SC CR 97 026

CR 03311

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

EJETSIAK SIMEONIE

Respondent

Memorandum of Judgment

The Crown appeals from a sentence of six months' imprisonment imposed on the Respondent accused in the Territorial Court on a conviction for assault causing bodily harm. The Crown elected to proceed by summary conviction and the accused pleaded guilty to the charge.

The facts as related to the sentencing Judge by the Crown were that the 50 year old accused and the complainant, who is the son of the accused's common-law wife, had been drinking. Once at the accused's home, the accused went to bed with his wife. The complainant and his friend stayed up to watch television and were making alot of noise. The accused, after first yelling at them to be quiet, came out of the bedroom and broke the television set.

The accused continued to yell at the complainant and his friend to be quiet, and then went back to the bedroom. The complainant and his friend continued to talk and the

accused continued to yell at them to be quiet. The accused's wife yelled at them as well and the complainant then went into the bedroom. Upon entering, he was hit once on the head by the accused with an axe or hatchet. There was no evidence as to how the accused came into possession of the axe. There was a struggle and the axe was taken from the accused, who apparently sustained a cut on his leg.

The complainant suffered heavy blood loss and required two stitches to close damage to an artery. He also required four stitches to close a four centimetre wound to his scalp. The bone over the cranium was dented by the axe. There was no evidence of lasting injury.

The facts were admitted by the accused. In his submissions, defence counsel described the people involved in the incident as extremely intoxicated. He referred to information from a witness that the reason the complainant had gone into the bedroom was to tell the accused and his wife to shut up. The defence also submitted before the sentencing Judge that the accused and his wife, who is infirm and confined to a wheelchair, were frightened of the complainant, who was described by the accused in a statement to the police as having been angry since the day before this incident. Defence counsel referred in his submissions to "an apprehension on the part of Simeonie and, indeed, the whole family, that when [the complainant] barges into a room, [the complainant] can be a pretty angry guy, too". Defence counsel also described the complainant's actions as a "small provocation" to the accused.

Crown counsel who appeared at the sentencing, who was not counsel on this

appeal, did not take issue with the submissions made by defence counsel or respond to them in any way.

The test for appellate intervention has been 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.

The Crown argues that the six month sentence imposed does not reflect the seriousness of the offence. It is submitted in particular that this was a breach of trust situation, an aggravating factor. At the sentencing hearing, however, Crown counsel did not make that submission.

There is very little information in the record about the relationship between the accused and the complainant, other than the fact that the complainant is the son of the accused's common-law wife and that the accused provided financial support for him when he was not working.

The information provided to me on the appeal was that the complainant is an adult. There was conflicting information about whether he lives or lived in the home of the accused.

Bearing in mind that the complainant is an adult, the circumstances put before the court are not, in my view, sufficient to characterize this as a true breach of trust situation.

In this case, the facts were admitted by the defence. There was at the sentencing hearing and again on appeal, a dispute as to how those facts ought to be interpreted. The Crown's version is that of a man in a rage, angry because the complainant and a friend were making noise, breaking a television set and then escalating into further anger and

violence with an axe when the complainant entered the bedroom to find out why his mother was yelling. The defence version is that the complainant was noisily interfering with the accused's attempt to sleep, the accused tried to get some quiet by breaking his own television set, and then, fearing the complainant who had barged into the bedroom, hit the complainant once with the axe.

Where a judge is faced with different versions of events or conflicting oral submissions at a sentencing hearing, he or she is not to accept the Crown's version of the unproven facts as related but must either hold a formal sentencing hearing at which the Crown must proved the factors alleged on the standard of proof beyond a reasonable doubt or, so far as is possible, accept the accused's version of the facts as related by counsel: *R. v. Gardiner (1982), 68 C.C.C. (2d) 477 (S.C.C.)*; *R. v. Poorman (1991), 66 C.C.C. (3d) 82 (Sask. C.A.)*.

Since the Crown at the sentencing did not seek to dispute the accused's version of what happened, it was open to the sentencing Judge to accept it. In light of the sentence imposed, I conclude that she did accept it. It is especially difficult to see how, on the accused's version, the incident could be described as a breach of trust.

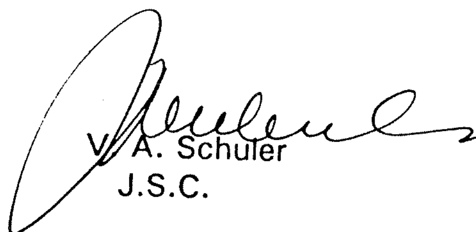
The Crown also argues that the sentencing Judge did not give sufficient emphasis to the accused's record and the principles of deterrence and denunciation. The record consists of eleven convictions, two of which, an indecent assault in 1980 and an assault causing bodily harm in 1989, are related to the charge before the court. The accused was sentenced to twelve months in jail and one year probation for the 1989 conviction.

The sentencing Judge referred specifically to the 1989 conviction and noted that the accused had not been in trouble in the seven years since then, despite having what was described by his counsel as a severe alcohol problem. She took into account that an axe was used. She also recognized the need for a jail sentence as a deterrent to others and because the assault was a serious one. In my view, she considered all the relevant factors.

Sentences for assault causing bodily harm vary greatly and depend very much on the facts of the particular case. In this case, in light of the factors referred to above and bearing in mind that the Crown proceeded by summary conviction, I cannot say that the sentence imposed is unfit, although it is at the low end of the range. I would not interfere with the sentencing Judge's decision.

The appeal is therefore dismissed.

Dated this 17th day of March, 1997.



V. A. Schuler
J.S.C.

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Memorandum of Judgment of the Honourable Justice V. A. Schuler

MAR 1997