SC CR 97 027

CR 03332

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BILLY NUYALIA

Respondent

MEMORANDUM OF JUDGMENT

This is a Crown appeal (heard by teleconference on the agreement of counsel and the Respondent) from sentence on a conviction for common assault, contrary to s. 266 of the *Criminal Code*.

The Crown proceeded by way of summary conviction, which means that the maximum sentence is, as set out in s. 787 of the *Code*, a fine of $2000.00 or imprisonment for six months or both.

The Respondent accused pleaded guilty to the charge before a Justice of the Peace, who suspended the passing of sentence and placed him on probation for two years with various conditions, including that he be under the supervision and guidance of a probation officer, that he perform 50 hours of community service work and participate in anger management counselling.

No transcript could be produced of the proceedings before the Justice of the Peace and accordingly, by consent of counsel, I considered the Statement of Facts set out in the Appellant's Factum, the further facts set out in the Respondent's Factum and the submissions of both counsel.

Because of the lack of a record, the Crown submitted that this matter should be dealt with as a trial *de novo* under s. 822(4) of the *Code*. Having considered that, in my view the section to be applied is 822(6), which requires that I:

> ... consider the fitness of the sentence appealed against and may, on such evidence, if any, as [the court] thinks fit to require or receive, by order,
>
> (a) dismiss the appeal, or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted ...

In my view it follows that the sentence should not be disturbed unless it is unfit.

Obviously, in the absence of a record of her reasons, I do not know what factors the Justice of the Peace considered in coming to the sentence she did. I was told by counsel on this appeal that she heard submissions from a police constable on behalf of the Crown, who sought a sentence of two to four months' imprisonment and from a court worker on behalf of the Respondent, who sought a non-custodial sentence or, if custody was to be imposed, an intermittent or conditional sentence.

The facts that were before the Justice of the Peace can be summarized as follows. The Respondent, age 20, and the complainant, who is two or three years older, had been in a relationship for five years and were living together with their child and the complainant's parents at the time of the assault. Upon returning from a

party, they began to argue. During the argument, the complainant laid down on their bed. The situation deteriorated, she attempted to leave, but the accused would not let her go. He held her and bit her twice on the face, once on the chest and once on her side by the lower rib cage. He also held her throat twice and told her that he would kill her. He then stopped and fell asleep and the complainant called the police.

The Respondent was then arrested and because of his state of intoxication was kept in the police cells overnight.

There is no evidence that the complainant suffered physical injury as a result of the assault.

The Respondent has a youth court record, which was in evidence before the Justice of the Peace. In 1991, the Respondent was found guilty of break, enter and commit theft and received a disposition of 8 months' probation. In 1994 he was found guilty of assault and uttering threats and received a global sentence of 15 months' probation. The latter offences were committed against the same complainant as in the present case. There is no evidence as to the circumstances of the earlier offences.

The Respondent committed the present offence approximately eleven months after completing his probation for the 1994 offences.

I was told by counsel on this appeal that the Respondent and the complainant have terminated their relationship. The Respondent has completed 25 of the 50 hours of community service work ordered by the Justice of the Peace and has participated in an anger management session at his own request; his counsel advised that the social services personnel have been too busy to arrange more. The Respondent is currently attending school and has what is described as a good prospect for summer

employment. These factors, indicating that the Respondent is making efforts to comply with the terms of his probation and to improve his circumstances, are significant in my view, particularly when one is dealing with a still relatively youthful offender.

The Crown argues that the sentence imposed by the Justice of the Peace fails to address the aggravating factors of the offence, the existence of the related criminal record and the principles of general deterrence and denunciation. The Crown relies in particular on the decision in *R. v. Ollenberger (1994), 29 C.R. (4th) 166 (Alta. C.A.)* for the proposition that general deterrence and denunciation are the most important principles in a case of spousal assault.

The fact that this was a spousal assault and therefore a breach of trust is an aggravating feature. In this case, although there is no evidence of any injury, the threats to kill are aggravating.

The related record is of concern. It must, however, be observed that it is a youth court record and that the assault now under consideration is the Respondent's first offence as an adult. The lapse of time (approximately two years) between the 1994 offences and the present offence is also of some significance.

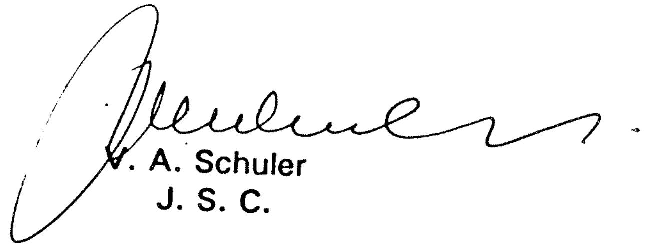
A mitigating factor is the Respondent's guilty plea, entered at an early opportunity.

I do not read *Ollenberger* as meaning that a jail sentence must be imposed in every case of spousal assault, even where there is a related record. Nor do I think that only a jail sentence can serve the principles of general deterrence and denunciation. And as in all cases, the court must consider the particular circumstances before it and decide what the appropriate sentence is for this offender

for this offence.

In all the circumstances, although it may not be the sentence I would have ordered, I cannot say that the sentence imposed by the Justice of the Peace for this assault is unfit. The appeal is therefore dismissed.

Dated this 4th day of April, 1997.



V. A. Schuler
J. S. C.

Counsel for the Appellant: Ulla Arvanetes

Counsel for the Respondent: Neil Sharkey, Q.C.

CR 0333

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- and -

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