ORAL REASONS FOR JUDGMENT:

Before:
The Honourable Mr. Justice Goldie
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Williams

May 30, 1996 Vancouver, B.C.

BETWEEN: REGINA RESPONDENT AND: KENNETH ROBERT APPELLANT

E. Bennett, Q.C. appearing for the Appellant
A. Budlovsky appearing for the (Crown) Respondent

1 GOLDIE, J.A.: The applicant seeks leave to appeal a sentence of nine years imprisonment imposed on him on 1 December 1995 following his plea of guilty to two counts arising out of twoincidents in Kelowna occurring close to one another on the night of 16 November 1995.

2 On the first count he was charged under s.348(1)(b) of the *Criminal Code of Canada* with breaking and entering what was a dwelling house and committing an indictable offence therein, namely, aggravated assault. On the third count he was charged with intent to break and enter a second dwelling house and with intent to commit an indictable offence therein. The issue before us is with respect to the sentence imposed for the count of breaking and entering and committing the indictable offence of aggravated assault.

3 The applicant and two companions, both young persons, were apprehended shortly after the attempt to break and enter the second dwelling house.

4 The relevant circumstances were described by Crown counsel:

> The accused, on November the 16th of this year, in the evening, was with two young persons, one MacKay and one Campbell. They were at the accused's residence and consumed between them a twenty-six ounce bottle of liquor. They left their residence in the wee hours. The two youths had with them backpacks. The packs were empty, and subsequently expressed that the purpose was to have empty packs so that they could put stuff in them; their purpose in them going out at this point in the evening was to find homes that looked like they would -- like they had nobody home, and break into those homes to look for cash and property.
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> They went past the residence of Eleanor Morrison located at 472 Glenwood Avenue in Kelowna. They rang the front doorbell, and got no answer. They knocked; got no answer. Mr. Robert, the accused, took from one of the youths a large screwdriver, and using the screwdriver he smashed a hole through the glass in one of the entrance doors, opened it, and the three people then entered the residence. They were inside the residence, using flashlights to assist them in being able to see. The residence was otherwise dark.
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> Mrs. Morrison had been asleep. She heard somebody in her home. She got up, and she yelled at the intruders to get out. One of the two youths gave the alarm to the others, and he, along with the other young person, fled; that is to say they left the interior of the residence.
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> Very shortly after they departed they could hear Mrs. Morrison yelling the words, "Get out." And they could hear her yelling, and they could hear blows being struck on someone, or what sounded like blows being truck, on the inside of the home. Her screams changed to cries for help.
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> * * *
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> The accused then joined his companions after a relatively short period of time where he was inside the home with Mrs. Morrison, and the accused and his two cohorts then continued on their way. They subsequently went to a residence approximately six blocks away, at 2411 Ethel Street. Again, there were no lights on, and no car in -- or apparently in the driveway. They went to the rear of the house. Mr. Robert cut the telephone and

> cablevision lines at the home. One of the young offenders then removed a window screen and pushed open a window. The three then sat outside listening to see whether or not their activities had caused -- or aroused any alarm. A dog started to bark from inside. They heard a radio -- or a radio inside was turned up, and the three then departed.

The applicant admitted he assaulted the occupant of the first house, a lady of some 90 years, when she raised an alarm. Her injuries were described in these terms:

> The diagnosis was that she received a two and a half inch long cut on the crown of her head, a three inch cut on the top of her head, which both cuts required stitches to close. She received a large bruise on both the front and back of her shoulders, bruises on her elbows and hands, she required a stitch to close a two inch cut on one of her fingers. She also sustained a gash on one of her thumbs, a two inch long gash on the back of one of her hands. All of the injuries are consistent with somebody that was in a defensive position throughout the attack that I've described, trying to fend off or -- fend off blows or protect themselves in their facial and head area.
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> She was hospitalized for several days.

5 With respect to the appellant's history I will paraphrase the information given the Provincial Court judge by Mr. Henry, counsel for the appellant. He was 33 years of age, born in Edmonton. He was one of a member of a family of six boys and one half sister. He is a status native person although of mixed parentage. He dropped out of school in grade seven and despite some effort he has not really proceeded beyond that level.

6 When he was 18 in 1980 his family moved to Fort McPherson and he started to work there for an oil company. He has had a drinking problem since about 1981 or 82, that is to say from about the age of 20 onwards. It would seem that he had very little steady employment from the age of 20. He has been what might be described as a drifter. He describes himself as a binge drinker, that he drinks heavily and that he can stop for about a month and then he gets drinking again and when he starts drinking he cannot stop.

7 His words to counsel about his drinking and his personality are, when speaking of criminal acts, that "the only time I get enough nerve is when I am drinking". He says "I'm a different sort of person when I'm sober. When I drink I'm a different personality."

8 He came to Kelowna in 1994. He went to Toronto, he returned to Kelowna and he has an apartment there where he held open house for some young people. He was on Income Assistance at the time in question. While in Kelowna he has assisted in the Native Friendship Centre, something that I will refer to later.

9 His record, to which Mr. Henry, counsel for the applicant, referred to as alcohol related, discloses four convictions of which two were for breaking and entering and theft; one, in 1983 for which he was sentenced to seven days, and the second in 1991 when he was sentenced to six months.

10 There is in this record of a 33-year-old man no indication of violence or propensity to violence. Nor, in my view, is there any indication that there is a likelihood of repetition of such an offence as we have before us. Rehabilitation therefore is a matter of primary importance.

11 The sentencing proceedings were interrupted when two witnesses, one from the Native Friendship Centre in Kelowna, and the other, the Native court worker, indicated concerns over the guilty pleas.

12 Both witnesses knew the applicant from his volunteer work at the Centre and felt the incidents were wholly out of character. The Provincial Court Judge was alive to the particular considerations involved where Native peoples come into conflict with the law. As I have said, the applicant, while of mixed parentage, has pursued the ideals of aboriginal peoples and one of these is respect for elders. That particular characteristic was noted by the worker at the Native Friendship Centre.

13 Mr. Robert made a short statement to the Court in which he expressed remorse, his sense of the shame his acts have brought to his family and of his personal feeling of shame. This statement is consistent with what I have said about the out of character aspect of this assault.

14 The sentencing judge was told by Crown Counsel, who sought a sentence in the six to ten year range, that the incidence of breaking and entering dwelling houses in the Kelowna area had increased by 50% from the previous year and that an unsolved crime of a similar character had

apparently resulted in the death of the occupant of the house in question. Crown Counsel, who was not counsel before us, discounted the degree of the applicant's intoxication.

15 The sentencing judge's reasons run to nine pages in the transcript. He referred to and adopted the observations of Mr. Justice Oliver in *R. v. Henry*, (unreported, B.C.S.C. Vancouver Registry 16 December 1992).

16 His emphasis was upon protection of the public and general deterrence. He accepted the characterization of the applicant as a binge drinker.

17 He referred to another case which was not reported but was familiar to both Court and counsel, *R. v. Davies*. We do not have the report, but it appears the sentence of seven years reflected the assault of a 19-year-old on his elderly grandmother after he had broken into her residence for the purpose of stealing.

18 As well he was referred to the cases of *R. v. Nicholson*, *R. v. Mitchell*, *R. v. Teed* and *R. v. Peters*, the last a judgment of this Court pronounced in 1993. I think R. v. Peters, supra, can be set to one side although it appears to be the origin of the high end of the scale of ten years adopted by the sentencing judge. In Peters the breaking and entering was the means to the end of premeditated revenge and the intention of imposing physical and sexual humiliation on an elderly woman who had befriended the convicted person. To my mind, it has no application to the case at bar.

19 An important recent judgment of this Court is found in *R. v. Desjarlais* (unreported, Vancouver Registry, CA020623, 30 April 1996 B.C.C.A.), decided after the applicant was sentenced. Desjarlais involved an aggravated assault in which the sentence of nine years was reduced to seven years by this Court. The details of the offence were, in my view, more serious than those here. I note from what the Chief Justice on behalf of the Court said in paragraph 7 of his reasons for judgment:

> It seems to be clear that the appellant is not a person with a propensity to violence and what happened on this occasion was quite out of character for him. There is in my view no reason to believe that this was typical conduct for him or that he was likely to offend again with violence particularly the kind of violence which was exhibited on this one instance.

I also note what he said in paragraph 12:

> Considering what will best serve the needs of society by protecting society against further injury from this person and also attempting as best we can to assist in the process of rehabilitation and giving him time to be rehabilitated it is my view that nine years was more than is necessary to serve the sentencing principles that apply in these cases and that a sentence of seven years would be sufficient for that purpose.

20 I set to one side the so-called "home invasion" cases to which the sentencing judge alluded in his reasons:

> "...breakings and enterings generally and breaking and enterings which take on the element of a home invasion."
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> This is a very different kind of offence which was dealt with in *R. v. Parinas* (1993), 37 B.C.A.C. 41 (B.C.C.A.). In that case, on a Crown appeal, the sentence was effectively increased to the equivalent of six years and I view that as the low end of the range for that particular offence. If this type of crime affected the sentencing judge's consideration of the case before him I think with respect, that was an error on his part.

21 I also wish to make reference to the observation made by the Chief Justice in *R. v. Desjarlais* in paragraph 10 of his judgment:

> Thus, the trial judge reduced the bench mark from 12 years to nine years and imposed that sentence. In my view, while I cannot say that it was a legal error to approach the case that way, I do say that it is somewhat unusual but the test at the end of the day is whether or not the sentence is fit and whether it fits within the range of sentences for this kind of an offence.

22 Ms. Bennett, who was not counsel at trial, concedes the sentence imposed by the trial judge should not, on the authority of *R. v. C.A.M.* (unreported, 21 March, 1996 S.C.C.) be interfered with

unless it is plainly unreasonable. I refer in this regard to paragraph 89 in the judgment of *R. v. C.A.M*., supra which I need not quote at this point.

23 In my view, that case recognizes the role of the Provincial appellate courts in maintaining some degree of uniformity in the sentences imposed for crimes of the same general character. This view is set out in paragraph 92 of *R. v. C.A.M.* Giving due weight to this and to the first provision in *C.A.M.* I referred to, I am of the view that a sentence which falls outside the generally recognized range as determined by decisions of this Court is plainly unreasonable and I am reinforced in that view by what I last quoted from *R. v. Desjarlais*.

24 In the case at bar I think the upper limit of the range is seven years. I need not refer the lower range. Here, a 33 year old man with no prior record of violence, a drifter, who says he was largely incapacitated by alcohol, treated the occupant of the house, unexpected as her appearance may have been, brutally. The trial judge, starting with the assumption that the top of the range was ten years, sentenced him to nine years.

25 Giving all due deference to the views of the trial judge to local considerations and the serious nature of the offence, I would grant leave to appeal, allow the appeal, and reduce the sentence to six years.

26 NEWBURY, J.A.: I agree.

27 WILLIAMS, J.A.: I agree that nine years is excessive and I also agree that six years is a fit sentence but I would add that in my view the emphasis of this case should have been on rehabilitation of this young man and that if I had been the judge in first instance I would have imposed a five year sentence.

28 GOLDIE, J.A.: Leave to appeal is granted. The appeal is allowed to the extent of reducing the custodial sentence to six years.

"The Honourable Mr. Justice Goldie"

"The Honourable Mr. Justice Williams"