so, in my view it was not a reasonable belief. Certainly he was aware he was not the boys' parent. In his evidence his belief that he may be entitled to impose some sort of discipline came from his status as their Uncle, not their guardian. His belief that an Uncle may have power to physically discipline a nephew is not a mistake about the existence of a state of things, but a misapprehension of the law.

Discipline, manage or control

35. The purpose of any such force used is only justified if it used to 'discipline, manage or control' such a child. Has the Crown proved beyond Reasonable doubt that the force used was not to discipline, manage or control B and D?
36. The term 'discipline, manage or control' is not defined in the *Criminal Code* (NT) and appears to have been rarely legally considered, even in cases involving parental discipline, with more attention placed on the disproportionality or necessity of an action.
37. That children require parents to engage in 'discipline' is generally not in dispute.

"It would generally be accepted that children need discipline: ... 'to set reasonable, consistent limits while permitting choices among acceptable alternatives. Discipline teaches moral and social standards, and it should

protect children from harm by teaching what is safe while guiding them to respect the rights and property of others.’”¹⁸

38. The Oxford English dictionary defines ‘discipline’ to be ‘punishment (esp. physical punishment) imposed with the intention of controlling or correcting future behaviour; castigation for a misdemeanour or transgression, usually with the implication of being salutary to the recipient; chastisement’¹⁹. The Macquarie dictionary includes ‘training to act in accordance with rules, instruction and exercise designed to train to proper conduct or action, punishment inflicted by way of correction and training’.²⁰
39. The addition of the words ‘manage’ and ‘control’ extend the phrase whilst also confirming some of the like meanings.
40. It is clear from the evidence, including his own evidence, that Mr Pluto became angry when he was told the boys were teasing the dog and would not stop when asked to do so by his own children. This anger was not just about the boy’s actions, but also about other members of their family, including their parents, not taking what he considered to be proper responsibility. That was not something the boys themselves had any control over. Was he striking them purely out of anger and a loss of temper accompanied by a desire to hurt them, or to ‘discipline, manage or control’?
41. Those two things do not have to be mutually exclusive. Perhaps many parents who use physical discipline do so at a time when they are angry or upset about a child’s behaviour. In the ‘cold light of day’ other options become apparent as more effective or appropriate. The presence of

¹⁸ “Whose Rights? Children, parents and discipline” Naylor and Saunders, *AltLawJl* (2009) at 25, quoting Jerry Burton Banks, ‘Childhood Discipline: challenges for Clinicians and Parent’ (2002) 66 *American Family Physician* at 447.

¹⁹ Oxford English Dictionary 3rd Edition, December 2013 www.oed.com

anger does not necessitate against the presence of other motives, although it can be a powerful indicator of motive and intent.

42. It is implicit in Mr Pluto's evidence that he thought that by physically striking the children, the pain caused would mean that they would then realise the seriousness of what they had done and not do it in the future. That is, he was intending to 'discipline, manage or control' the children and their behaviour. Whether a situation existed that required 'discipline, management or control' by the application of force in my view is a consideration when determining whether the force was unnecessary or disproportionate.²¹ I do find that the Crown have not disproved that he was intending to discipline, manage or control the children by his actions.

Unnecessary force

43. Unnecessary force is defined in s 1 of the Criminal Code (NT):

"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 the force, would regard as unnecessary for and disproportionate to the occasion."

44. The evidence before me as to Mr Pluto's knowledge of the level of force used was that he 'didn't have any intention to harm them kids or hurt them bad. Was just like normal smack'.²² In my view given the injuries received by the children the level of force was not 'just like a normal

²⁰ Macquarie Dictionary, 2nd Edition

²¹ In this I depart from the reasoning of Ms Little SM in *Police v Jimarin* [2007] NTMC 046 at par's 21, 22, and 23. There Her Honour discussed whether a situation existed that a child should have been disciplined, managed or controlled, and whether there was a need to do so, including alternative non physical actions that should have been taken, prior to consideration of necessary force. However in my view whilst those issues may go to examining the evidence around the intent of the 'parent', it is the *intent* in relation to the use of any action that is to be disproved by the Crown.

²² T at 35

smack'. But it is clear from his evidence that he thought that the level of force used was necessary and not disproportionate to the occasion, that is, to stop the children teasing his dog in the future. The teasing of the dog could result in the biting of the child, and thus the destruction of the dog by police²³ and perhaps rabies or stitches and medical treatment for the child.²⁴

45. The definition of 'unnecessary force' also includes the objective test of an ordinary person similarly circumstanced. Would an ordinary person in similar circumstances to Mr Pluto, regard the hitting a child with a metre long stick, broom handle thick, with such force as to leave marks and bruises and cause swelling and some impediment to normal gait, as unnecessary and disproportionate?

46. In considering the ordinary person, the Court must consider that there is a wide spectrum of views in relation to physical force used on children. All of which may be held by people in the community who are 'ordinary'. Some regard any physical force as excessive. However, I accept the assertion of Counsel for Mr Pluto that 'the very existence of s 27(p) anticipates that some level of physical force may permissibly be used to discipline, manage or control children.'²⁵

47. Previous cases determined in this Court outline a number of factors for consideration in determining proportionality.²⁶ These include the age of the child, the place on the child's body to which force was applied, the duration and extent of the force, including how it was applied and the purpose for which the force was applied. A child's capacity for reasoning is also a consideration.

²³ T at 28

²⁴ T at 31

²⁵ Defence Counsel Written Submissions p 2

²⁶ See *Police v Jimarin* [2007] NTMC 046 at para 24, *Police v Robert Pearce* [2010] NTMC 025 at para 50, 51, *Police v Kerinauia* [2010] NTMC 032 at para's 31,32,33

48. Physical discipline does not necessarily have to be a ‘measure of last resort’, but whether other options of discipline have been considered and/or tried and proved ineffective might be considered in determining necessity.

49. Mr Pluto struck both boys, aged 8 and 9 and described as ‘skinny’ with a metre long stick the thickness of a broom handle. He struck them to the lower back area once. He is a large man and they were small boys. The force was such that they immediately screamed and cried out in pain. They had bruising and swelling which was treated by cold water. The injury remained for some time. One boy, B, was limping for a time afterwards.

50. Ms Priscilla Pluto provides some evidence which helps inform perhaps the ‘similar circumstances’ of the ordinary person. That is, a person living in a place such as Campbell Springs. In her evidence she says

Priscilla, do you sometimes smack D if he’s done the wrong thing?---
Yeah.

Do you ever smack him with an object, like a stick? --- No.

Do you see other parents in Campbell Springs smacking their kids with their hand if the kids have done something wrong? --- Yeah.

Do you ever see other adults in Campbell Springs smacking their kids with a stick if they’ve done something wrong? ---No.²⁷

51. Mr Pluto’s evidence about practices in his community included the following:

Did you get smacked as a kid?---Yes.

What did you get smack with ? ---Nearly anything they'd (inaudible) hand, a sweeping stick or a strap, belt.

And that was when you were growing up?---Yes.

What about today? Do adults in the community smack kids in the community to discipline them? --- Not all the time....but yeah, I see some of their parents do that.

And is that just with their hand or with other things as well? --- Sometimes with their hands and sometimes with sticks. I know when their parents go back home drunk they abuse their little kids too and wanna flog'em, threaten them.²⁸

52. Information about past practices or what happened when adults were children is not particularly helpful when considering necessity and proportionality. Times have changed in relation to the regard for physical force used against children. It is an ordinary person in similar circumstances today that must be considered. It is perhaps telling that Mr Pluto's reference is to drunken parents using higher levels of force (I infer not a practice that he condones).

53. In my view, using a weapon such as a stick, combined with the force required to injure the children as the evidence suggests, by a person in similar circumstances to Mr Pluto, would be regarded as disproportionate and unnecessary. He was a man concerned about the teasing of his dogs, he thought that the children in question were not being disciplined by their parents appropriately, however made no further inquiries as to whether this had or had not occurred or raised the matter with any other adult who may have seen what had happened. He made little attempt to explain the wrongness of any perceived action or impose any other sanction. He

²⁷ T at 23

²⁸ T at 31

reacted quickly when there was no actual bad behaviour being exhibited at the time of the discipline or indeed likely to be exhibited given that he was now home and could protect the dogs from further teasing himself.

Summary and Orders

54. I am satisfied that the Crown has proved beyond Reasonable doubt that Mr Pluto assaulted both children, that they suffered harm, that they were 8 or 9 years of age at the time, and that a weapon, being a piece of wooden stick was used.

55. I am satisfied that the Crown has proved beyond Reasonable doubt that at the time of this assault Mr Pluto was neither a parent nor guardian of the children, nor a person in place of a parent or guardian.

56. I am also satisfied that the Crown has proved that an ordinary person in similar circumstances to Mr Pluto would Regard the force used as unnecessary and disproportionate to the occasion.

57. I find Mr Pluto guilty of both offences. I thank both Counsel for their helpful submissions in relation to the matter and will hear further submissions on sentence.

Dated this 7th day of January 2019

Deputy Chief Judge Morris
LOCAL COURT JUDGE