

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**ADRIAN MICHAEL DRAKES**

**Appellant**

- v -

**HER MAJESTY THE QUEEN**

**Respondent**

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Transcript of the Reasons for Judgment delivered by The Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 15th day of October, 2018.

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**APPEARANCES:**

Mr. R.H. Clements: Counsel for the Appellant  
Mr. M. Fane: Counsel for the Respondent

(Charges under s. 264.1(1)(a) of the *Criminal Code*)

1 THE COURT: This is the matter of R v  
2 Drakes. It is an appeal brought by Mr. Drakes.

3 On January 16th, 2018, following a trial, a  
4 Deputy Judge of the Territorial Court convicted  
5 Adrian Drakes of uttering a threat, and  
6 subsequently, on January 18th, Mr. Drakes was  
7 sentenced to prison for six months to be followed  
8 by two years' probation. He appeals from both  
9 the conviction and the sentence.

10 The evidence at the trial was largely  
11 uncontested and came from two witnesses: Irene  
12 Osland, whose son, Brent Thomas, was the object  
13 of the threat, and Mr. Drakes. Their evidence  
14 was remarkably consistent and differed only in  
15 that Mr. Drakes denied uttering the words that  
16 formed the threat.

17 Brent Thomas owed Mr. Drakes \$150.00.  
18 Mr. Drakes grew impatient waiting for Mr. Thomas  
19 to repay him. He had seen Mr. Thomas drinking  
20 alcohol and he thought perhaps, Mr. Thomas was  
21 purchasing alcohol for others and himself, yet he  
22 had not repaid Mr. Drakes.

23 Mr. Thomas and Mr. Drakes discussed the debt  
24 and argued about it at Mr. Drakes' home.  
25 Mr. Drakes also sent Mr. Thomas a number of text  
26 messages in which, among other things, he said he  
27 would tell Mr. Thomas' employer information which

1           could lead to Mr. Thomas being fired from his job  
2           unless he repaid the money.

3           Mr. Drakes lived very near to Mr. Thomas in  
4           Hay River, and sometime following the discussions  
5           at his home and the text messages, he saw that  
6           Mr. Thomas was drinking alcohol with friends in  
7           the backyard of Mr. Thomas' residence. He became  
8           angry and he went to Mr. Thomas' residence and  
9           confronted him.

10          Ms. Osland lived in the same residence as  
11          Mr. Thomas, and she was home when the events  
12          transpired. She testified that she was on a  
13          conference call inside the residence when things  
14          started, but she could hear what was going on  
15          outside. She heard yelling from outside, and so  
16          she hung up immediately from her conference call  
17          and she went out to investigate.

18          She observed Mr. Drakes at the bottom of her  
19          back stairs, yelling at Mr. Thomas. Ms. Osland  
20          told Mr. Drakes to leave several times. She  
21          heard him tell Mr. Thomas that he (Mr. Drakes)  
22          would be back in an hour, and if Mr. Thomas did  
23          not have the money, he would "smash his face in."  
24          Mr. Drakes then left.

25          It was put to Ms. Osland on  
26          cross-examination that she may have misheard what  
27          Mr. Drakes said to Mr. Thomas and she responded

1 "no."

2 While under direct examination from the  
3 Crown, Ms. Osland indicated she had a criminal  
4 record for two impaired driving convictions in  
5 the early 1980's. She was not cross-examined on  
6 that.

7 Mr. Drakes confirmed that there had been  
8 text messages exchanged between him and  
9 Mr. Thomas and that he threatened to tell  
10 Mr. Thomas' employer that Mr. Thomas had been  
11 drinking, which could lead to job loss. He also  
12 confirmed that he went to Mr. Thomas' residence.  
13 He admitted that he was upset and that he was  
14 yelling. He said it was possible that he swore.

15 He testified that he was a single father and  
16 needed the money. He also confirmed that he had  
17 told Mr. Thomas that he had an hour.

18 Mr. Drakes denied that he threatened to  
19 "smash [Mr. Thomas'] face in." He said that he  
20 only threatened to interfere with Mr. Thomas'  
21 employment.

22 The Crown put Mr. Drakes' criminal record to  
23 him on cross-examination and a copy of the record  
24 was admitted into evidence. Mr. Drakes did not  
25 dispute the contents.

26 The criminal record dates back to 1987 and  
27 contains over 50 convictions for a variety of

1 offences including property crimes, assaults,  
2 fraud, obstruction and failing to comply with  
3 court orders. The last convictions before  
4 Mr. Drakes' trial on this charge occurred in 2013  
5 for uttering threats and assaulting a police  
6 officer.

7 Mr. Drakes gave evidence and so the trial  
8 judge began his reasons by correctly instructing  
9 himself on the requirements set out in *R v W. (D.)*  
10 [1991] 1 S.C.R. 742, 1991 CanLII 93.

11 In considering Ms. Osland's evidence, the  
12 trial judge found that she was "straightforward,  
13 thoughtful, precise," and he twice stated that  
14 her evidence was not compromised on  
15 cross-examination. He noted that she "readily  
16 admitted" she had a criminal record for impaired  
17 driving and he found it had no bearing on her  
18 credibility.

19 The trial judge also noted that when she was  
20 asked by defence counsel if she heard the  
21 word "Brent," Ms. Osland:

22 ... did not answer immediately. She  
23 thought about it and said she heard him  
24 say "Brent" at least once, and she  
25 reiterated on cross-examination that it was  
not possible she misheard what he said.

26 *Trial Transcript, pp. 41 & 42*

27

1           The trial judge then considered Mr. Drakes'  
2 evidence. The key portions of his analysis are  
3 as follows:  
4

5           The accused says he was angry, upset,  
6 yelling, swearing. He needed the money,  
7 almost desperate for the money, but made no  
8 threats, he says. He had been after Brent  
9 for at least a couple of days through text  
10 messages to pay "or else." It just does  
11 not ring true that, yes, the conversation  
12 did not include what was overheard by the  
13 witness for the Crown, that is, the threat.  
14 He remembers everything pretty well except  
15 saying, "I'll smash your face in."

16 In my view, on the evidence before me, I do  
17 not find the accused's evidence reliable.  
18 Insofar as he denies the keywords "I'll  
19 smash your face in," I do not believe him.  
20 And, in my view, he admits most of the  
21 Crown's case.

22 In addition, I note that he has a long  
23 history of experience with the Courts, over  
24 50 convictions. He knows there are  
25 consequences for criminal activity. I do  
26 not believe him, and I am satisfied the  
27 Crown has proven its case beyond a  
reasonable doubt.

*Trial Transcript, pp. 43-44*

28           Trial counsel for Mr. Drakes indicated  
29 immediately after the trial that he wished to  
30 obtain a presentence report ("PSR"), but he noted  
31 that the judge was a deputy who did not sit  
32 regularly on that particular circuit.

33           The trial judge declined to order the PSR,  
34 stating:

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This is not a major crime. I will give you time to prepare. You can canvass your client about relevant facts. I am certainly willing to hear from you, but I am not going to adjourn this for a presentence report. I do not see anything particularly aggravating or mitigating or aggravating circumstances given the possible consequences. I think it is a resource we do not need to access in this case.

*Trial Transcript, p. 44*

The sentencing hearing followed on January 18th. At that time, Crown counsel sought a custodial sentence of five to seven months to be followed by two years' probation. It appears that the Crown's position was based, among other things, on Mr. Drakes' criminal record, the impact of the events on Ms. Osland and the escalating nature of the events leading up to the threat.

Crown counsel stated in her submissions that she was not aware of any *Gladue* factors, but that Mr. Drakes' counsel would address that point.

Trial counsel for Mr. Drakes sought a one-year conditional sentence order. He acknowledged that Mr. Drakes' criminal record could be problematic. However, he had information from a probation officer in the

1 community that she felt Mr. Drakes could be  
2 effectively managed in the community despite his  
3 criminal history. Trial counsel proposed a  
4 number of conditions which could be placed on  
5 Mr. Drakes and which had been recommended by the  
6 probation officer.

7 Defence counsel provided the trial judge  
8 with background information about Mr. Drakes,  
9 including that Mr. Drakes' father is Métis and  
10 that although his father did not play a  
11 significant role in his life, Mr. Drakes has  
12 connected with members of the Métis community  
13 since moving to the Northwest Territories from  
14 Ontario in 1980. Further, he said that  
15 Mr. Drakes is a single parent and that his  
16 children would be placed in foster care in the  
17 event that he was incarcerated. Finally, he said  
18 that Mr. Drakes and his family would lose their  
19 housing if he was sentenced to a period of more  
20 than three months' incarceration.

21 Trial counsel also stressed the principle of  
22 proportionality, noting that the threat was, in  
23 his view, fairly brief in nature, and that it was  
24 made out of frustration. He pointed out the  
25 collateral consequences of a custodial sentence  
26 of more than three months, namely the likelihood  
27 that Mr. Drakes would lose his housing and that



1 his children would be placed in foster care,  
2 things which he considered to be a highly  
3 disproportionate results.

4 In reply, Crown counsel argued that a  
5 conditional sentence order would not meet the  
6 objective of deterrence, nor would it satisfy the  
7 requirement for community safety given  
8 Mr. Drakes' record.

9 Ultimately, the trial judge sentenced  
10 Mr. Drakes to six months in custody to be  
11 followed by two years of probation. He listed  
12 the factors that led him to this decision.

13 First, he cited Mr. Drakes' criminal record.  
14 In this context, he considered the collateral  
15 consequences for Mr. Drakes, that is, the loss of  
16 housing and the impact on his children.  
17 Nevertheless, the trial judge determined  
18 Mr. Drakes' extensive record was evidence that  
19 Mr. Drakes knew the consequences of engaging in  
20 criminal activity.

21 The trial judge also considered the impact  
22 of Mr. Drakes' criminal record on the seriousness  
23 of the threat. Specifically, he determined that  
24 the criminal record made the threat more  
25 realistic, stating:

26  
27 If a 10 year old comes up and says, "I am  
going to punch you in the face," you can

1 laugh it off. If some man with convictions  
2 for violence, convictions relating to  
3 alcohol or drug consumption makes the same  
4 threat, it is a different proposition.  
5 There is a new taste or a new flavour to  
6 the threat.

7 *Sentence Transcript, p. 27*

8 The escalating quality of the events  
9 ultimately leading to the threat were considered  
10 aggravating by the trial judge and he noted  
11 Mr. Drakes' statement that he (Mr. Drakes) would  
12 return to Mr. Thomas' residence in an hour. He  
13 felt that this compounded the seriousness of the  
14 threat.

15 Finally, the trial judge found that there  
16 was no remorse on Mr. Drakes' part. Although not  
17 stated, this appears to have been based on the  
18 fact that Mr. Drakes did not plead guilty to the  
19 offence. Specifically, the trial judge said  
20 this:

21 There is no remorse. An accused is  
22 entitled to have the case proven against  
23 him, but I have always found, I think it  
24 is common in the courts, that when an  
25 accused person before the Court says, "I  
26 did it, I am sorry and I will not do it  
27 again," it can be taken into account and is  
28 a significant mitigating factor.

29 *Sentence Transcript, p. 28*

1           The essence of the trial judge's reasons for  
2 sentence is found at pages 29 and 30 of the  
3 Sentence Transcript:  
4

5           The point or goal of sentencing is set out  
6 in the *Criminal Code* to, in effect,  
7 engender a respect for the law and  
8 encourage non-criminal behaviour. In that  
9 regard, the past sentences with respect to  
10 an accused have been a total failure. He  
11 has been in and out of court since 1987,  
12 having been convicted of offences almost  
13 every single year: jail sentences, short  
14 ones, long ones, probation, assault, a  
15 break and enter. It goes on and on.

16           In light of the nonstop criminal conduct, I  
17 do not see how a conditional sentence,  
18 intermittent sentence can respond  
19 effectively to the accused and his conduct.  
20 I do not know when he is going to realize  
21 that he has to control himself, if ever.  
22 If there were a *hiatus* in criminal conduct  
23 of the accused, that might be a mooring  
24 buoy to attach a line to, but he has been  
25 convicted most recently, I think, in 2016  
26 for failure to comply with an undertaking,  
27 impaired operation of a motor vehicle.

          I said at the outset, the consequences for  
the accused, the indirect consequences, are  
going to be significant. I do not know  
that the Court can protect him from that at  
this stage.

          I have taken into account the submissions  
of both the prosecutor and the defence. It  
is a difficult matter in terms of  
balancing, doing the best I can.

          Mr. Drakes was not provided with an  
opportunity to speak on his own behalf before the  
trial judge rendered these reasons. Upon being  
invited to do so (immediately following the

1 reasons provided by the trial judge) Mr. Drakes  
2 spoke of the potential collateral consequences of  
3 a custodial sentence for both him and his family.  
4 He also expressed remorse, stating:

5  
6 I am very remorseful to the complainant and  
7 the victim and to the ladies and gentlemen  
8 of the court because I see that nobody  
would be here today if it wasn't just for  
me, and that's pretty sad.

9 I'm trying to be -- to better myself, and  
10 I'm asking for an opportunity to prove to  
the Court that my path can be a productive  
11 one.

12 *Sentencing Transcript, p. 31*

13  
14 Mr. Drakes has served 62 days of his  
15 six-month custodial sentence. He was released  
16 pending this appeal on March 20th, 2018.

17 I will deal first with the conviction  
18 appeal. The grounds advanced for the appeal from  
19 conviction are as follows:

20 (a) the trial judge provided insufficient  
21 reasons;

22 (b) an uneven level of scrutiny was applied  
23 to the evidence of Ms. Osland and  
24 Mr. Drakes;

25 (c) Mr. Drakes' criminal record was used  
26 improperly; and

27 (d) the trial judge did not apply properly



1           The appeal will be allowed only if, "... the  
2 trial judge's reasons are so deficient that they  
3 foreclose meaningful appellate review." *R v*  
4 *Dinardo* 2008 SCC 24, at para 25.

5           In my view, the trial judge provided  
6 sufficient reasons for his decision to find  
7 Mr. Drakes guilty. What he relied on in coming  
8 to his conclusion is clearly laid out. He  
9 assessed the evidence of both witnesses. He  
10 stated that he rejected Mr. Drakes' evidence,  
11 that he did not make the threat because, in the  
12 words of the judge, "it did not ring true" in the  
13 context of all of the other evidence,  
14 particularly, the escalation of the events that  
15 day.

16           Further, the trial judge concluded  
17 Mr. Drakes' evidence was unreliable because of  
18 his extensive criminal record. The trial judge  
19 determined Ms. Osland was credible and he  
20 believed her. He was satisfied that the Crown  
21 had proved the charge beyond a reasonable doubt.  
22 So, the way the trial judge reached his  
23 conclusion is clearly set out. There is a road  
24 map.

25           Turning to the ground that the trial judge  
26 applied an uneven level of scrutiny, Mr. Drakes  
27 submits that his evidence was subject to greater

1 scrutiny by the trial judge than that of  
2 Ms. Osland. He cites four examples.

3 First, he says the trial judge considered  
4 the fact that Ms. Osland readily admitted she had  
5 a criminal record for impaired driving as  
6 something that augmented her credibility, but he  
7 did not accord the same benefit to Mr. Drakes.

8 Second, Mr. Drakes argues that the trial  
9 judge found him less credible because he  
10 hesitated on some answers during  
11 cross-examination. At the same time, the trial  
12 judge treated Ms. Osland's pause before  
13 responding to whether she heard the word "Brent"  
14 as an indication that she was a thoughtful  
15 witness.

16 Third, Mr. Drakes says the trial judge  
17 stated Ms. Osland's evidence was not compromised  
18 during cross-examination, but he did not  
19 acknowledge that Mr. Drakes' evidence also  
20 withstood cross-examination.

21 Finally, Mr. Drakes argues that the trial  
22 judge left problems with Ms. Osland's evidence  
23 unresolved. Specifically, he suggested that  
24 Ms. Osland's evidence that neither Mr. Thomas,  
25 nor his friends, said anything to Mr. Drakes  
26 during the confrontation does not accord with  
27 common sense and human experience. Further,

1 Ms. Osland's response of "I don't think so" to a  
2 question about whether she heard other things  
3 said was, in the opinion of Mr. Drakes, an  
4 equivocal response on a key issue.

5 As Mr. Drakes' appellate counsel pointed  
6 out, it is very difficult to succeed on this  
7 ground of appeal. It is well known that a trial  
8 judge's findings on credibility are entitled to  
9 significant deference and can only be disturbed  
10 where there is an "overriding and palpable  
11 error."

12 What is required was set out succinctly by  
13 the Ontario Court of Appeal in *R v Rhayel*, 2015  
14 ONCA 377, at para 98:

15  
16 For the appellant to succeed on this ground  
17 of appeal, he must be able to identify  
18 something clear in the trial judge's  
19 reasons or in the record indicating that a  
20 different standard of scrutiny was applied  
21 – something sufficiently significant that  
22 the heavy door of deference is opened to  
23 the domain of the trial judge, where  
24 credibility is assessed.

25 In my view, this ground of appeal cannot  
26 succeed.

27 It is not surprising, in this case, that the  
trial judge spent less time discussing  
Ms. Osland's criminal record than that of  
Mr. Drakes' when he was assessing credibility.



1 Ms. Osland's criminal record is short and it is  
2 dated, the last of the two convictions having  
3 been sustained sometime in the early 1980s.  
4 There was little for the judge to say other than  
5 what he did say. Mr. Drakes' record, on the  
6 other hand, contains over 50 convictions,  
7 including false pretenses, crimes of violence and  
8 fraud. The sheer number of convictions contained  
9 in his record would require the judge to spend  
10 more time assessing it, as well as to spend more  
11 time considering its effect on credibility.

12 The trial judge's comment that Ms. Osland  
13 readily admitted her criminal record cannot,  
14 without more, be taken as an indication that the  
15 trial judge allowed this admission to enhance  
16 Ms. Osland's credibility but not Mr. Drakes'.  
17 There is nothing to indicate that the trial judge  
18 concluded that Mr. Drakes tried to hide his past  
19 criminal activity, or that he drew an adverse  
20 inference from that. That he did not make the  
21 same comments about Mr. Drakes is of no  
22 consequence.

23 The trial judge's treatment of Ms. Osland's  
24 pause in relation to one question and Mr. Drakes'  
25 hesitation throughout cross-examination is not  
26 evidence of uneven scrutiny, nor is the fact that  
27 the trial judge expressly stated that

1 Ms. Osland's testimony was not compromised in  
2 cross-examination while not expressing the same  
3 opinion respecting Mr. Drakes'.

4 Given the trial judge's comments about  
5 Mr. Drakes' testimony, including the comment  
6 about hesitation in answering questions, the  
7 inference to be drawn was that the trial judge  
8 found Mr. Drakes' testimony was compromised under  
9 cross-examination.

10 Ideally, the trial judge would have provided  
11 some specific examples of where Mr. Drakes  
12 hesitated in responding to questions. That he  
13 did not do so, however, is not enough to lead me  
14 to conclude that he scrutinized Mr. Drakes'  
15 evidence more intently. The trial judge had the  
16 benefit of observing Mr. Drakes, of hearing what  
17 he said and, more importantly, *how* he said it in  
18 response to questions.

19 Finally, I do not agree that the trial judge  
20 was required to resolve anything respecting  
21 Ms. Osland's evidence that she did not think any  
22 of Mr. Thomas or his companions had said anything  
23 to Mr. Drakes during the confrontation. There is  
24 no suggestion that this was inconsistent with  
25 past statements or with evidence that Ms. Osland  
26 gave during examination in-chief.

27 I turn now to the improper use of

1 Mr. Drakes' criminal record.

2 Mr. Drakes argues that the trial judge used  
3 his criminal record as evidence that he was  
4 motivated to lie in order to secure an acquittal.  
5 He argues that there is "an absence of fairly  
6 applied case specific reasons for disbelieving  
7 Mr. Drakes."

8 Mr. Drakes also submits that the criminal  
9 record was used as evidence of propensity, thus  
10 leading the trial judge to reject his evidence.  
11 Again, with respect, I disagree.

12 Section 12 of the *Canada Evidence Act*  
13 permits any witness, including an accused person,  
14 to be questioned about previous convictions and  
15 that evidence may be used in assessing  
16 credibility.

17 The purpose of s. 12 was summarized by then  
18 Chief Justice Dickson in *R v Corbett*, [1988] 1  
19 SCR 670, at para 22, 1988 CanLII 80:

20  
21 What lies behind s. 12 is a legislative  
22 judgment that prior convictions do bear  
23 upon the credibility of a witness. In  
24 deciding whether or not to believe someone  
25 who takes the stand, the jury will quite  
26 naturally take a variety of factors into  
27 account. They will observe the demeanour  
of the witness as he or she testifies, the  
witness' appearance, tone of voice, and  
general manner. Similarly, the jury will  
take into account any information it has  
relating to the witness' habits or mode of  
life. There can surely be little argument  
that a prior criminal record is a fact

1           which, to some extent at least, bears upon  
2           the credibility of a witness.

3           There is no doubt that Mr. Drakes' criminal  
4           record played a prominent role in the trial  
5           judge's assessment of his credibility. However,  
6           it was an entirely legitimate consideration.  
7           Moreover, it was not the only factor that the  
8           judge relied upon in concluding that he did not  
9           believe Mr. Drakes. Other factors were the  
10          escalation of the events that day, Mr. Drakes'  
11          threat that he would tell Mr. Thomas' employer  
12          information that could lead to Mr. Thomas being  
13          dismissed and Mr. Drakes' own admission that he  
14          was angry and frustrated at not being paid.

15          The trial judge found that in all of those  
16          circumstances, including the criminal history,  
17          Mr. Drakes' denial of the utterance forming the  
18          threat was not realistic. The criminal record  
19          and its impact on Mr. Drakes' credibility was  
20          just one factor.

21          Finally, I turn to the argument that the  
22          trial judge misapplied *W.(D.)* by failing to take  
23          into account the absence of evidence.

24          The argument here is that in finding that  
25          the Crown had proved its case beyond a reasonable  
26          doubt, the trial judge did not refer to the fact  
27          that the actual victim of the threat, that is,

1 Mr. Thomas, did not testify.

2 What witnesses the Crown chooses to call in  
3 a particular case is, generally, within its own  
4 discretion. The question before the trial judge  
5 was whether, based on the evidence, the Crown had  
6 proved its case beyond a reasonable doubt.

7 While the Crown did not call the victim  
8 to testify, it did call a witness who could offer  
9 direct evidence on all of the relevant events,  
10 including the threat itself. The trial judge  
11 found Ms. Osland credible and he accepted her  
12 evidence as proof of the charge beyond a  
13 reasonable doubt.

14 There was no requirement for him to question  
15 why the Crown did not call Mr. Thomas to give  
16 evidence, nor was he required to draw an adverse  
17 inference from this.

18 Accordingly, as I said, the conviction  
19 appeal is dismissed.

20 I now turn to the sentence appeal. Several  
21 grounds have been advanced for this. These  
22 include that the trial judge failed to consider  
23 and apply s. 718.2(e) of the *Criminal Code* and  
24 Mr. Drakes' *Gladue* factors and that the sentence  
25 ultimately imposed was disproportionate given all  
26 of the circumstances.

27 Sentence appeals also attract a deferential

1 standard of review. Save and except in error of  
2 law or an error in principle that has an impact  
3 on the sentence, appellate courts should not vary  
4 a sentence unless it is demonstrably unfit. This  
5 was articulated in *R v Lacasse*, 2015 SCC 64, at  
6 para 11.

7 I am granting the appeal from sentence and  
8 the reasons are as follows:

9 Information about Mr. Drakes' background,  
10 including his Indigenous status, was put before  
11 the trial judge through defence counsel. Despite  
12 this, however, the judge did not consider it in  
13 determining the sentence.

14 As stated by the Supreme Court of Canada in  
15 *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, this  
16 is an error which results in a sentence  
17 inconsistent with the principle of  
18 proportionality and which attracts appellate  
19 intervention.

20 At paragraph 87 of *Ipeelee*, the Court said  
21 the following:

22  
23 The sentencing judge has a statutory duty  
24 imposed by s. 718.2(e) of the *Criminal*  
25 *Code*, to consider the unique circumstances  
26 of Aboriginal offenders. Failure to apply  
27 *Gladue* in any case involving an Aboriginal  
offender runs afoul of this statutory  
obligation. As these reasons have  
explained, such a failure would also result  
in a sentence that was not fit and was not  
consistent with the fundamental principle

1 of proportionality. Therefore, application  
2 of the *Gladue* principles is required in  
3 every case involving an Aboriginal  
4 offender, including a breach of a LTSO, and  
5 a failure to do so constitutes an error  
6 justifying appellate intervention.

7 The sentence imposed on Mr. Drakes was  
8 disproportionate for other reasons as well. The  
9 threat against Mr. Thomas was serious insofar as  
10 it was a threat of serious harm made in the  
11 victim's home while Mr. Drakes was in a state of  
12 anger. However, the seriousness was, in part,  
13 informed by an erroneous assumption.  
14 Specifically, the trial judge cited Mr. Drakes'  
15 criminal record as something which could create  
16 the perception that the threat was more serious  
17 than it may otherwise have been. This presumes,  
18 of course, that Mr. Thomas and Ms. Osland had  
19 detailed knowledge of Mr. Drakes' criminal  
20 history. There is no evidence to support this  
21 and it was an error to rely on it as something  
22 which elevated the severity of the threat.

23 Further, the trial judge, in my view,  
24 erroneously concluded that Mr. Drakes showed no  
25 remorse, when clearly he did. The transcript  
26 reveals two reasons for this error on the judge's  
27 part.

28 First, the trial judge conflated the absence  
29 of a guilty plea with an expression of remorse.

1 While a guilty plea can certainly signify  
2 remorse, an offender who is found guilty after a  
3 trial can certainly take responsibility and  
4 express general remorse following the trial. It  
5 may not be as mitigating as a guilty plea, but it  
6 is a relevant factor and has to be considered.

7 Secondly, the trial judge did not invite  
8 Mr. Drakes to speak to sentence on his own behalf  
9 pursuant to s. 726 of the *Criminal Code* before  
10 developing and delivering his reasons. The judge  
11 gave his reasons, then he invited Mr. Drakes to  
12 speak, and then he immediately imposed the  
13 sentence.

14 Had Mr. Drakes been able to make his  
15 submissions immediately following those of the  
16 Crown and defence and before the trial judge  
17 formulated his reasons, the trial judge would  
18 have had the benefit of Mr. Drakes' apology and,  
19 in all likelihood, would not have assumed that  
20 remorse was absent. This, in turn, may well have  
21 affected the length of the sentence.

22 All of this brings me to the question of  
23 what would be an appropriate sentence for  
24 Mr. Drakes, taking into account the relevant  
25 factors. Those factors are the circumstances of  
26 the offence, Mr. Drakes' criminal record, his  
27 personal circumstances, including his Indigenous



1 status, and the remorse he expressed. Also  
2 relevant is the evidence which was provided  
3 through trial counsel that Corrections officials  
4 felt Mr. Drakes could be managed in the community  
5 under certain conditions.

6 Mr. Drakes' lawyer during the appeal urged  
7 this Court to substitute a sentence of  
8 approximately two months, which is what  
9 Mr. Drakes served, and which he submits would  
10 amount to a 90-day sentence.

11 The threat was objectively serious.  
12 Mr. Drakes told the victim he would "smash" his  
13 face if the money was not repaid when Mr. Drakes  
14 planned to return an hour later. It followed  
15 escalating discussions and communications and  
16 Mr. Drakes was in a state of anger when he said  
17 these words. All of this would, no doubt, cause  
18 great alarm in a reasonable person. It was  
19 alarming enough to Ms. Osland that she called the  
20 police. In my view, the threat attracted a  
21 custodial sentence.

22 There is also no getting around Mr. Drakes'  
23 criminal record. It is extensive, it is  
24 continuous and it contains several entries for  
25 violent offences and crimes against the  
26 administration of justice. It is aggravating.

27 Mr. Drakes is Indigenous, being of Métis

1 descent. Trial counsel drew no causal link  
2 between this and his criminal history, but that  
3 is not required: *Ipeelee*, at para 87. The role  
4 that colonization has played in creating systemic  
5 issues such as widespread poverty, addiction,  
6 homelessness and family dysfunction among the  
7 Indigenous population in Canada is well known.  
8 It informs proportionality and the degree of  
9 blameworthiness of the offender.

10 Section 718.2(e) is aimed at addressing the  
11 overrepresentation of Indigenous people in the  
12 Canadian prison population and requires that the  
13 sentencing judge consider all of the alternatives  
14 besides incarceration which are appropriate in  
15 the circumstances. Mr. Drakes, despite his  
16 criminal record, has the right to the benefit of  
17 this consideration and the right to the benefit  
18 of the recognition of those systemic factors  
19 which are unique to Indigenous Canadians.

20 It is true that, in some cases, systemic  
21 factors will be insufficient to overcome the need  
22 for a significant custodial sentence. A  
23 relatively recent example is the case of *R v*  
24 *Bonnetrouge*, 2017 NWTCA 1. That is not the case  
25 here, however. Despite the nature of the threat  
26 and Mr. Drakes' criminal record, there are  
27 factors which support the appropriateness of a

1 less onerous sentence.

2 First, Mr. Drakes expressed remorse when he  
3 spoke on his own behalf at trial. He also spoke  
4 of changes and improvements he has been making in  
5 his life so that it will be more productive.  
6 That does not, of course, absolve him of  
7 responsibility, but it nevertheless, demonstrates  
8 recognition by him of the harm he caused by the  
9 threat and it demonstrates a commitment to  
10 getting onto a better path in his life.

11 Second, as I noted earlier, Corrections  
12 officials feel Mr. Drakes can be managed in the  
13 community despite his criminal history.

14 Deterrence and denunciation are key  
15 sentencing objectives in this case, but that does  
16 not mean that other objectives, specifically,  
17 rehabilitation, do not come into play.  
18 Mr. Drakes came before the court because he  
19 committed a crime, adding to an already  
20 remarkable record. That said, he also before the  
21 court as an Indigenous person, expressing remorse  
22 and expressing a willingness to change his life.

23 In my view, the circumstances call for a  
24 sentence which combines custody with probation,  
25 albeit for a less time in each case.

26 The time that Mr. Drakes has served to this  
27 point is, in my view, sufficient to satisfy the

1           custodial portion of the sentence. That he  
2           served time in prison sends a message of  
3           denunciation and given the potential collateral  
4           consequences of future periods of incarceration,  
5           which Mr. Drakes appears to very-well recognize,  
6           it will serve as a deterrent for Mr. Drakes and  
7           others from engaging in this behaviour in the  
8           future.

9           Given Mr. Drakes' stated desire to change  
10          the direction of his life, I am optimistic that  
11          the structure and support that comes with  
12          probation will assist him in rehabilitation, and  
13          the supervisory aspect of probation will ensure  
14          that the community remains safe.

15          The term of the probation order will be  
16          reduced to one year. All of the other conditions  
17          will remain, and the ancillary orders will remain  
18          in place.

19          Mr. Drakes is to report to probation  
20          services in Hay River within the next 48 hours. 21

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22           **PROCEEDINGS CONCLUDED**

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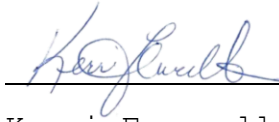
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**CERTIFICATE OF TRANSCRIPT**

I, the undersigned, hereby certify that the foregoing transcribed pages are a complete and accurate transcript of the digitally recorded proceedings taken herein to the best of my skill and ability.

Dated at the City of Sault Ste. Marie, Province of Ontario, this 21st day of October, 2018.

Certified Pursuant to Rule 723  
of the Rules of Court



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Kerri Francella  
Court Transcriber