In the Provincial Court of Alberta

Citation: R. v. Burtis, 2012 ABPC 12

Date: 20120206
Docket: 101484764P1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Teresa Lynn Burtis

Reasons for Decision of the Honourable Judge S.E. Richardson

[1] Teresa Burtis is charged with one count of common assault against the complainant G. On the date in question, Ms. Burtis was a substitute teacher in an early education class and G was a five year old student with autism in her class.

[2] The Crown called four witnesses in this trial. Ms. Burtis testified in her defence and called two character witnesses: a previous colleague and a former principal/supervisor both of whom attested to her abilities to work with special needs children in challenging and demanding classroom situations.

[3] Ms. Burtis denied the complaint as made by the two educational assistants who were in class with her on the day in question and instead explained that she did touch the child G, but in a different manner than observed by one of the educational assistants and accompanied by different words than were overheard by both of the educational assistants. Ms. Burtis argued that her touching of the child G was corrective and therefore she relied upon s. 43 of the *Criminal Code* to render her touching of the child lawful.

[4] Much of the evidence of the Crown and defence witnesses is not in dispute. Ms. Burtis at the time was a registered teacher, having an educational specialization in elementary education and special needs children and some 20 years of experience with that population of students. Although she was a substitute teacher, she was employed by the Edmonton Public School Board on virtually a full time basis. She had previously worked in the classroom which G attended, earlier in that same school year, on September 17 and October 6, 2010.

[5] On October 20, 2010, the accused was employed as the substitute teacher in this classroom of special needs students, with two educational assistants, Ms. Tully and Mrs. Schur, each of whom were also substitutes for that day as the regular teaching team was undertaking training in another part of the school. Ms. Tully had been the educational assistant in that class the year previous while Mrs. Schur had been in that classroom three or four times in the past. The class time for this class was in half day increments, with a morning class and an afternoon class, each with different students.

[6] On October 20, 2010, the afternoon class was a group of 11 boys ages four and five years old, and therefore, according to all educational models, the staffing ratio of one teacher and two assistants was low. This was particularly so because two of the students were coded as having behavioural disorders and one student was in a wheelchair and needed assistance toileting and being tube fed. As I said, the entire class was composed of four and five year olds who, for whatever reason, required pre kindergarten assistance in order to be ready for school at age five.

[7] In addition to a completely new teaching team, the class was subject to another change in its daily routine on October 20, 2010, in that there was an unannounced fire drill during class. Given the youthfulness, special needs, physical disabilities and flight risk of the children in the class, the fire drill was a chaotic event that resulted in many of the students not settling as expected into the class routine upon return to the classroom. The classroom environment became agitated and the noise level and the chaos escalated.

[8] G was at the time, a five year old boy who had autism and was on the severe end of the autistic spectrum. One of his perseverations, or behaviours that he performed for sensory feedback, repeating it over and over, was that he touched the ears of people he liked. In the classroom situation, this meant that he targeted two similarly aged boys, one of whom by chance had a behaviour disorder. This perseveration is something that autistic children "need to do" accordingly to Sheila Tingley, the principal, and it was "not something that G cannot do", according to Ms. Tully.

[9] While G was described during the trial as "non verbal" it was clear that he could speak; however, his speech ability was limited to one or two word combinations. He could not yet speak in full sentences. In terms of the corrective methods that his regular teacher, Ms. Whatley used with him when he perseverated on other students, she explained that G responded to:

1. being pulled aside and spoken to quietly,
2. counting,
3. having G sit at the back of the class behind a screen/wall, and
4. taking G into the hallway, for quiet, and review his social story.

[10] The reason for pulling G aside, taking him to the back of the class, or into the hallway was that the child did not respond well to loud voices or noisy, loud environments. Loud noises and noisy environments caused G to become agitated and left him unable to focus.

[11] The complaint against Ms. Burtis was made immediately at the conclusion of the school day on October 20, 2010 by Ms. Tully. Ms. Tully testified, in brief, that she saw the accused pinch G's ears 10-15 times over the course of the last part of the class, as a response to G pinching the ears of other students.

[12] The Crown led evidence from the school principal, Ms. Tingley, and the regular class teacher, Ms. Whatley, as to changes in the complainant's behaviour noticed by both women the day after this incident. The behaviour changes were described as a regression of the progress that the complainant had made to date, and the behaviour changes centered on the complainant verbalizing "no, no, no" when holding his ears, as well as being less willing to meet strangers, an increased inability to regulate himself and increased temper tantrums.

[13] The Crown argued that these behaviour changes were probative of the fact of the assault having occurred as alleged and indicative of the level of harm caused by the assault. I cannot agree with this proposition. While there is no doubt that the behaviour changes observed by the complainant's regular teacher and the school principal did occur after the incident, there is not a sufficient evidentiary foundation for the conclusion argued for by the Crown. Specifically, the conclusion the Crown seeks the Court to make would require expert evidence in interpreting or assessing the changes in and behaviours of this child and/or autistic children in general.

[14] The Crown also argued that the defence proffered, specifically, that the accused did not pinch the complainant's ears, but rather she cupped her hands around his ears on either side of his head and admonished him, should not be given any weight, or alternatively, should be given less weigh because the explanation of the accused was never put to the Crown witnesses. The Crown relies upon the case of *Browne v. Dunn* (1893) 6 R. 67, H.L. in this regard. I am satisfied on the basis of the extensive and detailed cross examination of the Crown witnesses that the *Browne and Dunn* argument is not applicable to the conduct of the defence case.

[15] Finally, part of the defence argument was a plea to the court to not rush to judgment as the accused argued the principal Ms. Tingley had done. I make this comment only because this plea was made repeatedly by counsel for Ms. Burtis. Ms. Tingley as the principal had very different professional obligations and concerns and applied a different consideration to the complaint before her than the Court does. Ms. Tingley's decision to put the accused on the "do not call list" for substitute teachers carries no sway and no weight whatsoever with the Court in terms of its role in assessing the accused's credibility, in assessing the credibility of the Crown witnesses or in deciding whether the Crown has proven the charge against Ms. Burtis beyond a reasonable doubt.

[16] As I said earlier, the accused testified that she did indeed apply force to the complainant. The force applied was after he repeatedly perseverated by touching or pinching the ears of classmates. The force applied was by way of the accused cupping both her hands over the ears of the complainant, with the heel of each of her hands at the front of his ears and her fingertips reaching around his head and coming together at the back of the boy's head. All the while, saying "no more ears" and "how would you like it if your friends did that to you?" She testified

that she performed this action many times during the afternoon class. She explained that the purpose of the application of this force was to redirect the boy and correct his behaviour.

[17] The starting point in any criminal trial is that the accused is presumed innocent until proven guilty by the Crown. This means that the burden is on the Crown to prove the guilt of the accused beyond a reasonable doubt. This burden remains on the Crown throughout the trial.

[18] If a reasonable doubt exists as to the guilt of the accused, she must be acquitted. The case law describes a reasonable doubt as a doubt that is based on reason and common sense and that is logically connected to the evidence or the absence of evidence. It is not based on sympathy or prejudice. On the other hand, reasonable doubt does not involve proof to an absolute certainty; it is not proof beyond any doubt such as an imaginary or frivolous doubt. See *R. v. Lifchus*, [1997] 3 S.C.R. 320.

[19] In deciding this case, given that Ms. Burtis testified, I will have to assess the credibility of the accused. I understand that the doctrine of reasonable doubt applies to this process. In *R. v. W.(D.)*, [1991] 1 S.C.R.742, the Supreme Court of Canada explained how to apply reasonable doubt to a credibility assessment when an accused testifies. I understand that I need not firmly believe or disbelieve any witness. Since the accused testified, I must acquit her if I believe her. I must also acquit her if, while I cannot believe or disbelieve her, her evidence, taken in the context of the evidence as a whole, raises a reasonable doubt as to her guilt.

[20] If I conclude that the evidence of the accused does not raise a reasonable doubt or if I reject it, I must determine whether the evidence that I do accept proves her guilt beyond a reasonable doubt. If it does not, then I must acquit. It is only where the evidence that I do accept proves the case beyond a reasonable doubt, and only then, that I may convict the accused.

[21] I understand that I may believe some, all or none of the evidence of any witness and that I must not permit my analysis of the evidence to become a credibility contest between the Crown and defence witnesses as that will move the focus away from the fundamental question: whether, on the evidence, there is a reasonable doubt as to the guilt of the accused.

[22] As directed by the case law, I begin with the evidence of the accused.

The Evidence of the Accused

[23] Ms. Burtis testified that in the increasing chaos of the classroom, brought about by virtue of the limited staffing resources for the number and type of students, the three new faces in the classroom and the effect of the unannounced fire drill on the students, the students were particularly difficult to manage. She explained that G in particular was pinching the ears of others in the class. She explained that she tried verbal redirection with him, put him on time outs, and spent time trying to block his attempts to pinch other students' ears. None of this was effective, so she put both her hands on either side of his head, cupping her hands over his ears, with the heel of her hands at the front of his ears, and her fingertips touching at the back of his head and said to him "no more ears" and "how would you like it if your friends did that to you?"

[24] She agreed in cross examination that she was speaking in a loud voice when she said these comments to G but explained that was because the class itself was noisy. She explained that she did this numerous times during the class.

[25] She denied absolutely ever pinching or pulling G ears, or using force upon him out of frustration or to discipline him (corporal punishment). She further denied absolutely ever saying “there, how does that feel” in relation to the force she used on the boy. She further denied that G reacted in any way to her application of force upon him.

[26] Ms. Burtis testified that classes with special needs students are always a challenge and given her training and experience with this population, she was used to dealing with this level of chaos and these types of students.

[27] I do not believe Ms. Burtis when she denied pinching or pulling the ears of G, when she denied saying “there how does that feel” and when she explained that the boy had no reaction to her use of force upon him.

[28] Ms. Burtis gave her evidence in a self serving manner. She testified that the regular teacher, Ms. Whatley spoke to her about the complainant “briefly, very briefly” on the morning of October 20, 2010, leaving the impression that this is an explanation for her lack of compliance with the usual corrective methods used with G by his regular teacher. This despite the fact that the accused testified that she was familiar with the complainant as she had worked in that very classroom with G on October 6 and September 17, 2010.

[29] In explaining that she met with Ms. Whatley only briefly, the accused went on to explain that she could not remember most of what Ms. Whatley told her about the complainant. Specifically, she could not remember if the regular teacher told her to use the time out social story as a corrective method with the complainant, and she could not recall if the teacher told her to whisper when correcting G, but she did recall that the teacher told her that she was going to have problems with G and with another student in class. This answer, when it was given in cross examination, was unresponsive to the question posed by Crown counsel and could only have been offered to suggest that the complainant was more of negative force than his age, disability, and behaviours warranted.

[30] In this vein, the accused took every opportunity to make the complainant out to be more of a challenge. The accused testified that she saw G pulling the hair of other students, when no one else saw this, nor was there any evidence that this was a behaviour of this child and most importantly, Ms. Burtis never testified that she took any action in relation to this hair pulling.

[31] The accused described the complainant as misbehaving, when on all the evidence, including the fact that he was in an early education special needs class with a diagnosis of severe autism, his behavior that was the subject of the accused’s application of force upon him was an autistic behavior, not an intentional misbehaviour.

[32] The accused testified that she “would never deliberately agitate G” yet, this is precisely what she did, on her evidence, when she spoke to him in a loud voice with her hands covering his ears. Further, she knew that speaking loudly to G would agitate him as she had been told that by the regular teacher that very morning and she had recent experience in that class with the same student.

[33] The accused changed her testimony in cross examination on the issue of her level of frustration. In examination in chief, Ms. Burtis explained that every day of teaching special needs students was a challenge but that she was used to it. In cross examination on the issue of another student’s behaviour, Ms. Burtis testified that this other boy’s behaviour did not frustrate her as it was common behaviour (he was throwing pudding to be used at a craft center across the room). She twice maintained that this other boy’s behaviour did not frustrate her. Upon further cross examination, she agreed that his behaviour “was a bit frustrating”. She denied as well that the ear pinching by the complainant frustrated her, explaining that it was typical behavior for an autistic boy. Upon further cross examination she testified that “well I was frustrated a little”, then, “I was as frustrated as he was” and finally, “his behaviour was a little frustrating to me”. This is important because the Crown argued that part of the impetus for the use of force against G is that the accused acted out of frustration, and not out of an attempt to correct the complainant.

[34] I do not believe the accused when she testified, unequivocally, that G did not react in any observable or physical way to her application of force to his ears as she described. She stated that the complainant never pulled away from her, he never cried and he never hunched over. This despite the fact that she said she was forcing his gaze on her to speak to him, and it clearly wasn’t effective as she testified that she had to do this four to five times. She also explained that G was agitated by the new faces of the teaching team in the classroom. Finally, the accused also testified that she was told by Ms. Whatley that G reacted negatively to loud voices and the accused was advised to speak quietly to G, yet when she was redirecting his gaze she was speaking loudly to him due to the general classroom noise. It is inconceivable that this boy, in these circumstances, would have had no physical reaction to the accused’s application of force to him as she described it.

[35] Finally, and most importantly, I do not believe the accused when she denied pinching the complainant’s ears, instead cupping her hands over his ears as previously described, and saying to him “no more ears” and “you wouldn’t like it if your friends did that to you” in a loud voice.

[36] First, the accused had been told that loud voices agitated the complainant and she was advised to speak softly to him, thereby on her evidence, doing opposite of what she knew worked with the complainant.

[37] Second, it is inconceivable that, in attempting to focus a severely autistic child’s attention, a professional teacher, with education and experience with special needs children, would use the very technique (a loud voice) that she knew would further agitate the child, thereby reducing the prospect of him being able to follow her direction.

[38] Third, it belies logic and common sense that, in trying to redirect an already agitated five year old severely autistic boy by way of verbal reprimand, a teacher would, in a noisy classroom, cover the ears of the student, thereby making it almost physically impossible for him to hear the reprimand or direction she was giving to him.

[39] Finally, the accused referred to G as “nonverbal” and explained that he didn’t understand long explanations. In spite of this fact, she would have the court believe that, in redirecting G as she described, her intent was to correct him by saying “you wouldn’t like it your friends did that to you”. On any grammatical deconstruction, this is a complicated comment. It involves a conditional future verb tense with a hypothetical situation and an abstract direct object and for this particular complainant, could have no corrective effect.

Findings of Fact

[40] Having regard to the whole of the evidence, I find the following has been proven beyond a reasonable doubt.

[41] The accused was a substitute teacher in an early education special needs classroom. She had previously worked in that class in September and October 2010. She was familiar to a limited extent, with the children in that class and their special needs. She was a trained and experienced teacher of elementary special needs students. On October 20, 2010, before the school day began, she met with the regular teacher who reviewed the needs of each child, in particular the complainant and one other student as these boys both needed one on one attention. She was made aware by the regular classroom teacher, of the methods used to address the complainant’s ear perseveration and that he needed to be spoken to quietly, as loud noises agitated his condition.

[42] The class was under resourced in terms of staffing. The students were a bit unsettled by the three substitutes (one teacher and two educational assistants) on that afternoon. There was an unscheduled fire drill. This unsettled the children in the class even more. As the afternoon went on, the classroom dynamic turned chaotic and the accused became increasingly frustrated with the class environment and with this complainant in particular.

[43] The complainant is a five year old severely autistic boy. Part of his behaviour was that he touched or pinched the ears of other students. He did this to receive sensory feedback and was a behaviour that was difficult for him not to do, given his severe autism. This was not an intentional act on his part and he was not trying to nor did he hurt the other students.

[44] The accused verbally reprimanded the complainant about his ear touching. This was ineffective. She counted with him, this was ineffective. She tried to give him a time out. This was ineffective. He continued his perseveration on the ears of other students.

[45] The accused became increasingly frustrated with the complainant, to the point where she responded to his ear touching of other students by speaking to him in a loud voice and saying “how would you like it if your friends did that to you?” When this was unsuccessful in changing

his behaviour, she resorted to pinching his ears and saying "there, how does that feel?" She did this multiple times.

[46] In response to the accused's application of force, the complainant hunched up his shoulders, pulled away from her and made an audible noise of discomfort.

[47] In making these findings I am aware that there are minor inconsistencies in the evidence of the two educational assistants however, these inconsistencies are of no consequence having regard to the fact they were otherwise occupied with other children during their respective observations and were in different areas of the classroom. However, I am left in no doubt about these findings of fact given that Ms. Tully and Mrs. Schur had never worked together before, have never discussed the events of October 20, 2010 with each other, they were both fair to the accused, declining to exaggerate when given the opportunity to do so, they both saw or heard pieces of the same event and they both observed the same reaction in the complainant to the accused's behaviour.

Section 43 Analysis

[48] The Crown argued that if I find that the accused pinched the ears of the complainant, then that action is corporal punishment and is not covered by s. 43 of the *Criminal Code.*

[49] In the case law, corporal punishment is vaguely defined as punishment or discipline. The action of applying force for the purpose of punishment, discipline, redirection or correction is a continuum upon which it is difficult for the court to place the accused's actions. This is particularly so because in applying force to the complainant, the accused addressed his ear touching or pinching of others by physically referencing his ears. Accordingly, I will apply a s. 43 analysis to her actions.

[50] Section 43 is commonly referred to as a defence however, it is important to keep in mind that in raising this defence, the accused is not required to prove anything. The Crown bears the burden of proving, beyond a reasonable doubt, that the defence does not apply. The accused, in raising a s. 43 defence to her actions, does so without shifting the burden of proof from the Crown, where it remains throughout the trial. In order to succeed the Crown need only demonstrate that one of the elements of the defence does not apply, beyond a reasonable doubt (*R. v. Hebert* SCC (1996) 107 C.C.C. (3d) 42, at paragraph 25).

[51] I am aware that the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada,* [2004] 1 S.C.R. 76, (hereafter *Canadian Foundation for Children, Youth and the Law)* at paragraph 35 said that the nature of the offence calling for the correction is not a relevant contextual consideration in a s. 43 analysis.

[52] This direction does not mean that the court does not take into account the nature of the complainant's actions that precipitated the use of force. The Supreme Court in making that comment was, in the my view, speaking about assessing the context of the nature of the offence which warranted correction. In this case, there is no offence on the part of the complainant, but

rather a resort to a perseveration that his disability made it difficult for him to refrain from doing. So in this case, there is a distinction from the usual s. 43 defence cases that makes the Supreme Court's comments about the nature of the offence calling for correction not being relevant.

[53] Additionally, given the facts of this case, the nature of the action on the part of the complainant, to use a more accurate phraseology to this case, is a relevant contextual consideration because the complaint as alleged, is precisely the action that the student was repeatedly doing to others in the classroom. In that respect, the nature of the complainant's actions is a relevant contextual consideration in this case.

[54] The only elements of s. 43 that are in dispute in this case are: did the accused use force by way of correction, and did the force exceed what is reasonable in the circumstances?

Was the Force Used by Way of Correction?

[55] The accused argued that her intention was not to restrain but rather to correct G's behaviour. I disagree. In order to be corrective a child must have been capable of benefiting from the correction (see *Canadian Foundation for Children, Youth and the Law*, supra at paragraph 25). In these circumstances, the regular teacher had already developed progressive methods for dealing with this behaviour in this child. Given the complainant's age, severe autism and the fact that, by all accounts, he couldn't not do the behaviour that was the subject of the accused's application of force, I find that he was incapable of learning from the application of force and therefore the force could not have been corrective.

[56] Second, the accused herself said that the child did not understand long explanations so her application of force accompanied by the comment "you wouldn't like it if your friends did that to you" could not have been understood by the child and therefore her actions could not have been corrective.

[57] Third, in order to be corrective, the accused must remain in control of herself. While I agree that corrective force and personal frustration are not mutually exclusive, in this case, when the application of force was accompanied by a teacher saying to a five year old autistic pre kindergarten student "there, how does that feel?" or "how would you like it if your friends did that to you?" this is indicative a loss of control by the accused to a sufficient degree that the application of force cannot be corrective.

[58] Fourth, the resort to this action on the part of the accused could not have been corrective as she was doing to the complainant the very action that she professed to be trying to correct him from doing. Pinching or pulling the ears of a five year old severely autistic boy in order to correct his own behaviour of ear pinching of others cannot, in these circumstances, be corrective.

[59] Although I have disbelieved the accused's explanation, on her own evidence, her actions could not have been corrective as she testified that she was covering G's ears while administering this verbal reprimand, which would have made it difficult for him to hear the instruction.

[60] Given the *Hebert* analysis, this would end the inquiry of whether s. 43 as a defence can be relied upon by the accused, however, I will continue with the final element of the defence.

Was the Force Used Reasonable in the Circumstances?

[61] Any assessment of whether the force used was reasonable in the circumstances must be made on an objective basis. It is an error of law for the court to apply its own subjective views on what constitutes reasonable force as the views on this point are as varied as different judges' backgrounds. The question must be considered in context and in light of all the circumstances of the case (*Canadian Foundation for Children, Youth and the Law*, supra, at paragraph 40). Although the subjective opinions of others can be taken into account, the court must be careful not to abdicate its role in objectively assessing reasonableness to the post offence opinions of others. Reasonableness in the circumstances must be objectively assessed.

[62] In determining what is reasonable, s. 43 demands an objective appraisal based on current learning and consensus (*Canadian Foundation for Children, Youth and the Law*, supra, at paragraph 36). I find that the force used by the accused was not reasonable in the circumstances. We are long past the stage in our collective social development where we agree that you hit a child to get him to stop hitting others, or that you bite a child to get him to stop biting others. Similarly, it is not objectively reasonable for a teacher to pinch the ears of a five year old severely autistic boy to correct his behaviour of ear pinching. This is especially the case where the teacher, in pinching the boy's ears, does the very act that her use of force seeks to correct.

[63] Even on her own evidence, which I have disbelieved, Ms. Burtis's actions were not reasonable in the circumstances. To apply a degree of force to this complainant, which is accompanied by a loud voice admonishing him, when the accused knew specifically that a loud voice agitated the child, is unreasonable, when the intent in applying force and verbally reprimanding him was to redirect him or correct his behaviour.

[64] While I agree that the accused does not have to make the best choice in dealing with the child, her choice does have to reasonable. In this case, there were other methods of dealing with complainant's behaviour that had not been tried, and the regular teacher and regular teaching assistants were in the school and available to assist the accused.

[65] Finally, it is important to keep in mind that the offending behaviour by the complainant was not intentional, nor was it harmful either to himself or others. The offending behaviour was an autistic behaviour that the regular teacher was trying to moderate. This was not a situation where the boy was intentionally misbehaving.

Conclusion

[66] In *R. v. Hebert*, supra, the Supreme Court of Canada outlined the analysis to be applied to a self defence argument. The direction of the Supreme Court is equally applicable to this case, where the accused argued that her actions were justified, and therefore not unlawful pursuant to s. 43 of the *Criminal Code.* In *R. v. Hebert*, the Court held that the Crown had to prove that the

defence does not apply to only one of the elements of the defence in order for the defence to not be applicable. In this case, s. 43 of the *Criminal Code* has the following elements in relation to this case:

1. It applies to schoolteachers - the accused was a schoolteacher,
2. Who are acting against a student - the complainant was a student,
3. Where the teacher uses force against the student - on the accused's own evidence, she used force against the complainant,
4. The force used must be by way of correction - as outlined above, the Court finds as a matter of fact that force used was not by way of correction,
5. The force used must not exceed what is reasonable in the circumstances - as outlined above, the Court finds as a matter of fact that the force used by the accused, against the student, was not reasonable in the circumstances.

[67] The Crown has shown, beyond a reasonable doubt that neither of these two contested elements of the defence apply, and therefore s. 43 cannot be used to justify the conduct of the accused.

[68] Stand please Ms. Burtis – I find you guilty of common assault against the complainant G by multiple times pinching or pulling his ears while saying to him "there, how does that feel" and "you wouldn't like it if your friends did that to you."

Given orally on the 18th day of January, 2012.
Dated at the City of Edmonton, Alberta this 6th day of February, 2012.

S.E. Richardson
A Judge of the Provincial Court of Alberta

Appearances:

M. Rosborough
for the Crown

B. Vail
for the Accused