IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Maddison, 2009 NSPC 16

Date: 20090421
Docket: 1893758
Registry: Kentville

Between:

Her Majesty the Queen

v.

Marlene Doris Maddison

Judge:	The Honourable Judge Alan T. Tufts
Heard:	February 4 & 12, 2009 in Kentville, Nova Scotia
Charge:	266(b) CC
Counsel:	Robert Morrison, for the Crown Donald Urquhart, for the defence

By the Court:

[1] Marlene Maddison is charged with one count of assault under s. 266(b) of the **Criminal Code**.

INTRODUCTION

[2] This proceeding is complicated by the number of allegations that the Crown is relying on to prove the offence notwithstanding only one count is charged. I will first summarize the allegations, explain the application of s. 43 of the **Criminal Code** and the criminal burden of proof and will then make some general observations about the testimony. Finally I will review the applicable law and apply that law to the facts as I find them by analysing all of the evidence.

SUMMARY OF ALLEGATIONS

[3] The defendant was an educational assistant, or "E.A." employed at the New Minas Elementary School. She was one of approximately six such assistants at the school. Four other of these E.A.s testified for the Crown. The defendant and some of the other E.A.s worked with their students in the resource room at the school located on the upper level of the building and referred to in the evidence as the "upper resource room" or for these reasons "resource room".

[4] The defendant's primary responsibility was to work with a student – a young boy – born March 9, 2001 – who I will call "C". C has very challenging behaviour problems which I will describe in more detail below. It was in the course of the defendant's duty as an EA that these allegations arose. They all arose at the school or in the playground and all relate to allegations of force which, it is alleged, exceeded legal justification.

[5] The allegations arose during the period of February 1 to April 2, 2008.

SECTION 43 and the CRIMINAL BURDEN OF PROOF

[6] The defendant relies in part on s. 43 of the **Criminal Code**.

[7] Section 43 provides that a schoolteacher is justified in using force by way of correction toward a student providing the force does not exceed what is reasonable in the circumstances. This section has been analysed by the Supreme Court of Canada in two decisions — **R. v. Ogg-Moss** [1984] 2 S.C.R. 173 and **The Canadian Foundation for Children, Youth and the Law v. Canada** [2004] 1 S.C.R. 76 – which I will describe in detail later.

[8] Some of the allegations, if true, would clearly fall outside the scope of s. 43. These allegations, like all the allegations however, must be proved beyond a reasonable doubt. In this regard the burden is on the Crown and never shifts to the defence throughout the entire trial. If the defendant's testimony is believed, raises a reasonable doubt or if any reasonable doubt of the defendant's guilt is present after considering all the evidence the defendant must be acquitted.

[9] There is no dispute that the defendant is a "school teacher" and C was "a pupil" for the purposes of s. 43 of the **Criminal Code**.

GENERAL OBSERVATIONS

[10] As I indicated above the trial is complicated by the number of allegations, notwithstanding there is only one count of assault charged. This appears to contravene s. 581 of the **Criminal Code**. The defence, however, made no objection nor did the defence seek particulars under s. 587. The defendant indicated she received full disclosure and was aware of all of the allegations. The Court required the Crown to specify at the end of the trial which actions it relied upon to support a conviction. Both counsel agree that any particular conduct which the Crown relied upon must be proved beyond a reasonable doubt.

[11] Having said this, many of the allegations – which I will detail below – had very little, if any, detail regarding when the allegations arose–date or times–or precise location; whether or not other students or teachers were present or other surrounding circumstances or events which would identify the specific event. I will reference these later when I describe the allegations in more detail.

[12] Also, there was no request to allow the Court to use the circumstances from one allegation as evidence relative to the other allegations and to support a conviction. No similar fact *voir dire* was requested.

[13] Words uttered by C were received as evidence without objection or comment. These utterances included words such as “it hurts”, “you’re hurting me” or words to a similar effect. C was never called as a witness.

[14] These utterances may be received as narrative but cannot be admitted for the truth of their contents because they offend the rule against hearsay – unless they fall into some exception. They may be included in the *res gestae* exception. However that was never argued. Also, there was no argument that these words were part of the principled hearsay exception.

[15] In any event, I have given this evidence very little, if any, weight. Even if the words are admissible, given C’s diagnosis for Oppositional Defiance Disorder these words of protest which others have described have very little, if any, probative value. They could very easily be part of his defiance. They cannot be relied upon to support allegations, in my opinion, in a criminal trial.

[16] The defendant also repeated words that C was alleged to have said. She said that C told her that he lied and was sorry. Again, no argument was made regarding these words. They are however, in my opinion, hearsay and do not fit into any exception to the hearsay rule. They are not admissible.

[17] Another difficulty in this proceeding was the lack of evidence regarding the layout and configuration of the upper resource room – where most of the allegations arose. There were also references to C’s classroom being across the hall from the resource room. In Marlene Pinch’s evidence in particular she refers to that room. It was not clear whether some of the movements which were described particularly in reference to the April 2nd incident were in or out of that room. This was never clarified by either counsel in their questioning. I mention this because, as I will explain later, there is a marked difference between the movements of these individuals as described by the defendant, Marlene Pinch and Darlene MacGregor. The lack of clarity in the evidence made the analysis of this incident very difficult.

[18] There were general references to the E A's desks, work table, computer table, time out booth and bookcases and other areas where E As instructed other students in the upper resource room. There were no pictures or drawings which gave me any sense of where particular witnesses were standing or seated, their points of observation, the distances involved or the ability of any particular witness to see or hear the events to which they testified. The only reference in this regard was that the room was the size of a typical elementary classroom – which I believe I can take judicial notice of and references to some estimates of distances by some of the witnesses. There was however, evidence that the room was divided by bookcases. I had no sense of how they were configured, how high they were or how they affected any witnesses' view to the events in question.

[19] Finally, there was evidence of a personality conflict between the defendant and at least two of the Crown witnesses – Marlene Pinch and Darlene MacGregor. The defendant testified to this and described how this originated from activities both in and outside the school. This came out in the Crown's cross-examination. Both Ms. Pinch and Ms. MacGregor were present during that testimony.

THE ALLEGATIONS - CROWN EVIDENCE

[20] The Crown presented four witnesses – the four E.As I referred to earlier. Each witness testified regarding various incidences which were observed between the defendant and C. Some witnesses have described the same incident, although it is not clear how many incidents this includes. Different witnesses however have described different events. The Crown relies on most of these incidents to support the one count of assault.

MARLENE PINCH

[21] Marlene Pinch described five separate incidents. I will start with what I call the "April 2nd incident" – the one which Ms. Pinch reported to the principal and which led to this proceeding.

[22] On this day the defendant was returning to the resource room after recess. The defendant and C had a confrontation before starting the recess break. Ms. Pinch saw the defendant and C come into the resource room. There was a verbal confrontation. She described words that C uttered to the effect that C did not want

the defendant to touch him. Ms. Pinch said she was at her desk and described how the defendant was trying to get C to sit down to do some work. C objected. She then said the defendant grabbed C by the throat with her hand and pinched him and moved him backwards toward the time out cubicle. She said she, that is the defendant, pushed him down into the chair and pushed the chair hard into the cubicle.

[23] She then described how the defendant moved the screen partition in front of the cubicle and that a further confrontation continued where the defendant was leaning over the screen and confronting C. She said during this event the defendant hit or cuffed C on the side of the head. She said she intervened and confronted the defendant and eventually took the boy from the room and reported the incident to the principal.

[24] Ms. Pinch also described an incident when the defendant was trying to get C ready to leave and C was resisting because he did not want to leave his artwork. This was prior to the April 2nd incident. The defendant was trying to get C to put his boots on while C was resisting. Finally the defendant took him to the door without his boots. Ms. Pinch said that the defendant had C in a choke hold and that she had lifted him off the floor as she dragged him down the hallway. I refer to this as the "boots incident".

[25] The next incident, which I will call the "hand bending incident", occurred at the resource room, but no particulars were offered as to the time or surrounding events. Ms. Pinch says it occurred during the February to April period. She described how the defendant was pushing down C's hand after he had apparently ripped up his "message", which was an exercise he was required to do as part of his schoolwork. She described C as clearly in pain and that the defendant was being confrontational.

[26] The next incident, which I will refer to as the "rice krispie square incident", occurred during lunchtime at the round table, which I believe is in the resource room. C was dressed to go outside and the defendant wanted him to eat his snack or lunch – a rice krispie square. She described – although not in great detail – that the defendant had C in a choke hold and that she had pulled him out of the chair. She said that Darlene MacGregor and Heather Lynch were also present. This event

apparently occurred in February 2008 and the three E.As reported this to the vice-principal, Mr. Walker, but nothing resulted apparently from that report.

[27] Finally, Marlene Pinch described in very general terms different times when the defendant would argue with C over eating. Because Ritalin, which C was taking, depressed appetite, arguments over eating were frequent. Ms. Pinch's description of this showed the apparent differences between the defendant and Ms. Pinch over their teaching techniques. It is clear the defendant is more strict and confrontational whereas Ms. Pinch seemed to be more permissive. She described this as, "You can't win every battle" and "You have to pick your battles", which was her preferable course of action with children who were O.D.D. I will describe this in more detail later.

[28] In any event, she described how on one occasion she saw the defendant hold C's head down to "make him eat", to use her words. This allegedly occurred in the resource room but no details of when or what else was occurring was described. I refer to this as the "holding down head" incident.

DARLENE MacGREGOR

[29] Darlene MacGregor testified. She described six incidents. She witnessed the April 2 incident. Some of the other incidents she desribed may have been described by others, but that is not clear. I will summarize her testimony.

[30] The first incident she described - what I call the "arm bending incident" – occurred in the resource room. Ms. MacGregor could not say on what date or at what time this occurred. Nor could she describe the surrounding circumstances or other events to ascertain what event was being referenced. In any event, she said she saw the defendant pressing down C's wrist or arm and C uttering words to the effect that it hurt. She said the defendant appeared angry because of her tone of voice. She said it appeared the defendant was trying to get C to do some kind of school work. It is not clear whether this was the same incident as the "hand bending" allegation described by Ms. Pinch.

[31] The next incident – which I will call the "taking by the throat incident" – she described included no details about date, time, location or surrounding particulars.

She described only that she had seen the defendant take C by the throat and sit him in a chair. She said that this occurred between February and April of 2008.

[32] The next incident, which I will call the "pushing from behind incident" Ms. MacGregor described seeing the defendant at one time pushing C from behind because she, that is the defendant, appeared to want C to go over to the computer table. She said C was pushed so hard he tried not to fall. She called it a big push with her hand. Again, there were no details as to time or date or surrounding circumstances sufficient to identify this particular event.

[33] The fourth incident she described occurred outside while the children were playing. Again there is no context described to ascertain when this occurred. She said she saw the defendant grab C's jacket by the hood and twist it until he began to choke. She said his face turned red. Again she said the defendant appeared angry. She said she confronted the defendant and asked her to stop. I call this the "twisted hood" incident.

[34] Ms. MacGregor also described the April 2nd incident which Ms. Pinch witnessed. Ms. MacGregor however did not see anything directly, it appears. She said it was hard to see over the bookcases. She did however hear raised voices and heard chairs moving. She heard C's words of protest and heard the defendant say, "I'm not hurting you". She said she heard the defendant sit in her chair and then described how Marlene Pinch came into the room. She said that C was serving a 2-minute time out. She said Ms. Pinch took C from the room. Her testimony conflicts in part with that of Marlene Pinch. Ms. MacGregor's evidence was to the effect that Ms. Pinch came into the room partway through the confrontation between the defendant and C. She did not testify that she heard anything said by Marlene Pinch.

[35] On cross-examination Ms. MacGregor described a sixth incident, which I will call the "choke hold" incident. She said she was upstairs in the hallway speaking to Ms. Blanchard when she saw the defendant lift C off of his feet with a choke hold. No other context or circumstances were described to identify this incident.

HEATHER LYNCH

[36] Heather Lynch testified. She described two incidents.

[37] In the first incident, which I will call the “computer table incident”, Ms. Lynch described C sitting in the defendant’s lap with the defendant having her right arm across his throat and her legs across his legs. She said C was yelling. This was apparently an argument about eating, which was common at lunchtime, for the reasons I described earlier. It is not clear whether this was the same incident as described by Marlene Pinch or Darlene MacGregor.

[38] She also described that on one or two occasions she witnessed the defendant push C into a chair by placing her hand on his head. She provided no context to these observations. I will call this the “push on the head in the chair incident”. It is not clear whether this is what Marlene Pinch was referring to in her testimony.

KATHLEEN DOREY

[39] The final Crown witness was Kathleen Dorey. She witnessed the boot allegation referred to above.

[40] She described how C did not want to get dressed to go home and kept running away and that the defendant grabbed him by the hood of the jacket. She said C kept kicking off his boots and that finally the defendant took control of him and took him downstairs without his boots.

[41] She said the defendant put her hand around his throat but conceded she was not choking him. She said the defendant was frustrated and had no patience with C. She offered that she would have tried to calm the boy down. She obviously would have employed a different methodology in dealing with C in this particular incident.

THE DEFENCE

[42] The defendant testified on her own behalf. She described the April 2nd incident in detail as well as the boots incident. In general terms she described the challenges with C’s behaviour and how she was trained to deal with these challenges.She described the various methods she used when attempting to modify his behaviour and restrain him if necessary.

[43] Regarding the April 2nd incident she explained that she had a confrontation with C before recess and described how she had some strawberries which Grace Moors had left for him. She described taking him out for recess. She said Marlene Pinch had dropped him off to her at 10:15 a.m. She said C did not want to come in from recess and another confrontation ensued. She also explained that she understood from Marlene Pinch that C had had a bad morning up until then. When she got him in from recess it appears that she went to the resource room. C continued to be defiant. She said he threw his pencil across the room when they were attempting to have him write his “message”. At times he was up on his knees on the chair and at one point he came down on her wrist with his fist. She said, “No” and he hit her again. This was the triggering event which prompted the defendant to place C in the time out cubicle. She placed him in the cubicle and he got up in the chair and attempted to swat the defendant with his hands. She used her hands to thwart these attempts.

[44] She denied ever hitting or cuffing C as Marlene Pinch described. She also denied pinching or grabbing his throat as Marlene Pinch alleged. Her description of the events were markedly different from that of Marlene Pinch. According to the defendant Ms. Pinch was on the other side of the room when C went into the time out cubicle and the movement to the time out cubicle came after they were sitting at the table, which is contrary to what Marlene Pinch described.

[45] The defendant also gave a detailed account of the boots incident. The circumstances surrounding the incident were essentially as described by the other witnesses. However, the defendant explained that when C kept kicking off his boots she decided to escort him to the door where his parents were waiting without his boots. This was something, she explained, that was an accepted and appropriate response. She testified in her experience that C was likely to hit her with the boots if she further confronted him. She said she gathered up the boots and coat and took him to his parents.

[46] She denied that she had C in a choke hold. She did explain that when she did restrain him it was from behind by placing her arm around his chest in order to avoid being hit. She also explained that because of her height – 5'1" – her arm often came up to the top of his chest.

[47] This may explain what appears to be a choke hold. Remarkably there was no evidence of how tall or short or large or small this boy was. I have no idea whether he is large or small for his age, or so-called normal size. There was no evidence of what a normal sized 7-year-old boy would be, in any event.

[48] The defendant also denied the other allegations contained in the various incidents that I described above. It is clear from her testimony she had no specific recollection of the allegations, however she explained that on occasion she would place her hand on his when instructing him to write or to encourage or urge him in this regard. She also explained that she has used her hand on the back or top of his head to get him to move along or to have him sit. She also described on at least one occasion C sat in her lap while she sat in the chair which, she explained, reclines.

[49] The defendant also described that there was a personality conflict between her and Marlene Pinch and Darlene MacGregor. She said this had existed for some time and that her conflict with Marlene Pinch surrounded issues arising in and out of school. In her opinion the other E.As had become involved on the side of Marlene Pinch and Darlene MacGregor in this conflict.

[50] The defendant also explained her experience with C and the challenges he has and the challenges he presents to the teaching staff. I will explain this after summarizing the evidence of Robin Magee.

[51] Grace Moores and Pam Ells, who are both school teachers at New Minas Elementary School testified for the defence. They both described their experience with C and the defendant. Neither of them witnessed any inappropriate conduct by the defendant and both were generally supportive of her ability as an educational assistant. Ms. Ells explained that the defendant was very consistent and that risk of harm was always an issue and that the E.As were required to anticipate a sudden shift to aggression by C. Eric Trahan, the Principal, also testified. He said he never saw any inappropriate conduct by the defendant towards C and never had any concerns in that regard.

DR. ROBIN MAGEE

[52] Dr. Robin Magee testified. She is a child clinical psychologist and is retained by the Annapolis Valley Regional School Board to provide professional advice regarding the behaviour of challenging children, including C.

[53] She has met and interviewed C. She had diagnosed him as having ADHD, which is Attention Deficit Hyperactivity Disorder, and ODD – Oppositional Defiance Disorder. She said that C fell into the extreme range of ADHD – "well beyond the 99.9 percentile". She described that this child was very challenging. She had met with the E.As and teachers at New Minas Elementary School before C was transferred there to brief them on those challenges.In-service sessions were available to the staff, which the defendant, among others, attended.

[54] Dr. Magee explained that C could be extremely aggressive. He has been known to strike teachers and other students in the face as often as "forty times", [she never specified over what period of time] although that had been reduced. He has bitten people, he can kick and has spat in people's faces. He can yell and generally be defiant to an extreme degree. According to Dr. Magee, C needs to be constantly monitored while at school. He can only be present in the classroom with other students for short periods of time. He needs to be under the constant care of an educational assistant.

[55] C is not able to go to school on the regular school bus and is required to be driven to school by a taxi, although he has been known to have hit the taxi driver as well.

[56] Dr. Magee explained the non-violent crisis intervention technique to which I need only briefly to refer. This involves placing one's arms around the upper body of the child, grabbing his wrists and placing one hand on the child's chest to restrain him. She also confirmed the "hand over hand" instruction method was appropriate.

[57] Dr. Magee agreed that C could change from being settled in one instance to aggression in another. When not medicated his conduct could be characterized by "great, great aggression", to use Dr. Magee's words.

[58] A series of progressive methods were used to address C's aggression. This involved a time out cubicle which was located in the resource room. This appears

to be a study carrel which was enclosed with a screen or portable office partition about four feet high.

[59] The next level required the student to sit in a chair outside the principal's office – the "blue chair". Finally, for the most extreme behaviour the student – in this case C – would be taken to a closet in the lower level adjacent to the principal's office. This was once a storage closet which was reconverted and modified – padded – to place children in who were extreme in their aggressive behaviour. The door would be held tight and their placement would be timed.

[60] The defendant described each of these methods. Particularly she said she had considerable reluctance placing C or any child in the time out room. She said, "as a mother" she did not like putting a child in that room. This remark was unsolicited. In my opinion it was a sincere and honest comment and showed sensitivity and empathy by the defendant towards students, and C in particular.

[61] The defendant also described her experience with C. She described that she had been hit in the face many times. She said that she had been bitten, kicked and spat at in the face by C. She described in detail one struggle when C's father came to pick him up after he refused to put his boots on and that C kicked the defendant in the face when the boy's father was carrying him.

THE LAW

[62] Assault is defined in s. 265 of the **Criminal Code**. In this context it means the intentional application of force to another person without his consent.

[63] Section 43, which I described earlier, as well as other sections of the **Criminal Code** – example: self-defence sections – do provide some legal justification for conduct which would otherwise be an assault. If such justifications arise the burden is on the Crown to demonstrate that no justification applies.

[64] Here all the allegations involve some application of force. The issue then is simply whether s. 43 applies and what is the proper scope relative to this factual context. I will describe the law regarding s. 43 as set out by the Supreme Court of Canada.

[65] There are clearly disputes on the facts in this case. I will make findings of fact after analysing the evidence. Again, the burden is on the Crown in this regard. If findings of fact result in a finding of guilt they need to be established beyond a reasonable doubt.

[66] The Supreme Court of Canada decision in **Canadian Foundation for Children, Youth and the Law v. Canada,** *supra* sets out the applicable principles regarding the application of s. 43. I will not quote from this decision at length, but simply enumerate only those principles which I believe are applicable to this case:

> 1. Section 43 applies to simple non-consent force – it does not apply to force that results in harm or the prospect of harm.
>
> 2. The focus of s. 43 is on correction and not on the gravity of the precipitating event – the gravity of the precipitating event is not relevant.
>
> 3. Section 43 includes only sober reasoned use of force that addresses the actual behaviour of the child and designed to restrain or express some symbolic disapproval of his or her behaviour.
>
> 4. It is wrong for caregivers or judges to apply their own subjective notions of what is reasonable – s. 43 requires an objective appraisal based on current learning and consensus, particularly supported by expert evidence.
>
> 5. Corporal punishment which involves slaps or blows to the head or the use of objects is harmful and is not reasonable.
>
> 6. While corrective force to remove children from classrooms or secure their compliance may be used, the use of corporal punishment is not acceptable.
>
> 7. Section 43 exempts only minor corrective force of a transitory or trifling nature.
>
> 8. Section 43 cannot exculpate outbursts of violence motivated by anger or animated by frustration.
>
> 9. The child must be capable of benefiting from the correction.

In my consideration of the application of the principles outlined by the Supreme Court of Canada regarding s. 43 of the **Criminal Code** I have reviewed the

following decisions: **R.v. A.B.** [2008] O.J. No. 4421 – see para. 84 to 98; **R. v. Olink** [2008] A.J. No. 1148; **R. v. B.S.** [2008] O.J. No. 975; **R. v. Beck** [2008] N.J. No. 110; **R. v. Persaud** [2007] O.J. No. 1752; **R. v. Tourand** [2007] S.J. No. 259; **R. v. Rennato** [2007] O.J. No. 1366; **R. v. C.M.T.U.** [2006] B.C.J. No. 3221; **R. v. T.J. R**. [23006] A.J. No. 906; **R. v. B.W.S.** [2006] S.J. No. 532; **R. v. T.E.** [2006] N.S.J. No. 61; **R. v. Foote** [2005] O.J. No. 3260; **R. v. J.D.B.** [2004] A.J. No. 814; **R. v. D.K.** [2004] O.J. No. 4676; **R. v. W.E.S.** [2004] S.J. No. 480

While the facts in these cases can be easily distinguished from those in this case they are helpful to understand the range and scope of the application of s. 43 to various factual scenarios.

ANALYSIS

[67] It is clear that there is a personality conflict between Marlene Pinch, Darlene MacGregor and possibly Heather Lynch and Kathleen Dorey, and the defendant. The origin and basis of this is not clear but appears to have developed over time. The defendant explained this and I accept her testimony in that respect.

[68] There also appears to be a difference in the style and manner in which these educational assistants approach their duties. It appears from the evidence that the defendant is stricter and perhaps less tolerant or forgiving whereas the other witnesses were more tolerant and forgiving. This may explain the many descriptions of the defendant's facial expressions or her tone of voice. It is possible that the defendant's expressions and tone are manifestations of her teaching style as opposed to an indication of her demeanor.

[69] I want to explain, however, that these are not intended to be pejorative remarks about any of the witnesses, including the defendant. What style of teaching is more effective or appropriate is not something that I am qualified to comment on, nor is it directly determinative of the issue in this proceeding. The contrast however, in my opinion, does impact on the testimony each witness gave – it colours their impression of what they saw and heard. The Crown witnesses, in my opinion, at times tended to generalize and infuse their testimony with opinions. The defendant, on the other hand, tended to rationalize her answers and was argumentative at times.

[70] I intend to analyse the April 2nd and the boots incident separately. I will deal with the remaining incidences collectively with some reference to specific allegations.

[71] I start by looking at the following incidents: “hand bending”, “rice krispie square” and “holding down head” incidents described by Marlene Pinch, the “arm bending”, “taking by the throat”, “pushing from behind”,” choke hold” and “twisted hood” incidents described by Darlene MacGregor and the “computer table” and “push on the head in the chair” incidents described by Heather Lynch.

[72] In each of the incidents the defendant was clearly applying force for a corrective purpose. She was either attempting to secure the child’s compliance or restrain him in anticipation of his aggressive behaviour. The difficulty with these allegations are that in most, if not all, incidences there is no context to fully explain the boy’s behaviour or the defendant’s response. The witnesses were either passing by or overheard the conflict while they were engaged in other activities. Furthermore, in my opinion, the utterances of C protesting may have influenced their impression of what had occurred. For the reasons I explained earlier his words are not probative of any degree of force the defendant was using given his extreme defiance disorder.

[73] I accept the defendant’s explanation of the “hand bending” and “arm bending” incidents. I also accept her explanation of how she would make the child move along on occasions by placing her hand on his back. I do not believe the defendant intentionally pushed C as alleged.

[74] The difficulty with the lack of specifics regarding dates and times is that it is objectively very difficult to respond to such an allegation other than a general explanation of one’s behaviour and a general denial. Specific allegations which are identifiable as to location, time and context may require a more detailed explanation, which the court can properly assess. Here, because of the weakness in the details of these allegations, it is very difficult to assess the defendant’s general denial. I have no reason to reject her denial in this regard and I accept her explanation about how she otherwise interacts with C. Specifically I find that those incidents which were described as “rice krispie square” and “choke hold” incidents were most likely cases where the defendant had her arm around the boy’s chest and because of her relative shortness this may have looked like a choke hold.

[75] Further, I accept the defendant's denial of the "hood twisting" incident. Given the sparsity of details regarding this allegation a simple denial is not an unreasonable response when it would be almost impossible for the defendant to recall which event was being referenced. I also had the impression that the description of this event may be coloured or embellished by the differences in approach between these women, which I described earlier.

[76] Accordingly, regarding all of the incidents other than the boots incident and the April 2nd incident I accept the defendant's explanation . I am satisfied that any contact witnessed by those witnesses which described those events – which I detailed above – was corrective and that no more than transitory or trifling force was used. It was, in my opinion, reasonable in the circumstances. I have at the very least a reasonable doubt in that regard.

[77] This leaves the "boots" and the "April 2nd" incidents to analyse.

[78] Before dealing specifically with those allegations, I want to comment on the witnesses' description of the defendant's demeanor during these incidents and the others I just described. The witnesses describe the defendant as being angry or frustrated because of the tone or level of her voice and expressions on her face or the fact that some comments may have been sarcastic or insulting to C.

[79] In my opinion, the court should be careful not to draw too many adverse inferences from these observations. First of all, the defendant was in each instance trying to convey her disapproval of the child's actions or non-compliance. Whether that is an appropriate educational technique is not, in my opinion, directly relevant in this context. Secondly, each witness who made these observations was not fully apprised of all of the circumstances confronting the defendant and was unaware of precisely the full extent of the conflict. Accordingly, the defendant's tone or expression in these circumstances cannot necessarily be probative that she acted out of anger or frustration. In my opinion it is more appropriate to focus on what she did, the force which was objectively apparent and the full context of how it occurred.

[80] I will begin by analysing the boots incident. There is little dispute about what occurred here except the degree of force used by the defendant. In my

opinion the defendant acted reasonably in the circumstances. More particularly I am not satisfied beyond a reasonable doubt that she acted unreasonably. Her actions were corrective and justified under s. 43. I will explain why.

[81] Clearly the confrontation between the defendant and C was startling and it would undoubtedly attract a great deal of attention given the level of defiance and aggression which this child is capable of demonstrating. As I explained earlier I do not believe that the defendant ever effected a choke hold on this child. As I indicated earlier, I accept her explanation about how she restrained him from behind across his chest. How she restrained the child was consistent with what Dr. Magee described. Her description was reasonable and capable of belief. I accept it.

[82] Undoubtedly she "dragged" the boy to the door to meet his parents as she described. There may have even lifted him from his feet – but in my opinion it was not by his neck as the Crown witnesses intimated.

[83] This was a reasonable response given the risk which the defendant and Dr. Magee describe, ie. the risk that he could become more aggressive instantly, the risk of him hitting, kicking or biting which had occurred on other occasions. The defendant's actions in the way she described them was consistent with her training and the appropriate methods Dr. Magee described. In my opinion her actions in this instance did not constitute a criminal offence. Her actions were justified under s. 43 of the **Criminal Code**.

[84] This leaves the April 2nd incident. The allegations surrounding this incident are much more serious – the grabbing of C's throat in the front by the defendant's hand and the slap or cuff to the head. If true, these allegations would, in my opinion, fall outside the scope of s. 43 as I described above. First of all the grabbing of the throat would be more than is required to be corrective given the context described and would be more indicative of a display or anger or frustration. The slap or cuff to the head is clearly beyond the constitutional limits set out by Chief Justice McLachlin in the **Children Foundation** case.

[85] The issue however is did these actions occur or better stated, has the Crown proved beyond a reasonable doubt that the defendant acted in such a manner? As I mentioned earlier, the Crown must establish that the defendant's action exceeded the scope of s. 43 beyond a reasonable doubt. Crown are not limited to the precise

nature of the allegations, however the conduct of the defendant must be proven beyond a reasonable doubt to constitute an assault.

[86] Probability is not sufficient. The standard of proof as set out by the Supreme Court of Canada in **R. v. Lifchus** [1997] 3 S.C.R. 320 and **R. v. Starr** [2000] 2 S.C.R. 144 need not be repeated here. It is suffice to say that the criminal standard of proof is beyond probability and closer to certainty than to probability. At the same time a reasonable doubt must be based on the evidence or lack of evidence and cannot be a frivolous or speculative doubt.

[87] Part of the difficulty here is that there is a difference in the evidence about where Marlene Pinch was situate when the defendant entered the resource room with C. Marlene Pinch says that she was at her desk. The defendant says she entered the room later after C was either in the time out cubicle or being placed there. The defendant specifically denies grabbing C by the throat or slapping or cuffing him about the head. The defendant says Marlene Pinch came from the other side of the room when C was in the cubicle. Interestingly, Darlene MacGregor, who only heard the commotion and the chairs being pushed, also has Marlene Pinch entering the room later and after hearing the commotion. I accept that the sequence of events occurred in the way the defendant described. I found her evidence in its entirety overall more detailed and clear as to the circumstances leading up to the events in question. It made sense to me and was consistent with what Darlene MacGregor described.

[88] In my opinion Marlene Pinch was not in close proximity as her testimony would suggest to observe the actions of the defendant immediately prior to C going into the time out cubicle. Together with the personality and other conflicts which I described above I have a serious doubt that Marlene Pinch saw the grabbing/pinching of C's throat which she described. At the very least I am not satisfied beyond a reasonable doubt the defendant applied the force in the way it was alleged nor that she exceeded any reasonable application of force if any force was used to get C into the cubicle such that it was justified under s. 43.

[89] Finally I also accept the defendant's explanation of what occurred when she was conversing with C over the screen when he was in the cubicle. Given the heights of the screen, the way C was positioned and the way the defendant was leaning over the screen in my opinion I am not satisfied Marlene Pinch could

accurately see what was occurring. What the defendant described is believable. I accept her evidence on this point. Again, I have a reasonable doubt that she either slapped or cuffed C on the head as alleged.

[90] Finally, as I mentioned above, in my opinion there appears to be a difference of opinion or styles or methods of teaching between the defendant and the other educational assistants who testified. This may be as a result of differences of personality or some other reason. This may explain how each witness may have seen the same events differently. In my opinion this difference affected each witness' perception of certain actions.

[91] I am not satisfied that the defendant in any of the many allegations which the Crown has made or any of the events upon which the Crown has relied used any force that was not corrective or beyond that which was reasonable in the circumstances and within the scope of s. 43 as explained by the Supreme Court of Canada. The defendant is accordingly found not guilty.

A. Tufts, J.P.C.