CR 02181

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LEON ANDREW

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Appeal against a sentence of 6 months in total on two counts of assault dismissed.

Heard at Yellowknife on March 19th 1993

Judgment filed: March 22nd, 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant:	James D. Brydon, Esq. Ms. Diana Rutschmann
Counsel for the Respondent:	Leslie Rose, Esq.

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REASONS FOR JUDGMENT

1 This vigorously contested appeal is against a cumulative sentence of six months imprisonment upon conviction of two spousal assaults. The appellant asks that the sentence be reduced to "time served". The Crown opposes any reduction in the sentence.

2 The total of six months is made up of two months for an assault committed on December 23rd 1992 and a further four months to be served consecutively, for an assault committed on January 13th 1993; both assaults having been committed by the appellant on his wife in the family home at Yellowknife.

3 The first of these assaults was not reported at the time. However, the wife did report it to the police two weeks later when reporting the second assault. The police immediately arrested the appellant on receiving the wife's report and the two assault

charges were laid. In due course, the appellant appeared before a Territorial Judge and entered "guilty" pleas to each of the charges. The sentences then imposed are the subject matter of this appeal.

I. Jurisdiction

4 The charges were dealt with pursuant to Part XXVII of the **Criminal Code**, by what is known as summary conviction procedure. They were laid under paragraph 266(b) of the Code, which states:

> 266. Every one who commits an assault is guilty of
>
> (b) an offence punishable on summary conviction.

5 There being no specific penalty provided in s.266, on summary conviction of assault, the penalty is governed in part by subsection 787(1) of the **Criminal Code**, which reads as follows:

> 787. (1) Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.

6 It is therefore clear that the sentences under appeal were not in excess of the limits set by this subsection of the **Criminal Code**. If the appellant is to succeed, he must show that the sentences are nevertheless unfitting in all the circumstances. This follows from the reference in subsection 822(1) of the Code which makes section 687 apply to summary

conviction sentence appeals. That section states:

> 687. (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.
>
> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

7 This, then, is the governing law for the purposes of this appeal in so far as that law is articulated in the **Criminal Code**. It requires me to consider the fitness of the sentences under appeal and to either vary them or dismiss the appeal. The question of fitness in turn obliges me to consider the circumstances of the two offences for which the sentences were imposed as well as the circumstances of the appellant as the offender.

II. Circumstances

1. The offences

(a) The December 23rd 1992 assault

8 On or about December 23rd 1992, in the evening, the appellant and his wife engaged in an argument at their home in Yellowknife. Mr. Andrew became upset over something said during this argument. He thereupon grabbed his wife's neck, squeezing it until she nearly lost consciousness. He then let go. This brought the argument to an end. The wife suffered a sore neck and throat as a result of this for about two weeks. She did not seek medical attention, however. Nor did she report the matter at that time to the police. No alcohol was involved on that

occasion.

(b) The January 13th 1993 assault

9 About two weeks later, at about 6.00 p.m. on January 12th 1993, the wife came home but found Mr. Andrew was out. She went out looking for him but to no avail. Returning home to await his arrival she noted down the telephone number of the Royal Canadian Mounted Police, leaving it next to the telephone for use in the event that she might need it later.

10 At 1.00 a.m. that night Mr. Andrew came home. He showed signs of alcoholic intoxication. Shortly afterwards, he became upset and grabbed the wife's shirt pocket and her necklace, ripping the pocket and breaking the necklace. Attempting to grab his wife, she managed to elude him; and so he went into the kitchen, returning to the living room with some apple juice which he poured over her. He then grabbed her and forced her to the floor. As he fell on top of her, he grabbed at her throat and at her clothing. She managed to push him off with her feet. He then got up, yelling at her, and again went into the kitchen, returning with a fork which he poked into the wall, twisting it with his hand. Mr. Andrew then smashed a window in the kitchen.

11 At this point the wife was getting her boots in the vicinity of the living room and kitchen doorway when Mr. Andrew again laid hold of her. She managed to push him away and he fell to the floor where she tried to pin him down by his arms, fearing that he would otherwise attack her again. Mr. Andrew however managed to get away and regained his feet. The wife called out to

him pleading that he not hurt her. He went into the kitchen and began to prepare some food.

12 The wife then gathered together some outdoor clothing, whereupon Mr. Andrew again approached her, taking hold of her parka and threatening that she would not leave. He then came back to where she was in the bathroom, pointing a fork at her which he scraped on the wall. Returning to the kitchen to eat, he left her long enough to allow her to put on some slippers and escape from the house by the front door. She went to a nearby restaurant and contacted the police, who came for her there and took her back to their office where she gave them a statement describing what had happened.

13 The police arrested Mr. Andrew at about 3.30 a.m. for the assault. They noticed signs of his impairment. He co-operated with them.

14 The only visible injury to the wife on this second occasion was a slight scratch to her chin.

2. The offender's circumstances

15 The appellant is described as being 46 years of age. He and the victim of these assaults were married in August 1992, only a few months before the assaults took place. The appellant had been married before. His first wife had died of cancer. And his parents died when he was quite young, leaving him as head of the family, being the eldest of nine children in the family at Fort Norman. Until his marriage in 1992 he had lived and worked for the most part in

or near Fort Norman. He moved to Yellowknife in mid-December 1992, very shortly before the first of the assaults now before the Court took place.

16 Although the appellant reached only a grade 5 level in school, he has learned to operate complex electronic and other technical equipment. Before his appearance in this case in the Territorial Court, he had made contact with a professional counsellor for assistance and treatment in relation to his acknowledged alcohol problem. Arrangements were made to have him admitted for treatment at a facility for such purposes at Donwood, Ontario. The appellant, through his counsel, indicated to the Territorial Judge at the sentencing hearing that he was also willing to take counselling in reference to his anger and his marital problems. He expressed his deep remorse for what had happened and his desire to improve things in the marriage.

17 The appellant's criminal record is a short one. According to him, the offences were all alcohol-related. This is not challenged by the Crown. There are four convictions in the record in the period 1984-1988; nothing else. He was fined on each of those convictions. On the last conviction, which was for assault causing bodily harm, he was also sentenced to serve one day in gaol. Crown counsel at the hearing in Territorial Court in the present case argued that this was done to impress on the appellant that such an offence could give rise to imprisonment for a lengthy term, the one day being purely symbolic, as a form of warning. On behalf of the appellant, it was argued by his counsel before me that the one day was not even that; but was merely a statutory requirement in compliance with the provisions of the **Criminal Code**. Either way, I recognize that the one day did not require actual incarceration. This is the first time that the appellant has been imprisoned under a court sentence.

18 It was said at the sentencing hearing before the Territorial Judge on the appellant's behalf that he began to abuse alcohol when his first wife was dying of cancer in 1981. They had been married for seven years and had jointly raised the appellant's two youngest siblings. It was also said that since the appellant's arrest for the second of the assaults now before the Court he had been abstaining from alcohol completely. There is nothing to suggest the contrary.

19 On the appellant's behalf, it was furthermore said at the sentencing hearing in Territorial Court that he had been extensively involved, over the years, in programs for youth and in cultural activities of the Fort Norman Dene Band. He had served on the Fort Norman Band Council for a number of years. He had taken part in establishing a day care centre at Fort Norman and had been actively engaged in other volunteer work on behalf of that community. It is not difficult to understand that his move to Yellowknife in mid-December 1992 was very difficult for him, since it meant meeting and moving among many total strangers and the loss of close contact with his original family and community.

20 Ordinarily, it is my practice to consider the circumstances of the victim of a crime of violence generally in conjunction with the facts of the offence in question. In the present instance, however, I shall consider her situation in relation more particularly to those of the offender. The victim is Ms. Ethel Blondin-Andrew, Member of Parliament for the Western Arctic. She was present throughout the hearing of the appeal, is present again today in the public gallery, and was present at the sentencing hearing in the Territorial Court, where she testified as a witness called on behalf of the appellant.

21 That the status of the victim in this case as an important public figure (elected to represent the constituency of Western Arctic in the House of Commons for Canada) is a significant factor, is not in any way questioned either by the Crown or by the appellant. The Court is not blind to that aspect of the matter, although it considers this to be no more nor any less serious a matter for that reason. It is an aspect which however helps the Court, I believe, to better understand the circumstances of these offences and of the offender. A small but not altogether insignificant indication of the importance of that aspect was revealed when counsel for the appellant mistakenly referred to him as "Mr. Blondin", correcting herself immediately to refer to him as "Mr. Andrew".

22 In the course of her testimony before the Territorial Judge at the sentencing hearing, Ms. Blondin-Andrew was asked by the appellant's counsel if she believed that a term of imprisonment would be beneficial. Her reply, as it appears in the record, was as follows:

> I believe that I love and support my husband, but my position is zero tolerance, and I cannot condone an act of violence perpetrated against any person. I believe due process has to take its course.

23 No further questions were put to Ms. Blondin-Andrew, who had earlier told the court that she had every intention of taking part in counselling along with the appellant and that she believed counselling would help him to deal with his anger problem. However, she then volunteered a further statement, as follows:

> I just wanted to make a brief statement because I believe this is undeniably a case that is going to attract a lot of media attention and the attention of the public, and I am a firm believer that many of these cases are complex and there is more than one victim. I believe that my husband is also a victim of circumstances that might have precluded our marriage, and I think it is complicated enough. I have always looked for other sources or other alternatives for

dealing with our problems, but it became a situation that was more difficult and more complicated than I as one person could deal with. This is certainly not what I wanted for my husband whom I love very much or myself or for his family or my family.

I believe in working for the public I have to be very specific about the position I take with regards to the way in which families and family members treat one another and the way in which individuals and the public treat one another, and I cannot condone violence whether it is psychological, emotional, verbal or physical.

I also can't deny the fact that I want my marriage to work, and I don't necessarily believe that whatever results from this will be the end to a marriage or has to be the end to a marriage or a relationship, but in some odd way, there can still be a new beginning and maybe a beginning to a healthier life for both of us. God knows we both had a very difficult life. That's something that I will never deny.

But I think that with the proper support and help that there is hope for people that experience similar problems, and I really believe that there are circumstances unforeseen in a case like this where you get to hear of the crime that is perpetrated, but you don't get to know the whole human being, and I think there is a wonderful person – there are two people that constitute my husband, one that's very sad and has had a very difficult time, and maybe that manifests itself in anger and bitterness, but I think there is another side that's caring and sensitive and human, and I think that one has lost the battle because of alcohol.

I have also lost a battle in that respect too, because alcohol abuse has touched my life all of my life, and many of my people's lives, and it has made me unable to respond in a healthy manner to people who are abusers of alcohol. I see it as a loss of control. I see it as being chaotic. I see my life and other people's lives sadly affected by it. And it makes me respond in a very negative way.

I think that we all need help with this problem. It is not just my problem or Leon's problem. It is a problem that reaches many more across this country and in the north. So what I would like to say is I really believe that there is hope if there is help, and I have no bitterness and I have no recriminations. I hope I have understanding and forgiveness and love. Thank you.

III. Grounds of Appeal

Shortly stated, the following grounds of appeal are raised on behalf of the appellant:

1. factors in mitigation were wrongly ignored by the sentencing Judge;

2. the sentences were excessive in all the circumstances, including the appellant's previous criminal record;

3. the total sentence was unreasonable in the circumstances; and

4. incorrect principles of deterrence were applied by the sentencing Judge.

IV. Discussion

1. Mitigating factors

(a) Lack of premeditation

25 That the earlier of the two assaults arose spontaneously in the course of an argument is not in dispute. To that extent it can be said to have been unpremeditated. I note that no alcohol was involved in that instance. The appellant's loss of self-control was not triggered or influenced by consumption of alcohol. Nor is there any suggestion that his actions were in any way intentionally provoked by the words or actions of the victim of that assault. However, the submissions on sentence made by counsel in the Territorial Court did not address the question of premeditation or any lack of it with respect to either of the assaults.

26 The most that can be said in this connection is that alcohol was involved in the second assault. Be that as it may, the Territorial Judge had this to say:

> The second offence, clearly the victim was worried in advance. She wrote down the number of the police and put it by the phone. Clearly she was waiting and expecting problems. She wasn't unfortunately, disappointed. The assault of the 13th of January is not a momentary burst of anger, a cruel, thoughtless and unpremeditated blow. This is a deliberate, continuing assault of another human being in circumstances as indicated by the Crown where it should not be occurring. A home is supposed to be a refuge. She was pursued. She was struck. She was knocked down. She was pursued again. She was threatened, which was implicit in the dragging of the fork across the wall and pointing it at her. She begged. She pleaded.

It is dehumanizing.

27 The only authority cited by counsel for the appellant for the proposition that absence of planning and deliberation is a mitigating factor is **R. v. Evans** (1975), 24 C.C.C. (2d) 300, 11 N.S.R. (2d) 91 (C.A.). My reading of the majority's reasons in that case does not reveal that to have been decided. The decision is equally consistent with the proposition that absence of premeditation goes to eliminate what would otherwise have been an aggravating factor. Even if the record in the present case can be read as being consistent with a lack of premeditation, in spite of the specific remarks of the sentencing Territorial Judge on that point, it must be borne in mind that the Crown in this case had elected to proceed by way of summary conviction. Had there been evidence of a cool, calm and deliberate plan, and thus premeditation in a strong sense, the Crown might well have elected to proceed by indictment so as to give the Court access to a much wider range of sentencing options which would reflect that as a seriously aggravating factor.

28 In my respectful view, the record does not show premeditation in any such strong sense; and to that extent I agree with the submission made on this point by counsel for the appellant. At the same time, alcoholic influences or no, the actions of the appellant during the second assault were apparently quite deliberate, in the sense that they were carried out intentionally in a sequence which was clearly designed to intimidate and subordinate Ms. Blondin-Andrew to the appellant's will. This was, as the Territorial Judge evidently saw it, and as I see it, more than a merely spontaneous spur-of-the-moment reaction on the appellant's part.

29 In **R. v. Ross**, [1983] N.W.T.R. 254 (S.C.), Ducros J. held that self-induced voluntary intoxication in a person who fully realizes that this results in violent states of aggression cannot be taken in mitigation of sentence for a violent crime. I respectfully agree, accepting that to be the generally held view of the courts in Canada, as mentioned by Ducros J. And while there is no evidence in the present instance that the appellant on January 13th 1993 did realize that his self-induced intoxication would have the results which it did, I infer that he was then at least sufficiently aware of his problems with anger and alcohol to know that he ran a risk of committing some violent act on returning home drunk, given what had happened on December 23rd 1992 when he was sober.

30 In all the circumstances, I therefore am unable to accept the submission made on behalf of the appellant that the sentencing Judge ignored the question of premeditation or that he was wrong in failing to reduce either of the sentences he imposed because of a lack of premeditation, due to alcohol consumption or otherwise. With respect to the earlier offence, neither counsel nor the court even thought to deal with the subject of premeditation. As for the later offence, where alcohol was involved, premeditation in the strong sense of planning and deliberation would, in my view, have been a very seriously aggravating feature. Absence of that sort of premeditation did not however warrant treatment as a mitigating factor. There was enough premeditation, in the weak sense of acts designed to strike fear into the victim, to warrant the sentencing Judge ruling out absence of such premeditation as a mitigating factor.

(b) Good character and Strong family support

31 It is perfectly obvious from the record of the sentencing proceedings that the Territorial Judge must have been well aware of these additional factors. He had heard Ms. Blondin-Andrew testify very shortly before he pronounced sentence. He had likewise heard the submissions of counsel. And he was not obliged to repeat all that he had heard when he came to pronounce the sentence and his brief reasons for it.

32 As to character and family support, the sentencing Judge had this to say, which indicates that these were in his mind:

> I also take into account the words of his wife who indicates that she is hopeful that Mr. Andrew apparently is willing to do something or at least try to do something about his abuse of alcohol and the abuse of his wife ...
>
> I take into account submissions of Defence with respect to this matter. But in my view, given the circumstances of the offence, anything other than a jail sentence would be contraproductive. I believe that a jail sentence can have a rehabilitative effect. It will make very clear to Mr. Andrew what he can and cannot do, and hopefully to others who might lose the control that he lost.
>
> I am asked to consider a variety of other options such as court ordered counselling, court ordered community service or probation. I am not inclined to do that. I am dealing with an adult who has some intelligence. Presumably he can make the logical connections and take the steps needed.
>
> I am encouraged by the evidence of Ms. Blondin Andrew that the accused is apparently taking steps to deal with whatever problems he may have. I don't think it is necessary for the courts to, in effect, get into his life any more than necessary. As I said, I want Mr. Andrew to leave this courtroom and to know with great certainty that this kind of conduct is unacceptable. It is criminal.

33 The appellant's criminal record, while showing an absence of convictions during the last six years, must be weighed in the balance with the information before the court reflecting favourably on his general character. The presence of a previous assault conviction in that record was particularly significant, even though it did not result in an extended prison sentence.

34 Given that a sentence of imprisonment of some real significance was clearly called for in the present case, I regret that I am unable to agree with the submission that the length of that sentence should have been reduced to specifically take into account the appellant's generally excellent character and the strong family support shown for him by his wife, the victim in this case. He received less than the maximum sentence for each of these assaults.

(c) Alcohol as a factor

35 The appellant's abstention from consumption of alcohol between the time of the last offence and the date of sentencing is commendable. I do not, however, find anything in the case of **R. v. Pottie and Keating** (1978), 4 C.R. (3d) S-24 (N.S.C.A.) to support the submission made on the appellant's behalf to the effect that this should result in a specific further reduction of his sentence in this appeal. That fact was before the sentencing Territorial Judge. And while it was a mitigating fact, it could not take precedence over the salient facts of these offences and the other circumstances before the court then. Nor can it do so now.

36 The appellant's absence of any memory of the second incident, presumably as a result of his intoxication at that time, is not in my view a mitigating factor in any event. Alcoholic amnesia is all too familiar to the courts as a symptom of the seriousness of the alcoholic's problem. It only goes to show that he or she has no memory of what occurred. It does not show that he or she was lacking in awareness at the time. Circumstances before the Court in this case clearly show otherwise.

(d) Stress and depression

37 There is merit in the appellant's further submission that a person may be eligible for a reduced sentence where psychological stress or depression are shown to have strongly influenced the commission of the offence. In that the appellant's behaviour was however not shown to have actually resulted from such stress or depression, though that may indeed have been the case, the sentencing Territorial Judge was left without the necessary foundation of fact upon which to rest any individualised sentence which would have eliminated a sentence of imprisonment, the usual penalty in cases of violent crime.

(e) Tragic life history

38 The difficulty which faces the courts in the Northwest Territories, in giving effect to this ground of general mitigation for purposes of sentence, is that there are so many instances of tragedy in the lives of so many persons who come before our courts. As Ms. Blondin-Andrew mentioned in her testimony, the appellant is also a victim, just as she has been, of tragic circumstances beyond their control.

39 One has only to remember the terrible impact of tuberculosis, for example, in the years up to the 1960s. And that is only one example. The impact of alcohol abuse since then, if not before, has been equally as devastating. One cannot spend time in court, as the experienced sentencing Judge has done over the years, without having an ever-present and haunting awareness of these terribly tragic elements in the lives of our northern population. This is not to downplay the appellant's own personal tragedy in the loss of his parents at an early age

and the subsequent loss of his first wife. His problem with alcohol is no doubt to a degree a result of his attempts to cope with his very natural grief over those events.

40 To the extent that this aspect of the matter could be taken into account, in the circumstances of this case, I find that it was properly before the sentencing Judge and I do not find that it was ignored. It was not possible, in the nature of these offences, to give any greater effect to this aspect of the matter than was done, in my respectful opinion. The case of **R. v. Metin** (1988), 66 Sask. R. 196 (C.A.), on which appellant's counsel relies, was for a property offence which clearly called for specifically compassionate treatment of the offender in all the circumstances. That is a very different case from this one. The case of **R. v. Falconi** (1982), 41 A.R. 433 (C.A.) is likewise easily distinguishable on its facts, though the offence in that case was one of assault causing bodily harm.

41 In any event the links between the appellant's tragic experiences in life and the offences before the Court are too tenuous and indistinct to warrant a reduction of sentence on this ground in this case.

2. Excessive sentences

(a) Magnitude, enormity or gravity of the offences

42 As submitted by counsel for the appellant, the gravity of the offence is always a factor to be weighed by the courts in sentencing.

43 In committing the first offence, the appellant choked his victim until she nearly lost consciousness. This was, all too clearly, a life-threatening act. It left the victim with a sore neck and throat for two weeks. More important, it left her in fear of her life, at least to the extent that she took precautions on January 12th 1993 to have the telephone number of the police handy in case she was attacked again.

44 The second offence also involved seizure of her throat by the appellant. And it involved threats with a fork in addition to the physical attack. She was forced to flee the home for safety and only then called the police.

45 This was not the usual impetuous punch in the nose or pushing and slapping around that one has heard of in domestic disputes all too often. It was, and was intended to be, seriously life-threatening. As common assaults go, these were at the upper level of seriousness. As I have said, the Crown could well have proceeded by indictment, where a much more severe range of penalties would have been available, had there been any indication of planning and deliberation or if this had been a case of repetition of previous assaults on the same victim which previous assaults had been before the courts already.

46 The fact that the physical injuries were not lasting or serious merely means that the offences were not charged or sentenced as having caused bodily harm. If the contrary had been the case, even more serious penalties would have faced the appellant.

47 In **R. v. Oakley** (1991) N.W.T.R. 27 (C.A.) the victim suffered only very minor bruises

and a very small laceration no more than one centimeter long, with some tenderness of the jaw, after an assault by her husband in the family home. Notwithstanding the existence of some intentional provocation, and the fact that both the victim and the offender were quite intoxicated, the Court of Appeal imposed a sentence of 60 days imprisonment, even though the offender in that case had been immediately discharged from his employment as a result of being charged with assault and was still unemployed a year later. The Court in that case stressed the emotional trauma to the victim and the need for vigorous denunciation of the offence, in addition to both specific and general deterrence.

48 I am unpersuaded that the present matter can be treated in any respect more leniently, given the clearly much greater magnitude of the assaults in this instance than was the situation in the **Oakley** case.

(b) The Victim's Forgiveness

49 One of the less understood aspects of the well-intentioned efforts of lobbyists, and now of Parliament, to give a voice to victims in the sentencing of their victimisers, is that some victims thereby tend to be subjected to indirect (or even direct) pressures of one kind or another to give favourable victim impact statements or to testify in a manner favourable to the accused offender, in the sentencing process.

50 Experience in court over the years reveals that victims may at times be intimidated or otherwise may be subjected to influence with a view to giving favourable information to the

courts from the standpoint of the accused offender, so as to persuade the courts to be lenient in sentencing the offender. That sort of thing existed before the recent changes in the **Criminal Code** which provide for victim impact statements, as anyone experienced in criminal cases can recall. There is nothing to indicate that these experiences of the past will not continue to repeat themselves.

51 Courts are, and have been therefore, at least quite cautious in assessing professions of forgiveness on the part of victims, although these have been and are still at times accepted as very positive indicators for the rehabilitation and ultimate reform of the offender. In Alberta, however, the Court of Appeal (whose members are also members of the Court of Appeal of the Northwest Territories) has made it emphatically plain in **R. v. Brown; R. v. Highway; R. v. Umpherville** (1992), 73 C.C.C. (3d) 242, at page 251; that:

> ... the plea of the wife that her husband be returned to her and that she not be further victimized by being deprived of his income should not readily be permitted to prevail over the general sentencing policy that envisages imprisonment of the man as not only an instrument of the deterrence of other men, but also as an instrument of breaking the cycle of violence in that man's family even at the risk of the relationship coming to an end during the enforced separation.

52 In the present instance, while the wife has affirmed her complete forgiveness of the appellant for these offences, and has done so in open court, it is apparent that she has not been motivated to do this simply to persuade the courts to deal leniently with him because of a dependency on her part upon his income or for his future goodwill towards her. She has made her position as a responsible Member of Parliament very clear, at the same time. She does not in any way condone the offences and asks only that they be dealt with by due process. And she has carefully made no attempt to even appear to abuse her position as a Member of Parliament

by attempting to influence the courts in their disposition of the matter one way or the other.

53 I accept that there has been a full and genuine forgiveness of the appellant by the victim of these offences. The fact that the sentencing Territorial Judge chose to treat this as immaterial is no indication that he did not accept it as entirely genuine. That is not the purport of what he said, which was that a victim's forgiveness, no matter how complete or genuine, should not operate in mitigation of sentence. Lack of forgiveness, or a desire for revenge, is equally no more material to sentence than the existence of forgiveness (except when it comes to restitution or reparation in relation to a property offence; and that of course is not the case here).

(c) Shame and Disgrace

54 It is argued, and I accept, that the appellant was exposed to national media attention as a result of the court proceedings in relation to these offences and that this would not have occurred if his wife were not a Member of Parliament who is well-known nationally in Canada.

55 In **R. v. M.A.**, [1990] N.W.T.R. 36 (S.C.), the offender had been a Member of the Legislative Assembly of the Northwest Territories, whose conviction and sentencing on a charge of sexual assault was the subject of widespread publicity. The offender in that case had publicly acknowledged his guilt by immediately resigning his seat in the Legislative Assembly. This was taken into account on appeal as indicating a very clear and public denunciation of the offence by the offender himself. There is no doubt that he suffered additional shame and disgrace, as a result of his holding elected office, in relation to these events.

56 The sentencing Territorial Judge in the present case was also the judge at first instance in **R. v. M.A.** He would of course have been well aware of the potential publicity in the present case as he no doubt remembered the publicity which had attended that earlier case. I have no doubt that he took this factor also into account in the present case, although it was not mentioned by him or by counsel in their sentencing submissions before him.

57 Counsel for the appellant has cited the case of **R. v. Schiegel** (1985), 7 O.A.C. 37 for the proposition that such public shame and disgrace may be taken into account in mitigation of sentence. I note, however, that the Ontario Court of Appeal, in reducing the sentence in that case, did not go further than to bring it down from imprisonment for six months to 90 days, to be served intermittently. In **R. v. Greene** (1985), 60 N.B.R. (2d) 86, 157 A.P.R. 86 (C.A.), a cumulative sentence was reduced from six years to one year followed by probation. The principal reason given by the court for this reduction was that the sentences imposed were well outside the normal range for the offences in question. Other considerations were also mentioned, including loss of job and home as well as the public disgrace suffered by the offender and his family. I conclude that while this will be taken into consideration by a court on sentencing, it should not be treated as a governing principle but rather as only one of the many factors to be kept in mind.

(d) Quantum of sentences

58 Counsel for the appellant has argued that this was not the worst case or one of the worst offenders in this kind of case, with the consequence that the sentences imposed were too

severe.

59 The sentence of two months imprisonment for the December 23rd 1992 offence quite clearly reflects the view that it was not either the worst case nor one committed by the worst offender. The sentence was well short of the maximum of a fine of $2000 (with a maximum of 6 months in gaol on default) together with another 6 months in gaol. The maximum sentence on summary conviction could thus, in such a case, amount in effect to a year in gaol.

60 The same is true of the sentence of four months imprisonment for the January 13th 1993 offence.

61 Counsel sought to persuade me that these two offences are to be treated as one, so that the cumulative sentence of six months imprisonment is the maximum sentence of imprisonment which could have been imposed (without the possibility of 6 more months on default of payment of a fine) pursuant to s.787(1) of the **Criminal Code**. That this is not a correct view of the matter requires no detailed elaboration. That submission ignores the clear language of s.787(1). And it ignores the palpable fact that there were two separate and distinct offences, both so charged and so revealed in the facts presented to the sentencing Territorial Judge, even if the circumstances also disclosed the repetitious nature of the assaultive behaviour in question.

62 It was also argued that the sentence for the second offence should not have been made double the length of the first since the so-called "jump principle" under which a subsequent

offence will be more severely sanctioned by a court operates only where the earlier offence has been already punished by a court. But the sentencing Judge made no reference to the "jump principle". This was mentioned first by me in the course of counsel's submissions at the hearing of the appeal. And I am inclined to agree with counsel's submission on that point. However, I consider the circumstances of the later offence, involving threats with a fork in addition to an attempt to further choke the victim, as being even more serious than the circumstances of the earlier offence, and that this sufficiently justifies the court's imposition of the four-month sentence for that offence.

(e) Previous Criminal Record

63 The existence of a previous criminal record goes, among other things, to the court's assessment of the type of person before it for sentencing. In this case it revealed an individual who had been convicted of mischief to property on two occasions and of a weapons offence as well as an assault causing bodily harm.

64 Fortunately for the appellant, the victim of that earlier assault was not the victim in the present instance. Had it been otherwise, he might well have been sentenced more severely. See **R. v. Yew**, [1991] N.W.T.R. 396 (C.A.). The appellant acknowledged that all the offences revealed in his criminal record were alcohol-related, as was the later of the two offences now before this Court. The appellant's alcohol problems are thus revealed to have been of long standing.

65 I agree with the submission of counsel for the appellant that consideration is to be given to the age of the criminal record and the absence of any convictions prior to the present offences since 1986. I also agree that regard must be had for the nature of these offences and that the existence of a criminal record does not automatically result in a more severe sentence. The record must be carefully assessed in conjunction with all the other circumstances of the offender.

3. The total sentence

66 In Ruby, **Sentencing** (3rd edition) at pages 38 to 39, the following appears:

> E. The Totality Principle
>
> The totality principle requires an assessment of the total impact of the sentence being imposed in relation to the seriousness of his conduct and the impact upon the offender. As the English Court of Appeal has said in **Bocskei**:
>
> > When consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.
>
> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects. The first limb of the principle can be seen as an extension of the central idea of proportionality between offence and sentence, while the second represents an extension of the practice of mitigation.

67 As I have already indicated, I remain unpersuaded that the sentences of two months and four months were excessive or unfit, taken individually, for the offences in question, given the circumstances of the appellant as the offender. The question which must therefore be considered is whether those sentences, when made to run consecutively, amount to a total

sentence which is unfit because it is excessive in all the circumstances. That total is six months, of which the appellant has now served approximately a quarter, or six weeks.

68 The normal level for the most serious offence of the kind now before the court is generally in the region of three or four months, subject of course to increases due to aggravating factors and decreases due to mitigating factors. In saying that I want to make it clear that I am referring to choking assaults coupled with other assaultive behaviour calculated to inspire genuine fear in the victim for his or her life and safety.

69 It does not require any sophisticated reasoning to explain why the courts will impose an additional penalty for an additional offence, in such a way as to let the offender, and the world, see that there is no "free ride" for the additional offence. An offender who exercises restraint and decides not to reoffend is thus rewarded, while the offender who offends again will have to pay an additional penalty. Much the same sort of reasoning applies to properly persuade a court to graduate the severity of the penalty so that offenders will not "go the limit" in their offences, believing (as the sheepstealers used to say) that "you might as well be hung for a sheep as for a lamb".

70 On the basis of that reasoning, the sentencing Judge was in my view fully justified in making the sentences consecutive and in graduating the severity of the penalties imposed to reflect the proportional seriousness of each offence. The only question left is whether, in doing that, the resulting term of six months imprisonment was "a crushing sentence" not in keeping with the appellant's record and prospects.

71 I have concluded that while the total sentence was indeed a heavy one, at the upper limit in the given circumstances, it has not been shown to have been so "crushing" as to warrant its reduction now on that ground. In reaching that conclusion, I have reminded myself that this is not the case of a youthful first offender and that the offences in question are of a kind which I will now discuss in connection with the fourth (and final) ground of appeal.

4. Deterrence

72 When it comes to assessing the general prevalence of certain types of offence, judges travelling on circuit and hearing criminal cases, week in week out over the years, throughout the length and breadth of the Northwest Territories, such as the sentencing Territorial Judge in this case (whose experience in that work now extends for over a decade), have a considerable edge over judges in more populous jurisdictions who hold court within relatively restricted geographical boundaries or who share their caseloads with scores of other judges . There are only five resident judges of the Territorial Court for the entire Northwest Territories. In consequence, I have no difficulty in concluding that they are as well informed as anyone today can be as to the prevalence in their court of the type of offence which is here under consideration.

73 The sentencing Territorial Judge took judicial notice, based on his own experience in court, of the prevalence today in the Northwest Territories of crimes of violence against women and, furthermore, that spousal assaults are a major component of the work coming before the Territorial Court.

74 Given these judicially noticed facts, the sentencing Judge concluded that these offences are to be firmly repudiated by the courts and denounced accordingly. I respectfully agree with that conclusion. This, very clearly, is not to approve of scapegoating any individual offender. It is no more than a general sentencing policy, applicable cross the board - subject only to exceptional treatment of very special situations based on truly exceptional facts.

75 By way of example, it may be noticed that in **R. v. William Davies**, unreported, September 6th 1981 (CR 01657), this Court upheld a sentence of four months imprisonment for common assault in which a man had choked a woman, putting her in fear for her life, the offender being intoxicated at the time. That case was also dealt with in summary conviction proceedings under Part XXVII of the **Criminal Code**. As in the present case, the victim in that case was assaulted in her home and had to make good her escape at night in the middle of winter. I cite that case only to illustrate that the present case is quite similar in that respect and has been disposed of in a generally similar manner. There was no mention of any previous criminal record when that case came before this Court on appeal; but I do not see that as a point of much significance in all the circumstances.

76 Counsel for the appellant has referred to **R. v. Sears** (1978), 39 C.C.C. (2d) 199 (Ont. C.A.) for the proposition that prevalence of the type of crime in question is no more than one of the various factors to be taken into account, the paramount question being always what should this offender receive for this offence, in the circumstances? I have no difficulty with that proposition. It leads me to conclude that the case of the appellant is in principle not so very different from that of the offender in **R. v. William Davies** notwithstanding the voluminous

submissions and the tremendous amount of legal research performed on the appellant's behalf by his painstaking junior counsel, Ms. Rutschmann, and the eloquence of senior counsel, Mr. Brydon.

V. Conclusion

77 Although the sentencing Judge had the advantage of having heard Ms. Blondin-Andrew testify, I accept the joint submission of counsel for both the appellant and the Crown that I am in as good a position as was the sentencing Judge to assess the information presented to him by counsel at the sentencing hearing. Having said that, and having carefully and completely reviewed all the material in the record, I find myself to be generally in agreement with the disposition made by way of sentence in this case by the Territorial Judge. In my respectful opinion the individual sentences and the cumulative or total sentence have not been shown to be unfitting in all the circumstances of this case.

78 The fact that no firearms order under s.100 of the **Criminal Code** was imposed in the Court below was not made the subject of any appeal or submission and I have therefore not considered that aspect of the matter.

79 Before concluding, let me say that I am strongly persuaded that this is an appropriate case in which to recommend and that I do recommend early parole for this appellant to the Director of Corrections, to whom I direct that a copy of these reasons shall be sent forthwith by hand, by the Deputy Clerk, so that he may proceed accordingly. I make that recommendation

so as to enable the appellant and his wife to move ahead as expeditiously as possible with their plans for further counselling and treatment, so that they may fully develop their marital relationship as I understand they both wish, without undue delay.

80 The appeal is dismissed.

M.M. de Weerdt
J.S.C.

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Yellowknife, Northwest Territories
March 22nd 1993

Counsel for the Appellant: James D. Brydon, Esq.
Ms. Diana Rutschmann

Counsel for the Respondent: Leslie Rose, Esq.

CV 02181

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

LEON ANDREW

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT
