CR 03238

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH OVILA LUC BIRON

Respondent

Appeal from sentences imposed on four summary conviction matters. Dismissed.

Heard at Yellowknife on January 17, 1997

Memorandum of Judgment Filed: February 4, 1997

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Brad J. Allison

Counsel for the Respondent: James D. Brydon

CR 03238

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH OVILA LUC BIRON

Respondent

MEMORANDUM OF JUDGMENT

1 The Crown appeals from sentences imposed in the Territorial Court on four summary conviction matters as follows:

s.267(b) C.C.	assault causing bodily harm	7 months jail
s.264.1(1)(a) C.C.	utter death threat	4 months jail consecutive
s.145(3) C.C.	breach of undertaking	1 month jail consecutive
s.145(2)	fail to appear in court	1 month jail concurrent
	TOTAL: 12 months jail	

2 The respondent entered a plea of guilty to the s.145(2) charge. On the other three

charges, he was found guilty after trial.

3 The facts consisted of a sorry series of events involving the respondent and his former girlfriend. The substance of the s.267(b) conviction was that he had struck her twice in the face, breaking her nose and causing one eye to become swollen.

4 While awaiting court on that charge, the respondent encountered the same complainant in a bar and, making reference to his expectation that she was going to put him in jail, threatened to kill her and then asked her to dance with him. The trial judge found that these actions were "equally consistent with an attempt to persuade the victim not to testify or to drop the charges or to do something...". Thus, the s.264.1(1)(a) charge.

5 The respondent subsequently breached a non-contact condition in his undertaking by speaking to the complainant, apparently after she initiated contact in a bar. Finally, he failed to attend court on a trial date scheduled for these charges.

6 The trial judge carefully considered the respondent's criminal record (three assaults in 1995, none of which were spousal), his time in remand and the principle of totality, as well as the injuries to the complainant and the circumstances of the offences.

7 The Crown submits that the sentences imposed are generally unfit. The only specific error referred to is in the following statement made by the trial judge:

> The charge of uttering a threat, again given all of the circumstances, given the maximum of six months, in my view, a term of imprisonment of four months consecutive is appropriate.

8 This was clearly incorrect as s.264.1(1)(a) carries a maximum term of eighteen months imprisonment on summary conviction: s.264.1(2)(b) C.C.

9 The test for appellate intervention was recently stated by the Supreme Court of Canada in *R. v M.* (C.A.)(1996), 105 C.C.C.(3d) 327 as follows:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

10 In my view, the only real issue on this appeal is whether the error made by the trial judge, with respect to the maximum sentence for the s.264.1(1)(a) offence, resulted in an inadequate sentence for that offence. The sentences for the remaining three offences have not been shown to be unfit.

11 The sentence for the threatening offence was imposed by an experienced trial judge, who heard evidence on all three of the s.267(b), 264.1(1)(a) and 145(3) charges. That put him in an advantageous position, which should not be overlooked. While it may be that he would have imposed a sentence of more than four months for the s.264.1(1)(a) offence had he adverted to the eighteen month maximum, I am not persuaded that the sentence is unfit or

inadequate either on its own or as part of the global one year sentence imposed for all the offences. It is clear that the trial judge had in mind the principle of totality and the fact that he was dealing with (as to three of the charges) a series of events which took place between two individuals.

12 Finally, it has not been shown to me that any of the sentences imposed are outside the range usually imposed for such offences in this jurisdiction. The appeal is accordingly dismissed.

V. A. Schuler,
J.S.C.

Dated at Yellowknife this
4th day of February 1997

Counsel for the Appellant: Brad J. Allison
Counsel for the Respondent: James D. Brydon