

JERSEY / JUDGMENT

S -v- AG [2009] JRC 226 (18 November 2009)

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JUDGMENT

THE BAILIFF: 1. This is an application for leave to appeal out of time against the applicant's conviction in the Magistrate's Court on 18th September, 2008, of one offence of having acted in contravention of Article 35 of the Children (Jersey) Law 2002 in that, having responsibility for a child under the age of 16, the applicant intentionally or recklessly caused harm to that child. 2. At the hearing, the court granted leave to appeal out of time, allowed the appeal, quashed the conviction and remitted the matter to the Magistrate's Court so that a re-trial could take place if the prosecution so elected. We now give the reasons for our decision. The Background 3. The applicant lives with his wife and children. Also living at the family home at the time of the incident were his wife's children by a previous relationship. One of these we shall refer to as B. He was aged 12 at the material time. 4. On 2nd April, 2008, the applicant went by car to pick up B from an activity in which B had been participating. When he got there he observed B behaving very badly including hitting and spitting at a girl and calling her a " fucking Muslim ". B accepted at trial that he had behaved very badly. 5. According to B, who gave evidence in chief by means of a video recording, the applicant hit him on the head twice with the back of his hand outside the place where the activity was taking place before putting B in the car together with a friend whom the applicant was going to drop off on the way home. When they arrived home after dropping the friend off, B said that he started to walk in but was told by the applicant to come back, which he did. The applicant then said " Are you gonna batter me as well then, are you?" B said that the applicant then slapped him across the head causing him to fall to the ground. According to B, the applicant then slapped him several more times around the head for about 30 seconds or so whilst he was on the ground. The blows were painful. He said he had received injuries to the back of his head and to his ear as a result of the applicant's assault 6. B was cross-examined by television link. It was put to him by Advocate Le Guillou, who represented the applicant, that the applicant had not hit him at all at the pick up point, that most of the slaps outside the car at home had hit B's arms rather than his head, that he had not fallen to the ground, and that he had not received any injuries as he alleged. However B maintained his story. 7. The only other prosecution evidence was a set of admissions under Article 3 of the Criminal Justice (Evidence and Procedure) (Jersey) Law . These accepted that B had sustained a minor injury to the back of his head as a result of falling over in the school playground on the morning of the 3rd April and that a slight reddening of B's left ear could not be attributed to the actions of the applicant. The admissions also exhibited the record of the police interview with the applicant, who had been arrested the

day after the incident. He admitted in this interview that he had slapped B about 6 to 8 times outside the house when they got home. On his version there was no hitting at the pick up point nor did B fall to the ground at any stage when they got home. Because of the importance it has assumed in this appeal, we set out below a key part of the transcript of the interview as produced to the Assistant Magistrate:- "Q He what, sorry? A He got quickly out of the back of the car he... Q Yeah A ... doesn't normally do that so I said wait a minute and er,, he waited just outside the back gate and er, I slapped him around the head a couple of times Q OK A I shouldn't have done that Q Where, whereabouts did you slap him? A Well I moved his elbows because he, covered up and (coughing) Q You're describing that you're, you're putting your hands above, above your head, above that and ... A Yeah he's, he's here and I'm like this Q Yeah A Harder than I should have, he's got his hands above his head protecting himself his elbow is like this Q Yeah A Something like that so, I mean you can't see the half of, 6 or 8 slaps, hit his elbow and arms Q Which, which hand were using? A Right hand" (Emphasis added) Later in the interview the applicant said that he was remorseful and admitted that he had slapped B harder than he should have. 8. The only other witness at the trial was the applicant himself. In his evidence in chief he denied any violence towards B at the pick up point, he admitted slapping B about 6 times outside the house, the first few being on the back of the head and then on the arms as B had put up his arms to protect himself. He said there was no question of B falling to the ground. Although passages of the police interview were read out during his evidence in chief, he was not asked specifically whether he had moved B's arms out of the way in order to get at his head, as he appeared to have stated in the police interview. He was referred to this passage in cross-examination but it was in the context of what he had said at interview. Thus it was not entirely clear from the questions whether the applicant was being asked whether he had said in interview that he had moved B's elbows or whether he was being asked if he had in fact moved B's elbows. 9. Pursuant to Article 35(5) it is a defence to a charge under Article 35 if the parent or other person having charge of a child is administering punishment to that child. The limits of this defence are set out in Article 79 and the corporal punishment inflicted must be reasonable and must not involve any means other than the use of a hand. 10. Thus the issues before the Assistant Magistrate at the trial were twofold:- (i) Was the nature of the violence used by the applicant that alleged by B or that admitted by the applicant or some combination of them? (ii) Was the force found by the Assistant Magistrate to have been used by the applicant reasonable corporal punishment? 11. The Legal Adviser acting for the prosecution placed great weight in his closing submission upon the fact that the applicant had admitted moving B's elbows out of the way to get at his head. He said that this pointed strongly against it being reasonable chastisement. Thus at one stage he said:- "You have heard the question and answer interview read by me, the 6 to 7 slaps around the head. The prosecution say that that was not reasonable, the more so because [the applicant] moves this child's elbows out of the way to get at his head." Later on he said:- "... it wasn't as if it was just 5 or 6, 6 or 7 slaps at the head, he admits at page 9 of his interview that he moved his elbows out of the way, so this is a serious, a serious point. The nature of that slapping is the more serious and shows that it is not reasonable ... not reasonable to spend half an hour thinking about it and then moving protective arms out of the way to get a better strike." 12. In her decision, the Assistant Magistrate reminded herself of the risk of convicting on the uncorroborated evidence of a child

and in effect found that the applicant had done only that which he had admitted to doing. Thus, she did not find it necessary to determine whether B fell over and was hit whilst on the ground. However, it is clear that she placed considerable weight upon the fact that the applicant had admitted in interview moving B's arms in order to get at his head. Thus she made the following remarks during the course of her judgment:- "I find that [the applicant] did hit [B] several times with his hand. He admitted that he hit him harder than he should have done. This was correction for bad behaviour but it was premeditated, it was a deliberate decision, it was repeated blows to the head and a deliberate attempt to get to the head. When [B] covered his arms and the blows fell on [B's] arms and elbows,[the applicant] moved [B's] arms so that he could get at [B's] head." Later on she said this:- "In all the circumstances..., I am sure that you hit [B] several times to the head, having had half an hour to decide how to punish him. Blows to the head are always more serious than blows to another part of the body for example the legs. You deliberately tried to get to [B's] head and removed his arms to do so and you hit his head several times." She held that the punishment had not been reasonable and accordingly convicted the applicant of the offence under Article 35. Events since the hearing 13. The applicant has shown the court a letter dated 23rd September, 2008, from Advocate Le Guillou advising that there were no grounds for appeal. On the evidence then available, that was perfectly sound advice. 14. However, in July 2009, during the course of care proceedings concerning B, it became known to the applicant that there had been an error in the transcription of his police interview. He and his wife listened to the tape and concluded that where, in the passage referred to at paragraph 7 above, it is stated:- "well I moved his elbows..." what the applicant had actually said was:- "Well mainly his elbows" In other words, the word "mainly" had been wrongly transcribed as "I moved". This does of course dramatically change the sense of what was said. It would now read:- "Q Where, whereabouts did you slap him? A Well mainly his elbows because he, covered up..." Having discovered the existence of this error, the applicant applied for leave to appeal out of time on the basis that this error in transcription had misled all the parties and, in particular, had misled the Assistant Magistrate. 15. In the skeleton argument for this hearing, Crown Advocate Pedley disputed that there had been an error in transcription. He said that when one listened to the interview, the applicant had indeed said "I moved ..." rather than "mainly". 16. Faced with this dispute, the court concluded that there was no alternative but to listen to the tape itself. It is not as clear as it might be but the unanimous view of the Jurats, having listened to the tape several times, was that the applicant had said "mainly" rather than "I moved..." The Appeal 17. In our judgement, this error in transcription played a crucial part at the hearing before the Assistant Magistrate. B did not allege in his evidence that the applicant had moved B's arms or elbows in order to get at his head. If there had not been an error in transcription, there would have been no suggestion from anyone that this is what the applicant had done. The point would therefore simply never have arisen. Yet, because of the error in transcription, the prosecution made great play about the fact that this was what had occurred. The legal adviser urged that it showed the unreasonable nature of the chastisement because it indicated a great determination on the applicant's part to overcome any obstacles in order to get at B's head rather than some other part of his body. The Assistant Magistrate accepted this and it is clear from her judgment that the fact that the applicant had gone as far as to move B's arms in order to get at his head was an important aspect in her conclusion that what

the applicant had done was not reasonable corporal punishment. 18. We ask ourselves whether we are sure that, had this error not occurred, the Assistant Magistrate would still have convicted. Given the weight placed on this aspect by both the prosecution and the Assistant Magistrate, we cannot be sure that she would have done so. 19. We have of course noted Mr Pedley's argument that the applicant must have known that he did not (on his version) remove B's arms and should therefore have made this clear when he gave evidence. We accept that one would normally expect that to be the case but the difficulty in this instance was that the nature of the questions posed by the legal advisor for the prosecution did not really draw a satisfactory distinction between what the applicant was supposed to have said to the police and what he was now saying had in fact happened. The questions invariably referred back to the transcript of the interview. 20. We have of course borne in mind the principles outlined in cases such as AG-v-Fossey

[1982] JJ 223, which emphasised that substantial grounds must be shown before the court will exercise its discretion in favour of allowing an appeal out of time, particularly where the delay in appealing has been as long as it has in this case. 21. However, we are left with the clear impression that the error in transcription (which was not the applicant's fault) distorted the trial process and led the Assistant Magistrate to conclude that there was evidence to support the existence of this aggravating factor, namely the pushing aside of the arms or elbows in order to get at B's head, whereas, in reality, there was no evidence from anyone to suggest that this had occurred. We emphasise that no criticism is to be attached to the Assistant Magistrate because she was not aware of this error in transcription. However, for the reasons we have given, we have concluded that leave should be given to the applicant to appeal out of time, the appeal should be allowed and the conviction quashed. 22. We considered whether it was necessary to remit the matter to the Magistrate's Court but concluded that, given the fact that there have been care proceedings and that B regularly visits the family home, it would be right to authorise a re-trial so that the true facts can be ascertained should the prosecution conclude that this is in the public interest, bearing in mind all the relevant factors, including B's well being and the desirability or otherwise of his having to engage for a second time in the criminal trial process. 23. We would add for the sake of completeness that the applicant raised a number of other grounds of appeal. In the light of our decision on the transcript point, it is not necessary to refer to these in this judgment. However, given that some of them involved criticism of Advocate Le Guillou, we think it right to say that we would have decided all these other grounds against the applicant. We are satisfied that, in the absence of the transcription point, there would have been no grounds for interfering with the verdict reached by the Assistant Magistrate. 24. In case there is a re-trial we would mention briefly one of the points raised. It appears from the custody record that, at the time of the applicant's arrest, the allegation against him was that he had kicked B to the head. This was of course a much more serious allegation than that which B made in his video interview and his evidence before this court, which contained no such allegation. On the assumption, which would of course have to be investigated, that this allegation came originally from B, it would clearly give scope for cross-examination as to B's credibility.

Miss Le Guillou explained in her affidavit why she elected not to cross-examine on this point and it was clearly a matter of judgement for the defending Advocate as to where the balance of advantage lay. On any view, no harm was done in this case because the Assistant Magistrate in effect only found proved those matters which the applicant himself had admitted. However it will be a point for the Defence Advocate to consider in any retrial. Authorities Children (Jersey) Law 2002. Criminal Justice (Evidence and Procedure) (Jersey) Law 1998. AG-v-Fossey

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