Citation: *R. v. D.G.*, 2003 YKYC 1

Date: 20030305
Docket: T.C. 02-03593
Registry: Whitehorse

Section 38 of the *Young Offenders Act* prohibits the publication of identifying information concerning the accused.

IN THE YOUTH COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

D.G.

Appearances:
Melissa Atkinson — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR JUDGMENT

Introduction:

[1] D.G. is a young person who was charged with an assault on Lana Howard. At the relevant date, October 25, 2002, D.G. was only several months past his twelfth birthday. D.G. was residing at a group home, Fireweed Residential Youth Treatment Centre (RYTS). Lana Howard was employed to work with the youth in that facility.

The Facts:

[2] I heard evidence from both Lana Howard and D.G. Their evidence was similar, differing in only a few material respects. In my opinion, both were open and honest, trying as best they could to remember exactly what happened on the evening in question. Based on their evidence, my findings of fact are as follows.

[3] The incident occurred around 8:00 p.m. on October 25, 2002. D.G.'s general mood was one of upset, because he was not going to get an allowance that week. He came up the stairs and approached a walk-in cupboard that stored food items and also cooking utensils, including knives. For that reason, the cupboard is supposed to be locked and D.G. knew he was not to go into it. On this occasion, however, the cupboard had been left open.

[4] Ms. Howard asked D.G. if he wanted anything out of the cupboard. D.G. replied "Nothing, fucking bitch". I pause to note that this response reflected D.G.'s attitude and emotional state that evening. Ms. Howard went to the cupboard and closed the door. Ms. Howard may have put her hand on D.G.'s shoulder to steer him away from the cupboard. D.G. says there was some contact and that Ms. Howard pulled him back a little bit. Ms. Howard does not recall any contact. If there was physical contact, it was incidental contact and not disciplinary. Ms. Howard closed the cupboard door. D.G. said his hand got caught in the cupboard door and it hurt a little bit and made him "feel more mad". Ms. Howard says that she closed the door normally and did not feel any resistance and therefore doubted that D.G.'s hand was caught in the door. If D.G.'s hand did get caught in the door, by D.G.'s own admission, it was a minor matter and clearly an accident. D.G.'s response, according to Ms. Howard, was to punch her on the shoulder.

[5] D.G. then moved a few steps towards a door that led out to the garage (to the left of Ms. Howard). D.G. attempted to open the garage door. This door too was supposed to be locked because of the materials (including cleaning materials) stored there. D.G. knew he was not allowed in the garage unless accompanied. The door was not locked. Ms. Howard stepped over and closed the door. Again, D.G. said his hand got caught in the door. Ms. Howard doubts that happened, as the door shut normally and she did not feel any resistance. According to Ms. Howard, D.G. exclaimed "Fucking bitch", cocked his fist and punched Ms. Howard in the middle of her forehead.

[6] D.G. then moved towards the coffee pot in the kitchen. Ms. Howard recalls that D.G. made an attempt to grab it, but someone stopped him. Instead, he moved to the sugar bowl, picked it up and threw it, just missing one of the workers. It was thrown with such force that it made a hole in the wall.

[7] Ms. Howard stated in court that D.G. punched her on the shoulder at the cupboard door and in the head after closing the door to the garage. In Ms. Howard's report to the police later that evening, she said both punches occurred after she closed the garage door. In my opinion, nothing substantive turns on when and where D.G. punched Ms. Howard on the shoulder.

Defence Position:

[8] The defence position is that Ms. Howard put her hand on D.G.'s shoulder at the cupboard door to steer him away. D.G.'s hand also got caught in the cupboard door when Ms. Howard closed it. Moreover, his hand was again caught in the door to the garage when she closed it. Defence counsel submits that these actions constitute an assault on D.G. In addition, by closing the door to the garage, D.G. was forcibly confined in the residence. In all of these circumstances, the defence submits that D.G. was entitled to use force to resist the attempts of Ms. Howard to discipline him or to correct his behaviour.

The Law:

[9] Does a staff member have authority to use physical force to correct a youth resident?

[10] Defence counsel has submitted three cases stating that there must be evidence of a delegation of parental powers or at least the parental power to correct, for a group home staff member to have authority to use force under section 43 of the *Criminal Code* [*R. v. A.J.S.*, [1998] A.J. No. 1250 (Prov. Ct.); *R. v. S.D.C.*, unreported, Alta. Prov. Ct. July 6, 2000; *R. v. S.D.C.*, unreported, Alta. Prov. Ct., October 26, 2000]. Section 43 provides that "every schoolteacher, parent or person standing in the place of a parent is justified in using force by

way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."

[11] These three cases follow the Supreme Court of Canada decision in *R. v. Ogg-Moss* (1984), 14 C.C.C. (3d) 116. In this case, the accused was a residential-care-facility-staff-member charged with assaulting a resident of the facility. The Supreme Court rejected the argument that the accused was protected under s. 43 of the *Criminal Code*, finding that the accused failed to prove he was “standing in the place of a parent”. The court relied upon an American case:

> North Carolina v. Pittard (1980), 263 S.E. 2d 809 (N.C.C.A.) … a day-care worker had claimed the right to use force in the correction of a child by virtue of the similarity of her functions in caring for the child and those of a parent. Wells J., speaking for the court, rejected this claim at p. 811:
>
> > The relationship of in loco parentis does not arise from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. The relationship is established only when the person with whom the child is placed intends to assume the status of a parent -- by taking on obligations incidental to the parental relationships particularly that of support and maintenance.

[12] The Supreme Court of Canada in *Ogg-Moss, supra,* went on to observe:

> As the decision in Pittard, supra, clearly indicates, delegation cannot simply be inferred from the fact of placing a child in the care of another.
>
> …
>
> For Mr. Ogg-Moss to succeed, the power must then have moved from the Minister to Mr. Ogg-Moss. On this latter point, the record in the present case goes beyond a simple absence of evidence of sub delegation to positive evidence of non-delegation in the form of the prohibition in personnel directive No. M.R. 17 forbidding the striking of any resident for any reason whatsoever. Mr. Ogg-Moss was not a delegate of the Minister for purposes of exercising any right of correction that may have been delegated to the Minister; nor, as a

> consequence of his certification that he read and understood this directive, could he assert that he mistakenly thought that he was.

[13] *Ogg-Moss, supra*, was followed by the Supreme Court in *R. v. Nixon*, [1984] 2 S.C.R. 197 and has been followed in various jurisdictions numerous times, including in the case of *R. v. F. (V.A.)*, [1989] S.J. No. 540 (Sask. Q.B.). In this case, the Crown failed to prove that a youth worker at a correctional facility had the authority to apply force to an inmate under his supervision. While at a work camp, the youth worker became concerned about an inmate, the accused, who was smoking inside a makeshift hut constructed by the accused out of wood-slabs. The trial judge noted that the youth worker was "rightfully" concerned for the safety of the accused. A scuffle occurred when the youth worker tried to remove the accused from the hut, resulting in a charge of assault. The Queens Bench dismissed the Crown's appeal of an acquittal of assault based on the trial judge's finding that the accused was acting in self-defence from the application of force by the youth worker. The court's reasons for dismissing the appeal are summarised in the last paragraph of the judgment:

> In short, the Crown failed the threshold matter; namely, that there was a guard and inmate relationship. That relationship not having been proven, it is impossible to hold that [the youth worker] had any authority to apply force to the accused. It then follows that the accused could apply force in defence of himself as the trial judge found. Accordingly, the accused was rightly acquitted.

[14] The answer to the question is, yes, a staff member of a group home can use reasonable force to discipline a resident, if the force is reasonable in the circumstances and the staff member stands *in loco parentis* or in the place of a parent. The latter fact will not be assumed, but must be strictly proven by evidence or admissions.

Conclusion:

[15] Although defence counsel has raised an important legal principle, I find that it has no application to the case before the court:

1. On the facts, I find that there was no assault, meaning an intentional application of force by Ms. Howard on D.G. Any physical contact was incidental and consistent with accepted social interactions. If D.G.'s hand was caught in either the cupboard or garage door (which I frankly doubt occurred at all), it was clearly accidental and not intentional.
2. There was no unlawful confinement of D.G. Although D.G. was not allowed to go into the garage, the evidence indicated that the doors to the home were unlocked at all times.
3. Steering D.G. away from the open cupboard and the garage was primarily a safety issue. Items were stored there that could be dangerous or used as weapons.
4. Even if there was a technical assault by Ms. Howard on D.G. (something which I find has not been established), D.G.'s response was excessive and disproportionate. The blow to Ms. Howard's forehead was forceful. It resulted in a headache which lasted several days, and in an emotional upset that persisted even longer.
5. Finally, I find that when D.G. struck Ms. Howard, he was not resisting her or responding to her assault. D.G. was already very angry about not getting an allowance. D.G. was not allowed to go into the storage cupboard or into the garage. D.G. went to throw the coffee pot and did throw the sugar bowl, but not at Ms. Howard. D.G. was very angry with everyone. Ms. Howard was nearby so he struck her.

[16] In the result, I find D.G. guilty of assaulting Ms. Howard.

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Lilles C.J.T.C.