STATE v KISSUN SAMI KRISHNA (s/o DOR SAMI) (HAA040 of 2007)

HIGH COURT — APPELLATE JURISDICTION

WINTER J

6 August, 10 September 2007

Criminal law — sentencing — appeal — absolute discharge — whether inflicting a corporeal punishment for failure to complete a homework was unreasonable — violence against children — whether conviction was proper — assault had no wanton aggravating features — events took place over 6 years ago — whether the sentence of imprisonment was inappropriate — Education Act ss 12(3)(a), 22(1)(a)(ii).

The Respondent, a head teacher, was charged with common assault for inflicting corporeal punishment on a 14-year-old girl by caning her palm. The Respondent initially wished to enter a plea of guilty; however, the Appellant insisted that punishment was carried out severely with a metal rod. The Respondent did not accept the Appellant's assertion and pleaded not guilty. The Respondent was found guilty but the magistrate gave an absolute discharge. On appeal, the Appellant and Respondent agreed that the magistrate provided no substantial reason for the decision. The Appellant sought conviction. The Respondent sought absolute or conditional discharge. At issue was whether the magistrate's absolute discharge of the Respondent was appropriate.

Held — (1) The absolute discharge was unreasonable and was quashed.

(2) The Education Circular current at that time made it clear that inflicting corporeal punishment was a last resort and should not be used for any academic failure. The Respondent's action was not a mere technical breach of the law.

(3) Maximum sentence of 1 year imprisonment is reserved for common assaults with aggravating features only. There were no aggravating features in this case. Furthermore, imprisonment is not an appropriate punishment considering that the offence happened 6 years prior to the present case.

(4) The Respondent's culpability is considered lower as the Ministry of Education partly condoned his action.

(5) A fine of $300 is imposed to emphasise the court's abhorrence of any violence against children.

Appeal allowed.

Cases referred to

Carol Mitchell Tabutt v CIR Crim App No 108/1998S; *CIR v Druavesi* Crim App No HAA 0012/1007; *Naushad Ali v State* Crim App No HAA 0083/2001L; [2001] FJHC 123; *State v Nand Kumar* Crim App No HAA014/2000L; [2001] FJHC 101, cited.

P. Bulamainaivalu for the State

D. Sharma for the Respondent

[1] Winter J. The Respondent in this case, a head teacher was found guilty of common assault. He had inflicted corporal punishment on a 14-year-old girl child at his school by caning her palm with a wooden stick. Without recording any reasons of substance the learned magistrate gave the Respondent an absolute discharge. The Accused received no punishment for his crime. The State appeals that decision.

[2] The State and the Respondent agree, quite correctly in my view that as the absolute discharge was not supported by a reasoned judgment it is in error and must be quashed. I am now required to exercise my discretion and re-sentence the Respondent.

[3] The Respondent seeks an absolute or conditional discharge. The State seeks at least a conviction.

Background

[4] The judgment is redacted to maintain the anonymity of the child. There is to be no reference in any publication to information that might lead to the identification of the child. This includes by necessity the suppression of the name and details of the school concerned and the identification of the Respondent headmaster.

[5] As a result of a complaint from a teacher that this girl child would not complete her homework the child was sent to the headmaster for "discipline".

[6] At that time in March of 2001 the Education Department General Orders on Corporal Punishment [Circular 10/1986] allowed the discipline of school children by belting them with a strap. That crude practice was stopped as the result of a landmark decision by Prakash J given a year later declaring all forms of corporal punishment unconstitutional (see *Naushad Ali v State* Crim App No HAA 0083/2001L; [2001] FJHC 123 (*Ali*)). In that scholarly judgment his Honour detailed the relevant and applicable principles of international law that effect our Constitution and logically require that all forms of corporal punishment against children be abolished. I adopt his Honour's reasoning and conclusions.

[7] It was to his credit that the headmaster on first appearance wished to enter a plea of guilty. However, the State insisted the beating administered to the child was severely carried out with a metal rod. The headmaster did not accept this and so a not guilty hearing was required.

[8] The result of that hearing were findings that the child's beating consisted of being hit across the hand with a wooden stick or cane with obvious injuries to her hands. It was reasoned that as at that time you could only belt a child with leather then what the headmaster did was "unreasonable". At law because his actions were an unreasonable application of force he had assaulted his child victim. He was convicted upon this basis.

[9] I pause to reflect that while the logical basis for the conviction is unassailable the beating of any child with or without the use of wood or leather is utterly unacceptable.

Constitutional considerations and deterrence

[10] The Convention on the Rights of the Child forms an international basis for ensuring the rights and protection of children. Violence against children persists as a permanent threat where authoritarian relationships between adults and children remain. The UN Regional Conference On Violence Against Children (held in Suva in 2005) made the following pertinent observations.

[11] Addressing violence against children requires us to recognise children as fully-fledged rights holders. Children have to be guaranteed their right to physical, mental and sexual integrity as well as their dignity.

[12] The belief that adults have unlimited rights in the upbringing of a child compromises any approach to stop and prevent violence committed within the home or school or state institution. For lasting change, attitudes that condone or normalise violence against children need to be challenged.

[13] Children have the right to be protected from all acts of violence the same way adults are. In view of their relative vulnerability, however, children are also recognised with special protection measures. Any form of violence — even light

— cannot be justified including violence as a form of discipline. Kofi Annan the former United Nations Secretary-General once observed that "Violence against children is never justifiable. Nor is it inevitable. If its underlying causes are identified and addressed, violence against children is entirely preventable".

[14] In this appeal in order to decide an appropriate sentence the court must address the violence of school discipline against this child victim.

[15] I find the prime sentencing principle for this case is deterrence. The punishment that fits this crime is for you and others to know and be constantly reminded by the sentence imposed that violence against children is unacceptable. The issue is whether your absolute discharge could justly satisfy that sentencing principle?

Absolute discharge

[16] As observed by Gates J in *State v Nand Kumar* Crim App No HAA014/2000L; [2001] FJHC 101 at 9, also a state's appeal against an absolute discharge for the offence of common assault, the considered law in Fiji and other jurisdictions is that an absolute discharge is an exceptional order. It should be reserved for those cases where the offender was not morally blameworthy or where there was a mere technical breach of the law and where the direct or indirect consequences of conviction are out of all proportion to the gravity of the offence.

[17] Where the accused is responsible for his or her offending an absolute discharge is not appropriate. (See *Carol Mitchell Tabutt v CIR* Crim App No 108/1998S). The Court of Appeal cited with approval the remarks of Scott J in *CIR v Druavesi* Crim App No HAA 0012/1007 where his honour re-emphasised that the powers given under s 44(1) of the Penal Code should only be exercised sparingly after balancing out all the applicable public interest considerations.

Analysis on absolute discharge

[18] It was submitted, without the benefit of sworn evidence, that you are a teacher of some 26 years standing. It is submitted you will face consequences to your employment and enjoyment of travel rights if you are convicted. I do not accept that to be so.

[19] While ss 12(3)(a) and 22(1)(a)(ii) of the Education Act render a teacher liable to lose his license for any acts of violence, back at the time of this offending, the similar barbarous act of belting children was condoned by the ministry. For that reason particularly in the absence of evidence, I cannot foresee a circumstance where your career would be affected merely because of this conviction.

[20] In the absence of evidence from a consular office I do not accept that a conviction for common assault would necessarily prevent you from overseas travel. I accept that a sentence of imprisonment might do so. However, for reasons that I will shortly explain you do not deserve imprisonment.

[21] Against the suggestion of employment and travel consequences, I am confronted with an accused headmaster who had the choice to administer corporal punishment to a girl child for failing to complete her homework.

[22] The Education Circular about corporal punishment current at that time made it clear that inflicting such punishment was a last resort and should not be used for any academic failure (*Ali* (above) at 23).

[23] I find that you chose to cane the child across the hands. You were not obliged to do so. At law you were not entitled to do so. You are responsible for your choices and actions. You are morally blameworthy for assaulting this child. This was not a mere technical breach of the law. Judged against the essential ingredients of the offence of common assault your actions were unreasonable. There can be no dispute that you and others should be deterred from such violence against children by the entry of a conviction.

[24] Accordingly your absolute discharge is quashed and I will now hear from counsel about sentence.

Punishment

[25] The maximum penalty for a misdemeanor common assault is 1 year imprisonment. The tariff ranges from a means tested fine to full and immediate imprisonment. Imprisonment is reserved for common assaults with particularly aggravating features such as wanton violence often accompanied with alcohol or drug abuse, domestic violence or street mugging.

[26] This was an assault for which you were responsible but your culpability is lower as your assault of the child was in part condoned by the Ministry of Education. As there was no wanton or especially aggravating features of your assault and as these events transpired over 6 years ago a sentence of imprisonment is not appropriate.

[27] I am told you have remained in employment. That you earn $29,000 per annum. You own a car, a house and you have no savings. You are otherwise of exemplary character. Like most teachers you have unselfishly devoted your working life to the education of children.

[28] A modest fine is all that is required. I take into account your remorse and early guilty plea but for those considerations the fine would have been significantly increased. You are fined $300. This fine is to be paid off at a rate of $50 a month starting with a first payment on 1 October 2007. In default of payment you will be liable, after appearance before a magistrate for enquiry; to a term of 30 days' imprisonment.

[29] This sentence is imposed to emphasise the court's complete abhorrence of any violence against children. Those who inflict harm on children will be given harsh sentences with imprisonment being the usual consequence of their actions.

Appeal allowed.