

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

YELLOWKNIFE SENTENCE APPEAL SITTINGS

HEARD OCTOBER 20, 1994

	<u>COUNSEL</u>	<u>TRIAL JUDGE</u>	<u>COURT</u>
HER MAJESTY THE QUEEN Appellant	A. Regel	Davis T.C.J.	Hetherington J.A. Vertes J.A. McFadyen J.A.
- and -			
PAUL TAIPAGAK Respondent	S. Duke		



APPEAL #CA 00489

Section 264.1(1) and 271 C.C.

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

HETHERINGTON J.A. (for the Court):

The respondent pled guilty to two charges of sexual assault and one charge of uttering a threat to cause serious bodily harm.

At trial the facts in relation to these charges were described as follows by the prosecutor:

"The facts of this case are that on the 23rd of June, 1994 there was a party at a residence. That's the residence of Ida Hala and her husband in Coppermine, Northwest Territories. At about seven or 8:00 in the morning most of the guests had left. Ida Hala and her husband were both passed out in the livingroom. Irene Allukpik was also passed out in that room. There were three children in the house. They were in a bedroom. They are the children that are named in the uttering threats charge, and they range in age from 12 to 14 years of age.

The accused was also in the house. He went up to Irene Allukpik. I should note he was in the house because he was invited to the party and had been a friend of the Hala's. He went up to Irene Allukpik, who was passed out, and began fondling her. He fondled her buttocks over her pants. Irene Allukpik then woke up, told him to stop or she would call the cops. The accused continued, and Irene Allukpik fled the house. She did, in fact, call the police and returned to keep an eye on what was transpiring later through one of the windows before the police came.

After Irene Allukpik left, the accused then undid the pants of Ida Hala. He put his hand inside her panties and was seen to be moving his hand around. She did not wake up. One of the children from the bedroom, that's the Hala children, came out and saw what was happening. This child saw the accused sexually assaulting her mother and told the accused to stop. The accused continued, and that child returned to the bedroom with the other children.

After a while the accused then went into the bedroom, as well. He told the three young girls who were in the bedroom, they're the girls named in the Information on uttering threats, that they -- he told them to spread their legs. They would not, and he stood at the foot of the bed. He waited there for about 15 minutes and then said that he was going to punch someone if they did not open their legs.

The police attended shortly after and arrested the accused. The accused was intoxicated, and the next morning or when he woke up in the cells, explained to the police that he did not remember what happened and, in fact, claimed not to have a

recollection of anything that took place until the police told him what happened. Those are the facts that are alleged.

The respondent admitted these facts.

The respondent had a substantial criminal record which included five convictions for assault, three convictions for assault causing bodily harm, one conviction for sexual interference, and four convictions for sexual assault. A copy of this criminal record is attached to this memorandum of judgment.

The trial judge sentenced the respondent to be imprisoned for four months for the sexual assault which involved touching over clothing. He sentenced the respondent to be imprisoned for seven months consecutive for the other sexual assault. And he imposed a sentence of six months concurrent for uttering the threat. The Crown has appealed from all of these sentences.

In *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 the Alberta Court of Appeal stated that the starting point in sentencing for a major sexual assault is three years. It described a major sexual assault as follows at 84:

"One archetypical case of sexual assault is where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not

physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two."

However, we do not think that the sexual assaults in this case were major sexual assaults. This is not because the victims were asleep, but because of the nature of the sexual activity.

In giving reasons for the sentences which he imposed, the trial judge referred to a starting point or range for the sexual assaults. However, no starting point or range has been established for sexual assaults outside the major sexual assault category. Sentencing in each case will depend on the facts of the case.

The trial judge also concluded that the touching of a person who is asleep is deserving of a lesser penalty than the touching of a person by force who is awake. We do not agree. It may be, but again, the facts of each case have to be considered.

Beyond that, the trial judge does not appear to have appreciated the aggravating circumstances in this case. They are:

- (1) The respondent tried to take advantage of two sleeping women who appeared to be unable or unlikely to resist.
- (2) He persisted in sexual activity after he was told to stop.
- (3) The threats to the young girls must have been very frightening in view of the persistence of the respondent and their inability to defend themselves.

We are all of the view that the sentences imposed by the trial judge are inadequate. In this case both the circumstances of the offences and the circumstances of the offender demanded sentences which emphasized denunciation and deterrence, both general and individual. The trial judge does not appear to have considered either.

In view of the respondent's record, we would have expected the trial judge to give very serious consideration to the protection of the public. If he did this, he did not say so.

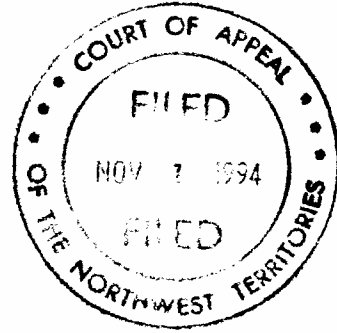
The sentences imposed by the trial judge make it clear that he did not give sufficient weight to any of these factors, that is, denunciation, deterrence and the protection of the public.

We therefore allow the Crown's appeal, and substitute for the sentences imposed by the trial judge, the following:

- for the sexual assault on Irene Allukpik, which involved touching over clothing, a sentence of six months;
- for the sexual assault on Ida Hala, a sentence of twelve months consecutive; and
- for threatening the children with serious bodily harm, a sentence of twelve months consecutive.

The respondent is therefore sentenced to be imprisoned for thirty months.

17/1/44



RECORD OF CONVICTIONS FOR ALL FEDERAL STATUTES AND TERRITORIAL ACTS

NAME: Paul K. TAIPAGAK

DATE OF BIRTH: 1948-08-08

FPS # 103149B

DATE COMPILED: _____

PAGE: 1

- DO NOT SHOW REFERENCE
1. Stays of Proceedings
 2. Withdrawals
 3. Dismissals
 4. Absolute Discharges

DATE & PLACE OF SENTENCE	CHARGE Section, Statute, Description of Offence	DISPOSITION
78-02-21 - Cambridge Bay, NWT	1) Sec. 234 C.C.	1) \$92.00 fine i/d-14 days, 6 mo probation
78-03-02 - Cambridge Bay, NWT	Sec. 83 C.C. - Dangerous Use of a Firearm	18 months probation
78-04-18 - Cambridge Bay, NWT	Sec. 236 C.C. - Drive with More Than 80 mgs	\$80 & Cost \$2, i/d-14 days
78-11-21 - Cambridge Bay, NWT	1) Sec. 245(2) C.C. - Assault CBH 2) Sec. 666(1) C.C. - Breach Probation 3) Sec. 666(1) C.C. - Breach Probation	1) 2 mos 2) 1 mo consec 3) 1 mo conc
80-10-14 - Cambridge Bay, NWT	Sec. 245(2) C.C. - Assault CBH	4 mo
82-01-11 - Cambridge Bay, NWT	1) Sec. 245(2) C.C. - Assault CBH 2) Sec. 245(1) C.C. - Common Assault	1) 4 mo 2) 2 mo consec, 1 yr probation
82-10-21 - Cambridge Bay, NWT	1) Sec. 245(1) C.C. - Assault 2) Sec. 666(1) C.C. - Breach Probation 3) Sec. 245(1) C.C. - Assault 4) Sec. 666(1) C.C. - Breach Probation 5) Sec. 35(1)(d) C.C. -	1) 1 mo jail 2) 1 mo consecutive 3) 1 mo consecutive 4) 1 mo consecutive 5) 2 mo consecutive
83-03-10 - Cambridge Bay, NWT	Sec. 666(1) C.C. - Breach Probation	2 mo jail
83-05-02 - Cambridge Bay, NWT	Sec. 666(1) C.C. - Breach Probation	6 mo probation
83-05-16 - Cambridge Bay, NWT	1) Sec. 245(b) C.C. - Assault 2) Sec. 666(1) C.C. - Breach Probation	1) 2 mo jail intermittent 2) 1 mo jail intermittent consecutive
89-08-15 - Cambridge Bay, NWT	1) Sec. 151 C.C. - Sexual Interference 2) Sec. 271 C.C. - Sexual Assault x 2 3) Sec. 266 C.C. - Assault	1) 2 mo 2) 8 mo on each chg consec & consec 3) 3 mo conc
91-02-12 - Cambridge Bay, NWT	Sec. 271 C.C. - Sexual Assault x 2	2 mo on each chg consec, 6 mo probation
92-02-15 - Cambridge Bay, NWT	1) Sec. 253(b) C.C. - Drive with More Than 80 mgs	1) \$750 & surchg \$112.50, i/d-42 days & prohib driving 4 mo
92-04-13 - Cambridge Bay, NWT	2) Sec. 335(1) C.C. - Take MV Without Owner's Consent Sec. 430(4) C.C. - Mischief Under \$1000	2) \$200 & surchg \$30, i/d-14 days consec \$100 & surchg \$15, rest \$132.06

14 June

27 June