PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. P.M.*, 2021 NSPC 11

Date: 2021-02-05
Docket: 8424880
Registry: Dartmouth, Nova Scotia

Between:

Her Majesty the Queen

v.

P.D.M.

Restriction on Publication: s. 486.4

DECISION

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	November 10, 2020 and December 3, 2020 in Dartmouth, Nova Scotia
Decision:	February 5, 2021
Charge:	Section 266 CC
Counsel:	Janine Kidd, for the Crown Kathryn Piché, for the Defence

By the Court:

[1] The accused is charged that he between the 1st day of August, 2019 and the 30th day of September, 2019, at or near Dartmouth, Nova Scotia, did unlawfully assault R.L., contrary to Section 266 of the *Criminal Code*.

[2] The accused is presumed innocent. The presumption of innocence remains in place throughout the trial.

[3] The Crown has brought the charge against the accused and bears the burden of proving it. The burden of proof is beyond a reasonable doubt. There is no burden on the accused.

[4] If on any aspect of the evidence a reasonable doubt arises, the accused must be acquitted.

[5] Proof of guilt may be established by means of direct or circumstantial evidence or a combination of both. Direct evidence entails a person witnessing the alleged event first-hand. Circumstantial evidence involves proof of surrounding facts from which the court is asked to conclude that the fact in question occurred. When the crown relies solely on circumstantial evidence, the court must be satisfied that it is reasonable to infer the fact(s) alleged and there is no other reasonable conclusion to be drawn from the proven surrounding facts.

[6] The offence of assault is defined in section 265 of the *Criminal Code*. The relevant portions reads:

> (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; …
>
> (3) For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant ...; or
>
> (d) the exercise of authority.

[7] This case involves an allegation of assault by the accused upon an alleged victim who, at the time of the alleged assault, was three years of age. It is not in

dispute that, at the relevant times, the accused was "standing in the place of the parent" of the alleged victim.

[8] Section 43 of the *Criminal Code* provides:

> Every schoolteacher, parent or person standing in the place of the 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.

Summary

[9] In the present case the accused was the boyfriend/fiancé of the alleged victim's mother. They lived together for a period of approximately two months in the accused's home in Dartmouth, Nova Scotia. During that time, the accused is alleged to have used various forms of discipline on the child including striking him on the hand and buttocks. The accused is alleged to have used an instrument, a wooden spoon or brush, to strike the child on at least one occasion. The Crown alleged that, on one occasion, the accused's actions caused the complainant to have bruising over both sides of his buttocks which lasted for more than a week.

Position of the Parties

[10] The position of the Crown is that the evidence has proven beyond a reasonable doubt that the accused struck the complainant with an object on at least one occasion and, on one occasion, caused an injury to the child that was indicative of the use of unreasonable force.

[11] The defence position was that the evidence was of such poor quality that the Crown failed to prove, beyond a reasonable doubt, that any of the alleged assaultive behavior occurred. If, however, the court found that the behavior alleged, or some part of it, had been proven, the Crown failed to prove beyond a reasonable doubt that the corrective force used by the accused exceeded what was reasonable in the circumstances.

Credibility and Reliability of Evidence

[12] With each witness who testifies at a trial the presiding judge, or jury, must decide whether to believe all, part, or none of their evidence. This decision is made based upon the court's assessment of the credibility and reliability of the witness's testimony. Credibility or believability takes into consideration a variety of factors including, but not limited to: the witness's demeanor; the consistency of their statements; the reasonableness of their evidence; how their evidence fits with other proven facts; and any indication of bias or collusion.

[13] Even where the court concludes that a witness's evidence is credible, a reasonable doubt may arise because the court may find that it is not reliable as proof of the alleged facts. Concerns regarding the reliability of a witness's evidence may arise for a number of reasons, including but not limited to: the witness may demonstrate poor observation skills such as lacking an attention to details of relevance; the witness's ability to accurately observe may be impaired, due to their observation location, or by physical impairment such as poor vision, or the witness's state of sobriety, *et cetera*; the witness may demonstrate a poor memory, being unclear or inconsistent about what they observed; a witness may lack the ability to clearly communicate what they observed, whether due to a poor memory or otherwise; and a witness's evidence may tend to reflect a bias as to how they recalled an incident observed by them.

The Testimony

[14] V.L., the complainant's mother, testified that her son R. is now four and was three at the time of the alleged offence. Her older son, L., is 14, having been 13 at the time.

[15] Ms. L. stated that she met the accused six years ago but only started dating him in June of 2019. In July he proposed marriage and she accepted. On August 3rd she accepted his invitation for her and her children to move in with him in his house on […]Road in Dartmouth. She gave up the apartment in which she and her children had been living. They lived together in his house for less than two months.

[16] She stated that their relationship followed a pattern of having a fight, making up, then things being all right until the next fight. She remembered them having a fight over the U-Haul on the day she moved in.

[17] She described the accused taking an active role in disciplining R immediately after they moved in. She testified that her son R was potty training at the time and was liable to having accidents, pooing or peeing his pants. He would also occasionally break something or talk back.

[18] She testified that the disciplinary measures employed by the accused included: making R sit on a chair in the kitchen for a lengthy period of time; putting R in his bedroom where he was to stay until allowed to come out; and, hitting R on the bum or hands with a wooden spoon. She stated that when any physical disciplining was done she was not allowed by the accused to be present.

[19] She described several specific, significant incidents.

[20] She testified that about a week after she and her kids moved into the accused's home there was an incident when R pooped his pants while in the living room. The accused got upset and picked up R and took him upstairs to the boy's bedroom. She stayed in the living room. She said that she heard the accused striking R several times ("smack, smack, smack") and heard R crying. Although she did not see what took place in the bedroom, she believed the accused struck R with a wooden spoon.

[21] After the incident happened Ms. L. said that she was going to move out, but she had given up her apartment and, therefore, had nowhere to go. She called a shelter that accepted children and was told they had no space. She called her sister-in-law, V.B., and asked her to come and take R., which she did.

[22] She testified that bruises, which had not been there before, appeared on both sides of R's bottom which she described as purple and brown and later turned yellow. She said the bruising was visible for more than a week. She said that when V. came and took R she saw the bruising. She said that V. kept R for a week. She also stated that she kept R out of daycare for a week so the daycare personnel would not see the bruising on his bottom and possibly call social services.

[23] Ms. L. stated that after this incident she called her father and told him about it, but, based upon what she told him, and because she had not called off the wedding, he thought it could not have been that serious. Ms. L.'s father did not testify.

[24] She testified that the day after the incident she exchanged text messages with the accused. In her text she said, "Seeing bruising makes me sad … the accused responded, "He took it well ... looks worse than it is."

[25] A photo of the text messages was introduced and marked exhibit #2. The text messages are dated August 13, 2019.

[26] Ms. L. testified that she took photos of the bruising on R's bottom and soon after doing so told the accused she had done so. She stated that he told her that if she made a complaint against him he would turn it around on her. He said he would take her down. He told her that if she was a good mother she would have made a complaint immediately. He convinced her that if she made a complaint against him she would get in trouble, she may go to jail, and may lose her kids. She said she was afraid he could and would do it, so she deleted the photos from her phone.

[27] She testified that over the subsequent weeks when she lived with the accused there were other occasions when the accused took R to his room and administered discipline but did not leave a mark on R on those occasions.

[28] She testified that there was an occasion when R had pooped on the floor in his bedroom. The accused took R into the bathroom. She was in R's bedroom cleaning up the mess when she heard a noise from the bathroom and came out to the hall. She stated that the bathroom door was ajar and she saw the accused in the bathroom with a wooden scrub brush in his hand. She said the accused noticed her watching and slammed the door shut. She said she heard a crack sound from inside the bathroom. She believed the accused struck R with the wooden brush. At one point she indicated she saw a bruise on R after the incident but at another point in her evidence stated that there was only the one occasion when the accused caused R to be bruised.

[29] She said that although she did not see it happen she believed that the accused used a wooden spoon or brush to discipline R in the bedroom or bathroom. She stated that he admitted it and told her that his father had done the same to him and he did not see anything wrong with such action. She made this statement when discussing the incident when she saw the accused in the bathroom with R and he had a wooden brush in his hand. Her evidence appeared to be indicating that the accused admitted using a wooden brush to discipline R. However, she did not clarify what the accused was to have admitted.

[30] She stated that he told her it was "his house, his rules". In context, this clearly appeared to relate to the issue of disciplining the children. However, her evidence was unclear whether she believed he was referring to the disciplining of the child, generally, or to a specific form of discipline. She said that she learned to keep her mouth shut and keep R away from the accused whenever possible.

[31] Ms. L. testified that she believed that the bruising incident was the first significant incident of the accused disciplining R. However, when speaking of the bruising incident, she stated that, as R was being taken upstairs by the accused, R covered his bottom with his hands. This suggested an expectation on the child's part that he would be struck on the buttocks by the accused, and further suggested that there had been a previous incident when that had happened. When questioned about this, on cross-examination, she said that she was uncertain which of the bruising incident and wooden brush incident occurred first.

[32] Ms. L. testified that on one occasion she saw the accused hold R out over the bannister of the stairs and pretend to drop him. She said that R screamed and the accused gave an evil laugh. She admitted that her statement to the police did not allege an evil laugh and she told the police that she thought the accused was just joking.

[33] Ms. L. testified that on one occasion she came down from upstairs (possibly from folding laundry) and the accused was letting R out of the basement where he had put him with the lights off. She did not know how long R had been in the dark basement. The accused told her that he did this to push R's comfort with the dark.

[34] Ms. L. testified that when the accused disciplined R by putting him in his bedroom he would turn off the bedroom light. He taped over the light switch so the boy could not turn the light on. She said that R was to stay in the room until he was ready to behave. In the early weeks of living with the accused she stated that R would come out of his bedroom before he was given permission by the accused to do so. Consequently, the accused bought a sliding bolt (lock) and installed it on the outside of R's door so that he could lock the door from the outside to prevent R from coming out until he was allowed to come out by the accused. She testified that R would cry and scream to be let out. To muffle the sounds of R crying and screaming, the accused would place a blanket on the floor against the door.

[35] Ms. L. testified that, on several occasions, she packed some of her things and intended to leave but did not because she had nowhere to go. She said that she threatened the accused several times that she was leaving before she actually did.

[36] She testified that her decision to leave was the result of an incident that occurred in late September on the day they celebrated Nana's birthday at their home. She stated that a couple of days after Nana's birthday, which was on September 25th, they had a party at the house for her. After Nana left and she and the accused had

finished cleaning up and putting the leftover food in the fridge, R went into the fridge and grabbed some of the birthday cake icing – something he was not allowed to do. The accused and Ms. L. came into the kitchen. R had blue icing from the cake on his face. The accused asked him if he had taken some icing. R said no. Ms. L. said that the accused "lost his mind". He got angry with R. He told R that he had lied. She said he put R's hand over the edge of the counter with his fingers out and hit R on his fingers "very hard" with a wooden spoon. She said that R shrieked. She said she told the accused that she was leaving.

[37] Ms. L. testified that she knew, then, that she had to leave. She still had no place to go and had little money. She called Bryony House, a women's shelter, but they had no room (or were closed due to a hurricane). She took a few things and went with her children to an Airbnb for a night or two. Then, on October 1st, she went back to the house to collect the rest of her things. The accused was not home, and she could not get inside because he had changed the door lock. The accused had put her things outside. She called him. They argued. She called the police.

[38] Ms. L. was subjected to detailed, lengthy cross-examination.

[39] Ms. L. stated that she made a complaint to the police, on October 1st, alleging that the accused had assaulted her son R, in part, out of a concern that, with the involvement of the police, her action of staying with the accused after the abuse began would be questioned by child welfare authorities, and she feared looking bad in their eyes and possibly losing her children.

[40] She agreed that on the date of the alleged assault with a wooden spoon in the kitchen she and the accused had an argument over the payment of bills. She stated that the argument happened earlier in the day and they kept things cool while Nana was present. She agreed that this was the only time she had seen the accused strike R with a wooden spoon.

[41] Ms. L. was asked about how long the accused had made R sit on a chair in the kitchen. She said it could have been 60 to 90 minutes. She acknowledged that in her statement to the police she had said it was two hours.

[42] Defence counsel suggested that she had not told the police about her sister-in-law looking after R. She insisted she had told them that and it was routine for her brother and sister-in-law to keep R overnight.

[43] Ms. L. was referred to e-mail communications with her sister-in-law, V., on August 24, 2019 and was asked why she did not mention abuse of R by the accused. She answered that V. was only aware of the one incident when R's bottom had been bruised. She stated that she kept the other incidents to herself. She stated that she was unsure how her family would react. She said that the accused behaved very well in front of her family members but was entirely different behind their closed doors. She stated that she was concerned that they would go to the police.

[44] The court's impression was that the relationship between Ms. L. and Ms. B. was not particularly close. In addition to her evidence of not confiding in Ms. B. about her concerns with the accused's disciplining of R (except on the one occasion), when she was considering moving out of the accused's home, she did not appear to even consider moving in with her brother and Ms. B., even temporarily. Furthermore, Ms. B. testified that she had not spoken with Ms. L. about the allegations since they gave their statements to the police, months earlier.

[45] Defence counsel pointed out that other persons who supposedly saw bruises on R's bottom did not testify, including N.D. and Ms. L.'s brother. The court ought not speculate what either of those potential witnesses may have said. The burden of proof rests upon the Crown. The court must decide the case on the evidence presented.

[46] In response to a question on cross-examination, Ms. L. stated that she had never taken a photo of any injury she sustained at the hands of the accused. After being referred to her statement to the police she acknowledged that she had taken one such photo of a bruise on her arm. It appeared to the court that she had forgotten about the picture, not that she was trying to hide the fact that she had taken it.

L.L.

[47] L.L. was 13 at the time he and his brother and mother lived with the accused.

[48] When asked how he got along with the accused he said, "He was my mom's boyfriend." L. stated that he would come home; he would talk to the accused. It was normal. They had no arguments.

[49] L. testified that when his brother R acted up or did not listen or broke something or peed on the floor, the accused would get a little bit angry. If the

situation got worse the accused would get mad. The accused would make R sit on a chair in the kitchen for a period of time. If a minor incident escalated or the matter was more serious, the accused would take R upstairs and lock him in his bedroom. He said there was a sliding lock on the outside of R's bedroom door which was under the door handle about one and a half feet from the floor. He said that R would be kept in the room for 30 minutes to an hour depending on whether he stopped screaming and crying. He said R would pound on the door asking to be let out. He agreed that in his statement to the police he had said that R was kept in his room for hours. He said he meant one or two hours.

[50] He stated that sometimes the accused would hit R on the bum or fingers/hand with a wooden spoon.

[51] He said that R was disciplined with the wooden spoon by the accused every day or two or three. He said this happened 20 or 30 times while they stayed with the accused. Later he changed his estimate to 15 to 20 times. He said he witnessed it.

[52] On cross-examination L. was referred to the statement that he gave to the police which referred to one incident when the accused hit R on his hands and bum with a wooden spoon. On that occasion he told the police he had been in his room and heard a noise outside. He came out of his room. He said he saw the accused flipping out. He saw the accused hit R with a wooden spoon. He went back into his room. L. said there was more than one incident like this and he was just giving the police an example. He described the wooden kitchen spoon used by the accused as one used for making cookies or macaroni. He did not state when this incident occurred nor whether it was the same incident that caused the bruising on his brother's buttocks.

[53] He recalled an incident when R was made to sit on the kitchen chair and R began to sing. That resulted in R being put in his bedroom. Sometimes time was added to how long R had to stay on the chair. L. said the accused used the timer on the stove to time the period R sat on the chair.

[54] Defence counsel pointed out to L. that he had not mentioned to the police that the accused ever locked R in his bedroom. L. maintained that it did happen.

[55] L. testified that on one occasion he saw bruising on his brother's bum. He said that there were marks all over, not just one spot. He said the marks were round. He said the bruises were black and purple. In his statement to the police he described

the marks as purple, black and blue. He said the marks on R's bottom were "pretty bad". He said the bruises remained visible for one to two weeks. He said he saw R's fingers/hand after the accused hit them with the spoon and they were red.

[56] L. placed the time of the bruising of R's buttocks as August 10th. He said that his mother had a timeline, and that date came from her timeline. He was asked if he had reviewed it and replied, "Not really," but he had seen it. He said that his mom had driven him to the courthouse, and he discussed the case with his mom.

[57] L. testified that most days R went to daycare except once or twice when his mom kept him home, which he recalled once being when R's buttocks were bruised.

V.B.

[58] Ms. B. testified that she was R's aunt. She is married to the brother of R's mother.

[59] She testified that before August-September of 2019 she and her husband had often babysat R and had often kept him overnight.

[60] She testified that sometime around the middle of August she received a phone call from Ms. L. and Ms. L. was upset. She said she could not be exact on the date of the call but mid-August was her best guess. She said that Ms. L. told her that R had bruising on his bottom and she wanted her to take R because she did not want R to be in the house with the accused.

[61] Ms. B. testified that Ms. L. told her that the accused had spanked R. On cross-examination she said that part of her recalled the mention of a wooden spoon. She acknowledged that in her statement to the police she had said that Ms. L. did not say exactly what happened that caused the bruises.

[62] Ms. B. testified that, as a result of the phone call, she went to Ms. L.'s home to get R. She said when she saw the marks on R's bottom she was "speechless". She said she saw red, blue and purple marks all over his bottom. She said the bruises ran all together.

[63] Ms. B. testified that when she was at Ms. L.'s home again, on a later date, she believed in late August, she saw a lock on the outside of R's bedroom door. She stated that the lock was up high on the door. She was shown court exhibit 1, and

upon review of it, said that she recalled the lock being higher on the door than as shown in the photo.

[64] On cross-examination Ms. B. stated that she did not recall how long she kept R. after the bruising in mid August of 2019. She also did not recall R. missing daycare.

[65] Ms. B. did not recall ever being told by Ms. L. about R. being struck on the hands/fingers by the accused.

[66] At the very end of the cross-examination Ms. B. said that she recalled that Ms. L. moved out of the accused's house only days after the bruising incident. This was inconsistent with her earlier evidence in two ways: (1) she testified that she recalled (her best guess) the bruising incident having been in mid-August; and (2) she testified that after the bruising incident, later in August, she was, again, at the accused's house and saw a lock on the outside of R's bedroom door.

Credibility and Reliability Assessment

[67] Ms. B.'s recollection of the dates of events was poor. Her evidence, about what Ms. L. told her about how the bruises on R's buttocks were caused was inconsistent.

[68] Ms. B.'s evidence was consistent with the evidence of L. and Ms. L. that there was an incident in August 2019 when R sustained significant bruising of his buttocks.

[69] Ms. B.'s evidence was consistent with that of Ms. L and L.L. that there was a lock on R's bedroom door (not there when she went to the house and saw R's bruises). I have no doubt that Ms. B.'s recall of the lock being higher on the door than shown on exhibit 1 and as testified to by other witnesses was incorrect.

[70] There was nothing in Ms. B.'s evidence to indicate she held any animosity toward the accused.

[71] The court found the evidence of Ms. B. credible. Her evidence was reliable except for that of the location of the lock on R's door, the timing of the bruising incident, and whether R was kept home, out of daycare, for several days after the bruising incident.

[72] The evidence of Ms. L. and L.L. must be considered in context. They lived in the accused's home for nearly two months. According to the evidence of Ms. L. her relationship with the accused followed a pattern of them fighting, making up, and things being all right until the next fight. The accused disciplined her son R in a manner with which she was not always comfortable. She spoke out but was told it was his house and his rules. L. similarly spoke of the pattern of events in the house. He spoke of his young brother acting out and being disciplined every one or two or three days.

[73] In this context I did not find it unusual that, unless there was something memorable or distinguishing about a particular event, the details may be difficult to distinguish from other similar incidents.

[74] My impression of L.'s evidence was favourable. He presented as a reasonably intelligent young man.

[75] He was articulate. I detected no evidence of guile or deception. He displayed no indication of anger or animosity toward the accused. The inconsistencies between his testimony and his statement to the police were reasonably explained.

[76] The fact that L. and his mother had travelled to court together and had discussed the case was not surprising. This was a mother and her 14-year-old son coming to a court to give evidence about alleged abuse of a brother/son. In my view it would be unusual if they had not talked about it. But the significant questions are: What was discussed? And how, if at all, did the discussion affect L.'s evidence? It was clear that the dates of incidents given by L. were not based on his own recollection but on his mother's timeline. Other than that, L.'s recollection appeared to be his own, and was, at times, more detailed than that of his mother. For example, he recalled the accused using the timer on the stove when making R sit on a chair in the kitchen. The court was persuaded that L. was testifying about the events according to his own recollection of them and was trying to truthfully relate them to the court.

[77] L. testified that he saw the accused discipline his brother 15 to 20 times using a wooden kitchen spoon. Ms. L. testified that she saw the accused strike R with a wooden spoon only once. Neither L. nor Ms. L. stated whether the other was present when these incidents occurred. There would have been times, such as when Ms. L. was working, when L. would have been in the house with his brother and the accused and Ms. L. was not present. Ms. L. testified that the accused did not allow her to be

present when he disciplined R. The difference in the evidence of L. and Ms. L. on this point did not support the defence arguments of possible collusion. I found L.'s evidence of seeing the accused strike R with a wooden spoon on a number of occasions credible.

[78] There was nothing in the evidence of L.L. and/or Ms. L. that raised any doubt in the court's mind as to L. trying to present a prepared or rehearsed version of events. L. did not specifically refer to an incident in the kitchen involving R being hit on his fingers by the accused with a wooden spoon. If Ms. L. coached her son to lie to support her evidence the court would have expected L. to address that significant event. I found his lack of testimony corroborating that of Ms. L.'s on that point inconsistent with the submission that he and his mother may have colluded.

[79] I found the evidence of L.L. credible and reliable, and I accept it.

[80] Ms. L.'s evidence revealed several inconsistencies, including whether she took a photo of an injury to herself caused by the accused, whether the accused was joking when he held R out over the stair rail, how long R was made sit in the kitchen chair as punishment, how long R was locked in his room, whether R had a bruise after the incident in the bathroom when the accused was seen holding a wooden brush, and whether the wooden brush incident or bruising incident occurred first.

[81] Ms. L. acknowledged that her decisions were, at times, influenced by a concern regarding how her actions would be perceived by social services agents and whether she may lose her children. She acknowledged that her complaint of an assault on R by the accused was, in part, motivated by a desire to put herself in a more positive light with the child welfare authorities. Prior to her making that complaint, neither the police nor child welfare authorities were involved. She initiated that process.

[82] On her evidence, Ms. L. was aware of her responsibility to her children and the role of the social services agents in relation to the protection of children. She testified that, after the bruising incident in August 2019, she knew that she ought to have left the accused's home with her children. She stayed, tolerating the situation until late September. Then she took her children and left with only some of her belongings, with little money, and with no stable place to go. That action was consistent with her testimony that there was a significant event which precipitated her action.

[83] Ms. L.'s testimony that she kept R home from daycare for a week after the bruising incident to prevent the daycare authorities from seeing the bruising on R's buttocks was consistent with her concern regarding the child welfare authorities. Her evidence on this point was consistent and credible. Although Ms. B. did not recall R being kept home from daycare after the bruising incident, I accept Ms. L.'s evidence that he was.

[84] Ms. L. presented as a person of average intelligence. She appeared nervous as she testified. She acknowledged the inconsistencies in some parts of her evidence. She acknowledged her concern regarding the involvement of Community Services child welfare agents. Ms. L.'s evidence regarding an incident when R's bottom was significantly bruised was supported by the evidence of Ms. B. and her son L. as was her evidence that there was a lock on the outside of R's bedroom door. I found her evidence regarding the incident with the wooden spoon in the kitchen consistently told, reasonable, credible, and reliable.

[85] The court observed no indication that Ms. L. colluded with her son L.L. nor V.B. to concoct evidence against the accused. The inconsistencies in her evidence were acknowledged/explained and did not cause the court to doubt that Ms. L. was attempting to truthfully relate the events of August-September 2019 to the Court.

[86] When considered in light of all of the evidence the court found the evidence of Ms. L. credible. The Court found her evidence reliable except for her statement that she saw a bruise on R's bottom after the wooden brush incident and whether that incident or the bruising incident occurred first.

Findings of Facts

[87] I find that, at all relevant times, the accused was in the position of a parent to the child, R, and R was in his care.

[88] On the whole of the evidence I am satisfied that the accused put a lock on the outside of R's bedroom door, and it was as shown in the photo, exhibit #1.

[89] In relation to the text messages, exhibit #2, based upon the evidence of Ms. L., which I accept, and the words exchanged, the court finds that it was the accused and Ms. L. communicating with each other. The words typed by the accused, "looks worse than it is", convinced the court that the accused was aware of the severity of the appearance of the bruising. His words "he took it well" and the evidence of Ms.

L. convinced the court that he was present at the time the blows which caused the bruises were administered. I accept the evidence of Ms. L. that the accused administered the blows which caused the bruising while he had R in his bedroom, and she was in the living room. I accept her evidence that the bruises were not present on R's buttocks before that incident. I find that the accused administered the blows that caused the bruising of R's bottom.

[90] I accept the evidence of Ms. L. that there were subsequent occasions when the accused took R to his bedroom and disciplined him but, on those occasions, did not cause any bruising.

[91] When did the bruising incident occur? On the whole of the evidence, including the evidence of Ms. L., the evidence of L.L., and the text messages between Ms. L. and the accused, the court is satisfied, beyond a reasonable doubt, that the incident which resulted in R having bruising over virtually the entirety of his buttocks occurred on or about the 12th day of August, 2019.

[92] I am persuaded that Ms. B.'s evidence that the bruising occurred within days of Ms. L. moving out was incorrect. Her evidence did not raise any doubt in the court's mind regarding the timing of that incident.

[93] How was the bruising of R's bottom caused by the accused?

[94] The evidence of L.L. of seeing the accused strike R on his buttocks with a wooden spoon when in his bedroom was not proven to have been on the occasion when the bruises were caused. The evidence regarding the manner in which the accused caused the bruises to R's bottom was circumstantial.

[95] Ms. L. did not see the blows being administered. She believed the accused used a wooden spoon but her belief is not proof thereof. She stated that he admitted disciplining R as his father had done to him. Exactly what the accused admitted was unclear. She testified that she saw the accused discipline R using a wooden spoon on another occasion, in the kitchen.

[96] Ms. L. did not indicate how or when the accused took possession of a wooden spoon. She stated that he grabbed R and took him upstairs. She did not mention a trip to the kitchen to get a wooden spoon, if that was where it was kept.

[97] The court accepted the evidence that the accused was angry at R when he took him upstairs.

[98] Ms. L. described the sound made by the accused striking the child as "smack, smack, smack". That evidence was insufficient alone and in combination with the other evidence to satisfy the court that a wooden spoon, not a hand, caused that sound.

[99] Ms. L.'s evidence suggested that there were three sounds of the accused striking R. Based upon the evidence of Ms. L. and the evidence of the locations and description of the extent of the bruising, I am persuaded that there were at least three blows administered.

[100] I am not persuaded beyond a reasonable doubt that L. saw the blows which caused the bruising of R's buttocks. He testified that on more than one occasion he saw the accused discipline R with a wooden spoon, but he did not, specifically, refer to the incident in R's bedroom. L. did not indicate that he ever saw the accused slap or spank R.

[101] L. testified that the bruising marks on R's buttocks were round. Neither Ms. B. nor Ms. L. made this observation. No photos of the bruising were in evidence. The evidence failed to establish beyond a reasonable doubt that the bruises on R's buttocks were round.

[102] Ms. L. did not recall telling Ms. B. exactly how the bruising of R's buttocks was caused.

[103] The evidence of Ms. B. was quite unclear and inconsistent as to what she was told about how the bruising of R's buttocks was caused. She stated that she was told that the accused spanked R. (although she thought she recalled the mention of a wooden spoon).

[104] On the whole of the evidence I am not satisfied beyond a reasonable doubt that the accused used a wooden spoon to strike R on the occasion when he caused the bruising of R's buttocks. That was one reasonable conclusion that may be drawn from the evidence but not the only one. The accused may have used his hand(s).

Other Incidents

[105] I accept the evidence of Ms. L. and L.L. that the accused took an active role, indeed the main role, in disciplining R. I accept the evidence of Ms. L. and L. that disciplinary measures employed by the accused included having R sit on a chair in

the kitchen for long periods, putting R in his room for long periods (with the lights out and, after the lock was installed by the accused, with the door locked).

[106] I accept the evidence of Ms. L. that there was an incident when the accused held R out over the stair railing and pretended to drop him.

[107] I accept Ms. L.'s testimony that, she moved out of the accused's home with her two boys in late September 2019, of her choosing. She did not, at that time, take all of her belongings. She spent a night or two at an Airbnb and for weeks, thereafter, they lived where they could or where placed by the Department of Social Services. She called the police within days of leaving the accused's home. She knew that by calling the police the child welfare authorities would be alerted and would look into the well-being of her children.

[108] I accept her evidence that she knew that she should have moved out of the accused's home when the accused first caused the bruising of R's bottom. She allowed herself to be talked into or frightened into staying. I accept her evidence that the accused told her that if she was a good mother she would have left at that time. I find that she knew he was right and, therefore, his threat to turn things against her if she, thereafter, made a complaint against him, frightened her, as he knew it would.

[109] So, why did she leave?

[110] Ms. L.s testimony about an incident after her nana's birthday party at the house was credible. Her evidence was clear, detailed, consistently told, reasonable, and completely believable. I accept Ms. L.'s evidence that she and the accused discovered that R had gone into the fridge and taken some icing from the cake and then lied to the accused about doing so – with the evidence of icing on his face. I accept her evidence that the accused became angry, he told R that he'd lied, and hit R on the fingers with a wooden spoon while his fingers were on the edge of the counter. I accept Ms. L.'s evidence that observing this act against her son was the final straw, resulting in her leaving with her children. I accept the evidence of L.L. and find that on a number of occasions the accused disciplined R by striking him on the bum or hand with a wooden spoon.

Jurisprudence

[111] The leading case on section 43 of the *Criminal Code* is *Canadian Foundation for Children & The Law v Canada (Attorney General)*, [2004] SCC 4. At paragraph 40, McLachlin, CJ, for the majority stated:

> Generally, s.43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s.43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all of the circumstances of the case. The gravity of the precipitating event is not relevant.

[112] The *Canadian Foundation for Children* case majority decision represented a significant "reading down" of section 43 of the *Criminal Code*. The scope of the defence was clarified and significantly narrowed.

[113] Defence counsel referred the court to two additional cases.

[114] *R. v M.(L.)*,2017 ONSC 875, Lucelle, J.: The accused was convicted at trial for spanking his four-year-old daughter, causing bruising. The accused appealed. The appeal was dismissed. The trial judge had found that the accused spanked his daughter causing "serious bruising on her buttocks, several days after the events." The trial judge rejected the accused's evidence of what he said he had done and rejected his evidence that he had not been angry when he spanked his daughter. The trial judge concluded that the force used by the accused exceeded the transitory and trifling force permitted under s.43. The appeal judge found that these findings were open to the trial judge.

[115] *R. v A.(M.)*, [2011] O.J. No. 873, Harris, J.: In *A.(M)* the accused's spouse, from whom he was separated, noticed that her six-year-old daughter had marks on her bum cheeks and on her head when she returned from a visit with the accused. The accused was charged with pushing his daughter off the bed causing her to hit her head on the floor, raising his fist to the child, and an assault by spanking the child

causing bruising. At trial the young girl recanted her police statement regarding the first two allegations. On the third count the trial judge found that the accused struck the child twice on her bottom with his open hand. He did so with sufficient force that he left bruises showing the outline of his hand. The force used was by way of correction of the child. The bruises took one to two weeks to go away.

[116] The trial judge, after reviewing a number of cases involving spanking, and considering the meaning of minor force and transitory and trifling injuries, concluded that the Crown had failed to prove beyond a reasonable doubt that the force used exceeded what was reasonable in the circumstances.

[117] The cases referred to by the trial judge included several that were decided before the Supreme Court decision in the *Canadian Foundation for Children* case, in 2004.

[118] The trial judge referred to *R v J.(O.)*, [1996] O.J. No. 647 (Ont.Prov.Ct.). The accused spanked his six-year-old daughter twice on her bottom, through her pyjamas, for refusing to brush her teeth and get ready for school, and after further defiance by her, he struck her twice on the buttocks with a ruler, leaving red marks. The red marks were seen the following days by school officials. The trial judge found that the injuries were transitory in nature.

[119] In my respectful view, the use of the ruler alone would have resulted in a different outcome had it occurred after 2004. The case is also distinguishable based upon the age of the child. In the present case, where the child was but three, he was barely old enough to understand correction.

[120] In *R. v Bell*, [2001] O.J. No.1820 (Ont.S.C.J.) Langdon, J, Bell had used his belt to strike the child two or three times, one of the blows leaving a mark in the shape of a belt buckle on the child's buttock. The trial judge found that the bruise was merely transient or trifling but found the accused guilty, in part, because he acted out of anger. On appeal the conviction was overturned. The court held that the accused's corrective action cannot be considered unreasonable solely because it was accompanied by a degree of anger or frustration.

[121] In my respectful view, the use of the belt would result in that case being decided differently today. Nevertheless, I take from the decision that an assault motivated entirely by anger or frustration cannot constitute corrective force. An act motivated partly by anger or frustration may be for the purpose of corrective force

and may be lawful if the force used did not exceed what was reasonable in the circumstances. In cases where the court finds that the accused acted in part out of anger or frustration the court may consider this as one of the circumstances to be considered in assessing whether the force used exceeded what was reasonable in the circumstances.

[122] This court noted that in several of the decisions referenced in *R v A.(M.)*, *supra*, the trial judge considered the "parental value system" of the accused in assessing whether the force used was reasonable. The Supreme Court, in *Canadian Foundation for Children*, *supra*, made clear that the test of whether the force used by the accused was reasonable in the circumstances is an objective, not a subjective, test.

[123] This court must consider the findings of fact in this case. The court must apply an objective test as to whether the accused's actions were reasonable in the circumstances, i.e., whether the force used exceeded what was reasonable in the circumstances. The court must apply the reasonable person standard, not the court's personal view.

Application of the Law to the Facts

[124] I will first consider the incident resulting in the bruising on R's buttocks. The court did not have photos of the injuries to consider. The evidence of the witnesses was:

[125] Ms. L. testified that there were purple and brown, and later yellow, bruises on both sides of R's bottom. She said they were visible for more than a week. In her text message, of August 13, 2019, she said that looking at them made her sad.

[126] Ms. B. testified that when she saw R's bottom she was speechless. She said that there were red, blue and purple bruises all over his bottom.

[127] L.L. testified that the bruising was "pretty bad". He said the marks were round. He said they were black and purple (and blue).

[128] I accepted this evidence.

[129] The accused, in his text to Ms. L., said, "looks worse than it is".

[130] I am satisfied beyond a reasonable doubt that a reasonable person would find such injuries to the buttocks of a three-year-old child were neither transient nor trifling.

[131] The nature of the injuries to the child and the manner in which they were caused are two factors considered by the court in determining whether or not the force used by the accused exceeded what was reasonable in the circumstances. Other circumstances considered included:

- the accused was not the child's father but was in the position of a parent and the child, R., was in his care;
- the child and his mother had been living in the accused's home for little more than a week;
- there was no evidence of what, if any, lesser means of correction of R the accused had tried for pooing or peeing his pants;
- the child was just three years old;
- the child was potty training;
- while arguably of no relevance, the action of the child prompting the accused's action was an accident, pooing in his pants.

[132] The court found that the accused acted quickly and, in part, out of anger when disciplining the child on this occasion. On all future occasions when he struck R he did not cause bruising. That fact suggests that the disciplining of R could have been done without the causing of bruises.

[133] There was no expert evidence regarding the force needed to cause significant bruising of the buttocks, nor need there be. There was no evidence to suggest that R. bruised more or less easily than any other child. The Crown bears the burden of proof. The court must apply an objective test based upon the proven circumstances.

[134] On the totality of the circumstances I am satisfied beyond a reasonable doubt that the force used by the accused on that occasion exceeded what was reasonable in the circumstances.

[135] In relation to the birthday incident, the court considered the following circumstances:

- The child and his mother had been living in the accused's home for less than two months;
- The child was three years old;
- While arguably of no relevance, the incident prompting the accused's actions were the child taking icing from a birthday cake without permission and lying to the accused about doing so;
- The accused acted quickly and, in large part, out of anger;
- The nature of the injury to the child was mere redness;
- The nature of the accused's action entailed him placing the child's fingers on the kitchen counter and striking them, hard, with a wooden spoon;
- The Court found that the accused's action caused a clear risk of bodily harm to the child, i.e., the possible breaking of one or more of the child's fingers.

[136] This court finds that the use of an object to strike the child was not reasonable corrective force. In addition, the Court finds that the accused's action risked causing bodily harm to the child and was, therefore, not reasonable corrective force.

[137] I am satisfied beyond a reasonable doubt that the force used by the accused on this occasion exceeded what was reasonable in the circumstances. The striking of a child with a wooden spoon at any time, for any reason, whether on his hand or his buttocks, the Court finds to have been unreasonable corrective force.

[138] As to the other actions of the accused toward R: On the whole of the evidence, the Crown has failed to prove beyond a reasonable doubt that the accused's action

of holding R over the stair rail and pretending to drop him was other than play. In the court's view his action was inappropriate but has not been proven to have been a crime.

[139] In relation to the accused having the child sit on a chair in the kitchen for a long period, this is a matter which, depending on the length of time, may well have been inappropriate parenting, but I am not satisfied it constituted a criminal offence.

[140] In relation to the accused locking the child it his bedroom for a prolonged period with the lights off, again, depending on the length of time involved, the accused's actions became more and more inappropriate, but have not been proven to have been criminal.

[141] As to the incident in which Ms. L. said that she saw the accused with a wooden brush in his hand in the bathroom with R, I accept her evidence of what she saw, but she did not see the accused strike R with the wooden brush. She said she heard a sound and believed he had done so. The Court found that there was no mark seen by her on R on that occasion to support her belief. The evidence of an assault was circumstantial. Ms. L.'s conclusion was reasonable. However, the court was not satisfied that it was the only reasonable conclusion. I find that it was reasonable to conclude that the wooden brush may have been used by the accused to clean the child's bottom rather than to strike him. The sound heard by Ms. L., a "crack" could have been caused by something other than the accused striking the child, such as dropping the wooden brush on the floor. The court was not satisfied that the accused made an admission to Ms. L. that he hit the child with a wooden spoon on this occasion. I find the conclusion urged upon the court by the Crown is not the only reasonable conclusion that may be drawn from the proven facts. I am not satisfied that this event constituted a crime.

[142] In conclusion, the Court is satisfied beyond a reasonable doubt:

(1) that the accused's actions causing the bruising of R's buttocks around the 12th of August, 2019 was an assault because the corrective force used by the accused exceeded what was reasonable in the circumstances; and

(2) that the corrective action employed by the accused around the 27th of September, 2019, when the child, R, took icing from a cake without permission and lied to the accused about doing so, was an assault, because

(a) of the use of an object, wooden spoon, to strike the child; and

(b) of the finding of the Court that the accused's action created a risk of bodily harm to the child; and

(3) that the striking of the child at any time, on any part of his body, with an object, a wooden spoon, was unreasonable corrective force.

[143] The accused is found guilty as charged.