

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

YELLOWKNIFE CRIMINAL SITTINGS

JANUARY 16, 1996

---

	<u>COUNSEL</u>	<u>TRIAL JUDGE</u>	<u>COURT</u>
HER MAJESTY THE QUEEN Appellant	Ms. L. Charbonneau	Davis, T.J.	Tallis, J.A. Hetherington, J.A. Hudson, J.A.
- and -			
BERNIE ATATAHAK Respondent	S. Duke, Esq.		

APPEAL #CA 00599

---

MEMORANDUM OF JUDGMENT  
DELIVERED ORALLY FROM THE BENCH

---

Tallis, J.A. (for the Court):

Following pleas of guilty in Territorial Court, the respondent was convicted of the indictable offences of assault under s.266 of the Criminal Code and sexual assault under s.271 of the Criminal Code. He was sentenced to 2 years less a day and probation for one year on the sexual assault conviction; on the assault conviction he was fined \$400 and placed on probation for one year.

Although it forms no part of this appeal, the respondent was also convicted of the summary conviction offence of assault under s.266 - in respect of an assault that occurred on September 29, 1995.

The Crown appeals these sentences on the principal ground that the learned trial judge failed to properly apply the principles of sentencing with respect to "spousal" assaults. The relevant circumstances of these offences are summarized in the following passages from the Crown's Statement of Facts:

17. The Respondent and the victim in these matters have been in a common law relationship for 5 years, and have a 3 year old child together. The Respondent is 22 years old, and the victim is 17 years old.
18. On September 29th 1995, at approximately 5:00PM, the victim and the Respondent were at their residence in Cambridge Bay. The Respondent became upset with her because she didn't buy pizza or spaghetti at the store, and pushed her hard; she was 10 weeks pregnant at the time.
19. The victim's cousin, who was in the house, called the R.C.M.P. and asked that they attend the house. Police officers responded to the call and when they got to the residence, the victim was crying. She spoke to one of the officers in private and disclosed the assault referred to in Paragraph 18. The sentence ultimately imposed in relation to that incident is not the subject of the present appeal.
20. When she gave her written statement to the police officer, the victim disclosed that the Respondent had also assaulted her during the summer in 1993. On that occasion, he became upset with her and accused her of cheating on him. He was intoxicated. He dragged her into the house and kicked her repeatedly. She called out for help but no one assisted her. She waited for the Respondent to pass out, and then crawled out a window and went to a friend's house. She eventually went to a shelter and stayed there for a few days. The victim sustained bruises on her back, shoulders and arms, a black eye, and lumps on her head as a result of the assault, but did not seek medical attention.
21. As a result of the information provided by the victim, the Respondent was charged with a count of assault for the most recent incident, and with a count of assault causing bodily harm for the incident which occurred in 1993. He was released, before a Justice of the Peace, on an Undertaking with conditions to keep the peace and be of good behaviour, to abstain from the possession and consumption of alcohol, to not be within 200 meters of the victim's residence, and to not have any contact with her. He was released on this Undertaking on September 30th 1995, at 5:00PM.
22. On October 1st, 1995, at approximately 10:00AM, the Respondent went to the Victim's residence and walked in; he had been drinking alcohol. He went to her bedroom, where she was sleeping. He spoke to her, removed her pants and had sexual intercourse with her; she was struggling to get him off and she was telling him to stop doing this. He made a comment to her about her dropping the charges which had been

laid the previous day. After the intercourse, the Respondent left the house and returned a few times over the course of the next few hours. Eventually, another person who was in the house and who was aware of the no-contact condition told him that he was not supposed to be there and that she would call the police. The Respondent then left the house.

23. This assault was reported to the R.C.M.P. the same day. The Respondent was charged with sexual assault and breach of Undertaking and was remanded in custody; he remained in custody until the matters were dealt with on December 7th, 1995.
24. The Respondent was bound by two Probation Orders when these incidents occurred. While one of the Probation Orders related to an assault conviction, that incident did not involve the Respondent's spouse.
25. After his arrest, the Respondent was transported to the Yellowknife Correctional Centre and appeared before the Territorial Court in Yellowknife. The assault charge was proceeded with summarily, and the Respondent entered a plea of not guilty to that charge. The charge of assault causing bodily harm was proceeded with by indictment; on that charge, the Respondent elected to be tried in the Territorial Court and entered a not guilty plea. The sexual assault charge was proceeded with by indictment; on that charge, the Respondent elected to be tried by a Judge and a Jury. The preliminary hearing on that matter and the trials on the other two matters were adjourned to proceed on the next circuit of the Territorial Court to Cambridge Bay, which was on December 6th, 1995.
26. On December 6th, the Respondent appeared before the Territorial Court in Cambridge Bay. All matters were adjourned to proceed on the next day, and the Crown witnesses were directed to return at that time.
27. On December 7th, 1995, before the trials or preliminary hearing began, the Respondent applied to change his plea to guilty on the assault charge. With the consent of the Crown, he entered a guilty plea to the included offence of assault with respect to the assault causing bodily harm charge. Finally, on the sexual assault charge, he re-elected on his mode of trial, elected to be tried in the Territorial Court, and pleaded guilty.
28. On sentencing, the Appellant's position was that a global sentence of 3 years was appropriate. Defence counsel did not take issue with the fact that the sexual assault was a major sexual assault, but submitted that given the guilty pleas, a global sentence in the range of two years would be appropriate.
29. The sentencing Judge imposed a sentence of two years less one day on the sexual assault charge, and fines on the two assault charges; he also placed the Respondent on Probation for a period of 1 year after his release.

The respondent has the following criminal record:

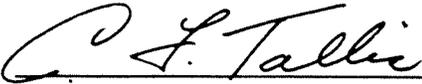
1992-02-12 Cambridge Bay, NT	(1) Assault s.266 CC(1) (2) Assault s.266 CC (RCMP Cambridge Bay 91 0821)	(1) \$150 i-d 2 weeks and probation 6 mos (2) 1 day & \$200 i-d 3 weeks consec
1993-08-25 Cambridge Bay, NT	Be & Theft s.348(1)(b) CC (RCMP Cambridge Bay 93-351)	\$250 & surcharge \$25 i-d 3 weeks, probation 6 mos
1995-01-09 Cambridge Bay, NT	(1) Assault s.266 CC (2) Mischief under \$1000 s.430(4) CC (RCMP Cambridge Bay 95-639)	(1-2)20 days intermittent & probation & probation 6 mos on each chg consec
1995-08-21 Cambridge Bay, NT	(1) s.253(a) CC Impaired Driving (2) s.254(3) CC Refuse breath demand	(1) \$690 i-d 6 weeks Driving prohib. - 6 mos (2) \$200 i-d 12 days Probation 6 mos

Although it would appear that this young man has a serious alcohol problem, it does not excuse his behaviour toward the victim. The serious sexual assault was committed less than a day after the respondent was released on an undertaking related to the other charges. Furthermore, the respondent was on probation when this sexual assault was committed. In such circumstances, the principles of rehabilitation and specific deterrence are of secondary importance. We must give effect to the Crown's contention that the learned trial judge failed to properly apply the principles articulated in *R. v. Brown*; *R. v. Highway*; *R. v. Umpherville* (1992) 73 CCC (3d) 242 (Alta. C.A.); *R. v. Bonneteau* (1994) 93 CCC (3d) 385 (Alta C.A.); and *R. v. Sandercock* (1986) 48 C.R. (3d) 154 (Alta. C.A.).

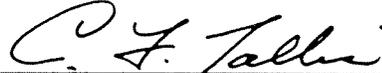
Applying those guidelines to the case before us, we allow the Crown appeal and, after taking pre-trial custody into account, increase the sentence on the sexual assault offence to a term of 3

years imprisonment. Since the sentence appeal by the Crown on the other charge is essentially moot, we do not vary the sentence. However, the probation order must be vacated in each case.

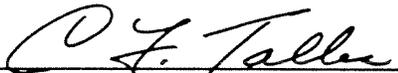
DATED at YELLOWKNIFE, NT,  
this 16th day of January,  
AD. 1996

  
Tallis, J.A.

I concur:

*authorized to  
sign for*   
Hetherington, J.A.

I concur:

*authorized to  
sign for*   
Hudson, J.A.



APPEAL #CA 00599

---

IN THE COURT OF APPEAL OF THE  
NORTHWEST TERRITORIES

---

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BERNIE ATATAHAK

Respondent

---

MEMORANDUM OF JUDGMENT  
DELIVERED FROM THE BENCH

---



