Osima v. ROP, 16 ROP 178 (2009)
ROSEMARY OSIMA,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL 08-001
Criminal Citation No. 08-0050

Supreme Court, Appellate Division
Republic of Palau

Decided: June 3, 2009
p.179
BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem

Appeal from the Trial Court, KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Appellant Rosemary Osima appeals her February 25, 2008, conviction in the trial court for assault and battery. The trial court found Appellant, a teacher, in violation of criminal law 17 PNC § 503, for punishing a student by poking her in the forehead with Appellant's finger. Appellant argues that the trial court applied the incorrect legal standard for assault and battery by a teacher to one of her students based on the affirmative defense of corporal punishment. Appellee argues that the trial court made a correct finding of fact, that Appellant's actions were not reasonable, and that the court's finding must be sustained. For the reasons articulated below, and after hearing oral argument in this matter on January 30, 2009, we reverse and remand this matter to the trial court, as it applied an erroneous legal standard of review for assault and battery of a student by a teacher in this jurisdiction.

BACKGROUND

On December 6, 2007, the victim and her friend, students at Palau High School, knocked on Appellant's office door during her lunch hour, then proceeded to run away. Appellant later found the students in class and took them to the principal's office. Also present in the office were two other teachers from the high school. Appellant questioned the girls as to why they did what they had done. The victim responded that she knocked on the door simply "because she wanted to." Upset by the lack of respect the girls had shown towards their teacher, Appellant lectured the girls with an angry tone about respecting their elders. During this lecture, Appellant used her finger to "poke" the victim's forehead, resulting in no lasting pain, discomfort or injury. The student was frightened and upon complaint by her mother, an investigation was conducted.

Appellant was later charged with criminal assault and battery, in violation of 17 p.180 PNC § 503.

At trial and later at oral argument, both parties agreed that the appropriate legal standard for assault and battery in this matter was whether a reasonable person would find Appellant's conduct to be "clearly excessive" force by a teacher in punishing one of her students, given the totality of the circumstances. The trial court found Appellant guilty using a reasonableness test, stating:

> Would a reasonable person find that the poking of a forehead by a teacher to a student– is that unreasonable? [. . .] Is it unreasonable for a teacher who is *in loco parentis*, to pull a student out while in class to miss a class for the purpose of teaching them respect under Palauan custom by poking them in the forehead to teach them a lesson? The court finds that it was not reasonable.

Audio Tr. Trans. 3:43:12-3:44:33. The court sentenced Appellant, on March 7, 2008, to thirty days imprisonment, with a $50 fine. The sentence was suspended, and Appellant was placed on supervised probation, subject to various conditions.

STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for clear error. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). The trial court's conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). The parties disagree as to which standard should be applied in this appeal. While Appellant argues that the trial court made an error of law, Appellee argues that the determination was one of fact. We agree with the appellant and find that the determination of the legal standard for assault and battery by a teacher is a legal matter that precedes any later determination of fact. Because this appeal takes issue with the legal standard applied, we review the determination *de novo*.

DISCUSSION

A. The Law of Corporal Punishment

Under the PNC, a person is guilty of battery if he or she "unlawfully strike[s], beat[s], wound[s], or otherwise do[es] bodily harm to another." 17 PNC § 503. The parties primary disagreement in this matter is whether Appellant's actions were criminally "unlawful." Appellant's action, as a teacher, is analyzed in the context of corporal punishment, which is an affirmative defense to an assault and battery charge in this jurisdiction absent a statute barring it. 89 ALR 2d 396, 400 (1963) (highlighting that in special relationships, such as parent-child and teacher-student, a conviction may not be sustained where it might ordinarily be valid); *see also* 89 ALR 2d at 413 (stating that in the absence of a statute regarding corporal punishment, reasonableness is the ordinary rule to test the propriety of a particular punishment). There is no statute in the Republic of Palau that bars corporal punishment, and the Restatements of the Law

are likewise p.181 silent on this issue.[1]

Of the remaining states that continue to allow corporal punishment in the United States, the standard most frequently applied has been that a teacher may inflict physical punishment upon a student, unless he or she acts unreasonably, through the use of excess force. [2] 6 AM. JUR. 2D, *Assault and Battery* at §§ 10, 31 (1999) (citing *e.g. Goode v. State* , 408 So.2d 198) (Ala. Crim. App. 1981)); 89 ALR 2d at 404. Although the standard for both tort and criminal assault and battery appears the same, and states that corporal punishment must not be either unreasonable or excessive, this standard is applied differently for tort damages than for criminal sanctions. Most states that criminally sanction corporal punishment require something more than unreasonable or excessive behavior, such as lasting injury or malice. *See e.g. Ingraham v. Wright*, 430 U.S. 651 (1977) (finding that behavior that is excessive or unreasonable can be criminally sanctioned upon a showing of malice according to Florida state law).[3]

Courts that have found corporal punishment to be excessive have done so when the punishment far outweighs the child's misbehavior, where there is malice, or where there is lasting injury. For example, in *P.B. v. Koch*, 96 F.3d 1928 (9th Cir. 1996), the court found that a high school principal, overhearing derogatory remarks believed to be directed at him, acted excessively when he punched, slapped and choked three students, because he could not have reasonably believed his actions to be lawful. Likewise, in *London v. Directors of DeWill Pub. Schs*., 194 F.3d 873, 875 (8th Cir. 1999), a teacher was found liable for corporal punishment when he dragged a student across the p.182 room and banged his head against a metal pole.

These standards were followed in *Dachuo v. Trust Territory of the Pacific Islands* , 2 TTR 286, 290 (1961), where the high court of the Truk District announced a rule that corporal punishment is permissible unless reasonable men would find the punishment to be "clearly excessive." While this standard was based on laws of the Trust Territory, the law in this respect remains unchanged and valid today. The standard announced in *Dachuo* is confusing, however, for several reasons. The statement that "a punishment which in the general judgment of

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[1] *See* 1 PNC §303 (stating that "[t]he rules of common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law").

[2] The "excess force" language is derived from 42 U.S.C. § 1983 suits against government officials, which sanctions excessive force by the government. In *Ingraham v. Wright* , 430 U.S. 651, the U.S. Supreme Court dealt with a §1983 suit, and stated that "[t]he prevalent rule in this country today privileges such force as a teacher or administrator 'reasonably believes to be necessary for [the child's] proper control, training, or education.' To the extent that the force is excessive or unreasonable, the educator in virtually all states is subject to possible civil and criminal liability." The Court moves on to discuss Florida law, which finds that where a teacher's actions are excessive, meaning "not reasonably believed at the time to be necessary for the child's discipline or training," then he or she could be liable in damages, but if malice is shown, subject to criminal penalties.

[3] *See also Saylor v. Board of Educ. Of Harlan County, Ky.* , 118 F.3d 507 (Ky. 1997) (stating that under Kentucky law, criminal sanctions may be imposed for excessive or unreasonable corporal punishment when the action is conducted with malice); *see also* Tex. Penal Code Ann. §§22.01, 22.04 (criminalizing excessive corporal punishment where there are lasting injuries).

reasonable men would be called clearly excessive" appears to have been taken from a Vermont tort case of assault and battery from 1935.[4] *Id*. at 290. Because no case was cited in the opinion, it appears that the *Dachuo* Court was announcing a criminal standard, which was not the case.

However, reading further into the holding in *Dachuo* provides more clarity into what the Court may have been stating. The Court additionally stated "much less did the prosecution prove that appellant inflicted any lasting mischief consisting of permanent injury, and there was no showing at all, and no attempt to show, that appellant acted with malice." *Id*. It seems, then, that the Court found that neither the civil tort benchmark from *Melen* was met, nor the criminal standards of malice and permanent injury. It is difficult to decipher, therefore, what criminal standard the *Dachuo* Court announced, as it did not even find that the tort standard was met. In other words, we don't know if the Court would have required permanent injury or malice from its holding, although it appears that it would have.

Without the establishment of a clear criminal standard for corporal punishment in this jurisdiction, we are left to create one. While we do not find that malice or lasting injury is required in addition to excessiveness or unreasonableness, we do find that certain factors must be considered, and that criminal sanctions shall only be appropriate in the most extreme cases. Corporal punishment is most often viewed as a tort, either for assault and battery or as a §1983 action, where constitutional rights are implicated. Therefore, because criminal sanctions are a harsh and unusual punishment, so too should be the teacher's actions.

What is excessive or unreasonable has not been clearly defined in this jurisdiction, nor convincingly throughout the United States, although case law provides some guidance to this effect. Many courts weigh certain factors relating to the circumstances at the time of the incident, including: (1) the nature or severity of the offense; (2) the apparent motive of the offender; (3) the influence of his example upon other children in the same family or group; (4) the age, sex, physical and mental conditions of the child; (5) the nature and severity of the child's misconduct, past and present; and (6) the availability of less severe, but equally effective means of discipline. 68 Am. Jur . 2d, *Schools*, at § 294; 89 ALR 2d at 401. We find that these factors must be p.183 considered on the record prior to finding a teacher guilty of criminal assault and battery.

The one applicable case in this jurisdiction, *Dachuo*, found that a teacher who reacted to a student's repeated refusal to give his opinion in class by striking him with a number of "hard, rapid blows to the posterior," resulting in crying but no lasting marks, did not act excessively, unreasonably, with malice, or with lasting injury. 2 TTR at 290. In reaching this conclusion, the Court looked at the habitual disobedience of the pupil, the severity of the teacher's action, whether there was lasting injury, and the pupil's underlying action warranting discipline. *Id*. at 290.

The *Dachuo* Court did find, and we agree, that "the presumption is that the chastisement

[4] *Melen v. McLaughlin* , 107 Vt. 111,113 (1935) (stating that "the teacher is not to be held liable on the ground of excess of punishment, unless the punishment is clearly excessive and would be held so in the general judgment of reasonable men").

was proper and the burden of proving unreasonableness or excess, or that the punishment inflicted was not for the purpose of restraint or correction, is on the prosecution." *Id*. at 289-90. To be criminally unreasonable or excessive, an action must be proven, beyond a reasonable doubt, to be convincingly disproportionate with respect to all or most of the factors stated above. In other words, the action must be severe, without convincing motive, and fail to serve the deterrence or policy concerns stated in factors three through six above.

Because the trial court found simply that Appellant's actions were unreasonable, we review this legal conclusion *de novo*. At a minimum, Appellant must have been found to have acted clearly excessively in the general judgment of reasonable men, if not with malice or lasting injury according to the then existing precedent in this jurisdiction.

B. Analysis

Appellant first argues that her actions were not "unlawful"under the current law of this jurisdiction, and that the trial court erred by applying the incorrect legal standard for teachers and students. Second, Appellant argues that, even if the trial court applied the ordinary assault and battery standard, her actions do not constitute an assault and battery under 17 PNC § 503.

1. The Affirmative Defense of Corporal Punishment

Appellant argues that the correct legal standard in analyzing her guilt or innocence is whether her actions would be considered "clearly excessive" by reasonable men. Counsel for the parties agree that this standard governs the current matter. The parties disagree, however, as to whether this legal standard was actually applied by the trial court in its determination of guilt. Appellant's contention is that, despite opposing counsel reiterating this standard in his closing argument, the trial court applied the incorrect legal standard when it found her guilty of assault and battery by holding that her actions were not "reasonable." Appellee maintains that reasonableness and "clearly excessive in the general judgment of reasonable men" are the same standard, and therefore that the trial court applied the correct standard.

We agree with Appellant and find that the trial court applied the incorrect legal standard by simply stating that Appellant's actions were "not reasonable." At a minimum, the *Dachuo* standard for corporal punishment requires that p.184 reasonable men would find the action clearly excessive. This is not the standard the trial court applied, and therefore reversal is required. Moreover, in reviewing this legal conclusion *de novo*, we find that Appellant's actions were not even criminally unreasonable, much less clearly excessive. If a poke to the forehead failing to produce lasting injury, in response to a disrespectful act of a student, is clearly excessive corporal punishment in the general judgment of reasonable men, there is little that is not. We cannot do the job of the legislature in eliminating corporal punishment, and we will not constructively do so by criminalizing even the slightest physical contact between a teacher and a student.

We disagree, as well, with Appellant, in stating that a finding that the action was clearly excessive in the eyes of reasonable men is all that is required to find a defendant guilty of

criminal assault and battery. We find that an analysis of the factors stated in section A of this Opinion, must also be conducted, and that they weigh severely against the teacher.

The trial court, in using a reasonableness standard, omitted all analysis of whether Appellant's behavior would be considered clearly excessive. We hereby adopt these factors, and require that a trial court may not find that a teacher has acted clearly excessively in the general judgment of reasonable men without stating and weighing on the record: (1) the nature or severity of the offense; (2) the apparent motive of the offender; (3) the influence of his example upon other children in the same family or group; (4) the age, sex, physical and mental conditions of the child; (5) the nature and severity of the child's misconduct, past and present; and (6) the availability of less severe, but equally effective means of discipline. 68 AM. JUR. 2D, *Schools*, at § 294; 89 ALR 2d at 401. This analysis must include the proportion between the child's misconduct and the teacher's punishment and whether there was any malice, lasting injury, or additional aggravating circumstance. In addition, the court must recognize that the presumption in teacher-student relationships is that the punishment was proper, and that it is the burden of the prosecution to prove excessiveness beyond a reasonable doubt.

Because the trial court did not weigh even the factors set forth in *Dachuo*, because it applied the incorrect minimum tort standard, and because we find that Appellant's actions were not criminally unreasonable, this matter is reversed and remanded. Unless and until the legislature enacts a bar to corporal punishment, physical discipline is permissible in this jurisdiction absent a finding that the teacher acted clearly excessively in the eyes of reasonable persons, and that the factors weigh severely against the teacher.

2. Ordinary Assault and Battery

Appellant's second argument is that the trial court made an error by applying the incorrect standard for an ordinary person committing an assault and battery by finding that the act was an "unwanted, unlawful touching." Appellant argues that this is the tort standard for assault and battery, rather than the criminal standard, which requires an "offer of physical violence." *ROP v Olkeriil*, 6 ROP Intrm. 361, 365 (1997). The Court is not currently reviewing ordinary assault and battery, but the affirmative p.185 defense of corporal punishment. In other words, whether the conduct of poking a student on the forehead constitutes a "strik[ing], beat[ing], or wound[ing]" is a matter that the parties did not fully address at trial or on appeal. Thus, the Court need not delve into this matter, as it would be dicta.

CONCLUSION

In light of the foregoing, we **REVERSE** and **REMAND** this matter to the trial court for a determination of guilt based on the appropriate legal standard: whether reasonable persons would find Appellant's actions were clearly excessive, given the totality of circumstances and a presumption of correctness in favor of Appellant.