IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

YELLOWKNIFE CRIMINAL SITTINGS

HEARD JANUARY 22, 1997

| | COUNSEL | TRIAL JUDGE | COURT |
|---|---|---|---|
| HER MAJESTY THE QUEEN<br>Appellant | L. Charbonneau | Lagacé, T.C.J. | Vertes, J.A.<br>Schuler, J.A.<br>Berger, J.A. |
| - and - | | | |
| ADAM KALLUK<br>Respondent | V. Foldats | | |

APPEAL #CA 00655

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

**VERTES, J.A. (SCHULER, J.A. concurring):**

In the matter of The Queen and Adam Kalluk, the Court is divided. I will read the decision of the majority concurred in by Madam Justice Schuler.

In this case the offender entered pleas of guilty at an early opportunity to charges of sexual assault and common assault, both charges having been committed against his common-law spouse, and with the Crown proceeding by way of indictment with respect to both charges.

The learned sentencing judge imposed a global sentence of two years less one day, consisting of 18 months on the sexual assault charge and six months less one day on the common assault charge plus probation for two years. The offences occurred within a few days of each other.

They were violent and accompanied by threats of death, and in one instance there was the presence of a young child.

The offender is relatively young and is able to hold down responsible employment. He has had a difficult childhood, but we are told he is now starting to deal with the problems emanating from that childhood. A significant factor is that he has an unenviable criminal record. He has been convicted of 11 offences between 1983 and 1995, more specifically, of these, five convictions are for assaults on the same victim. Those assaults started in 1989 when the relationship started. He has been treated previously with extreme leniency. He has been placed on probation on at least two occasions before with respect to convictions for assault on his common-law spouse. Obviously these periods of probation have had no beneficial results.

It is evident to the majority of this Court that this man has failed to demonstrate any responsiveness to the lenient treatment accorded to him previously. Indeed these two offences were committed shortly after he completed a one year period of probation. If it can be said that an appropriate sentence in any given case should reflect the moral culpability of the offender, then in this case where we have an offender who has repeatedly committed similar acts of violence, against the same victim, has been punished for them and yet has failed to change his ways, it appears to us that his moral culpability is indeed grave.

The primary emphasis in this case must be on specific deterrence. In our view, the reliance on probation by the learned sentencing judge was misguided and results in these sentences being demonstrably unfit. With respect to the sexual assault offence specifically, it is unnecessary, in the circumstances of this case, to label this particular offence as a major sexual assault. It is more

important in our view to consider the global consequences of the disposition imposed on this offender.

In the view of the majority, an appropriate global sentence is one of three and a half years' imprisonment. Accordingly we would set aside the sentences imposed by the learned sentencing judge and substitute therefor a period of imprisonment of two and a half years on the charge of sexual assault and one year on the charge of common assault to be served consecutively. It is the recommendation of the majority of this panel, having regard to the information provided to us regarding post-sentencing activities of this offender, that every consideration be given to having him serve his sentence in a northern facility and to the continuation of the programs on which he has embarked.

**BERGER, J.A. (dissenting):**

I respectfully dissent from the opinion of the majority. The learned sentencing judge made no error in principle. He did not fail to consider a relevant factor, nor did he overemphasize any of the appropriate factors. This Court should not interfere unless the sentence is demonstrably unfit. The thoughtful and careful reasons of the sentencing judge reveal that he did not reject a penitentiary disposition out of hand.

He properly considered that the unique circumstances of the Respondent warranted a stern territorial sentence that, coupled with two years of probation, would best protect the complainant. As the sentencing judge put it:

> "What I have to do is try to find the sentence that takes into consideration the fact that the community has to be protected and the victim has to be protected. The fact that the gentleman will go back in this society and the community in Igloolik again and live there, whatever I do he is going to go back there. He is not going to be in jail for the rest of his life. A very long sentence won't change that fact. Eventually he will go to Igloolik. The Court can't protect individuals unless they're handed life sentences which would not be the case here. It has to be a sentence that is long enough for the accused to understand that he cannot commit these kinds of crimes".

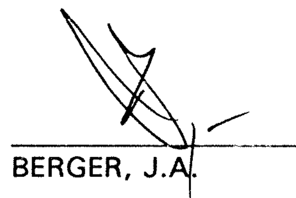
The sentencing judge, no doubt mindful that the Respondent had not offended while recently on probation, added:

> "The fact that it's not over two years, there can be a Probation Order. A Probation Order allows everybody, the whole system, to get back at you if you commit any other crime or infraction once you are released".

We have no evidence of the circumstances of the previous assaults. We do know, however, that the Crown did not appeal the previous dispositions. I cannot, accordingly, accede to the majority opinion that the Respondent has previously been treated with "extreme leniency" (emphasis added).

It is unfortunate that a sentence of the kind imposed by the sentencing judge was not earlier imposed given the Respondent's deplorable record for spousal assault. It would have been better to send a stern message to this accused in a more timely manner.

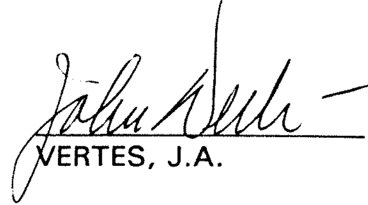
I would dismiss the Crown appeal.



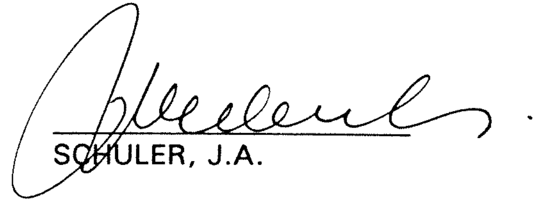
BERGER, J.A.

**VERTES, J.A.**:

Accordingly, leave to appeal is granted. The appeal is allowed and the sentences will be substituted accordingly.



VERTES, J.A.



SCHULER, J.A.

Yellowknife, NT

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