SC CR 95 036

CR 02904

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs -

ESAU TATATOAPIK

Transcript of the Reasons for Sentence delivered by the Honourable Mr. Justice J. E. Richard, sitting at Yellowknife in the Northwest Territories, on November 15, A.D. 1995.

APPEARANCES:

MR. J. A. MACDONALD — On behalf of the Crown

MR. D. BRICE-BENNETT — On behalf of the Defence

THE COURT: It is with some sadness that I preside here today with the serious responsibility of imposing a sentence on Esau Tatatoapik for a crime that he committed. This is a 38 year old Inuk who spent his early years living with his family in outpost camps and in the small Inuit community of Arctic Bay, and he eventually obtained the necessary education and experience to enable him to become a career member of the Royal Canadian Mounted Police. He has, by his crime, lost his status as an RCMP officer after having served as a member of that police force for ten years.

His crime was committed in Nanasivik just before Christmas last year, and his crime was sexual assault committed by him after a social gathering in his home during which he had consumed alcohol, and his victim was an aquaintance who was heavily intoxicated at the time.

It was her evidence, accepted by the jury, that when she was leaving the offender's home in the early morning hours she was quite drunk, and was at the back door putting her boots on, when the offender approached her, put his arms around her and told her he wanted to have sex with her. Although she told him she did not want to, he pushed her or pulled her to the floor and tried to get her pants and underpants off. She resisted, she says, successfully. She says that although he pulled her pants part way down, he

did not expose her genitalia and he did not penetrate her. She says that he was moving his hips as if to try and enter her, but that she resisted his efforts. These efforts ceased, and the offender got off of her when they heard noises elsewhere in the house. That was the victim's evidence, and it was believed by the jury, notwithstanding Mr. Tatatoapik's sworn testimony at his trial that the sexual contact with her was consentual.

It was Mr. Tatatoapik who asked to be tried by a jury, and we must accept the jury's verdict as Mr. Tatatoapik had a fair trial and was ably represented during that trial by highly competent counsel.

As to the other incidents of sexual contact that was included in the testimony of the victim at trial, that being a fondling at the couch and the forced touching of the penis at the back door, I will state my view of these for purposes of the record as part of my reasons for sentence.

Having heard the testimony heard by the jury, I am not satisfied that the jury necessarily, by the verdict, decided that it was this offender Esau Tatatoapik who did fondle the victim at the couch, and I do not intend to include that incident as part of Mr. Tatatoapik's crime against this victim. As to the forced touching of the penis, the victim did identify

Mr. Tatatoapik as the person who did that to her, and I consider that incident as part and parcel of the sexual assault which occurred in the porch area.

Mr. Tatatoapik's crime could be described as an attempted rape, in fact that is what the crime was called many years ago. Upon further consideration I am not satisfied that I can describe it as a "major sexual assault" as that term was defined by Mr. Justice Kerans in the seminal decision in R v Sandercock (1985) 48 C.R. (3d) 154, and I read from that decision in excerpt at page 159:

> "One archetypical case of sexual assault is where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual assault aspect of the situation, or from the violence used, or from a combination of the two. This category, which we would describe as major sexual assault, includes not only what we suspect will continue to be called rape but obviously also many cases of attempted rape, fellatio, cunnilingus, or buggery, wherein forseeable related harm which we later describe more fully, is present."

That description of the category of major sexual assault was confirmed again recently by the Alberta Court of Appeal in R v McDonnell (1995) 169 A.R. 170.

Although I do not place Mr. Tatatoapik's crime in

the Sandercock category, it was nevertheless a serious sexual offence, as found by the jury. He blatantly disregarded this woman's right to say no, and he was taking advantage of her vulnerability while intoxicated. The victim left his house and went to her own home where her husband was already asleep. She herself went to sleep. Later that day she told her husband that Esau Tatatoapik had sexually assaulted her. She says that she did not tell her husband the whole story because she was afraid of her husband. She did not make any complaint to the police until mid February of this year when she had chance to speak to another Inuit officer in Iqaluit while she was there.

From my observation of the victim while testifying at the trial in Nanasivik last month, it does not appear that she continues to suffer notable psychological or emotional harm or trauma. Although the trial no doubt brought back unpleasant memories, I am satisfied that this mature woman is able to put this terrible matter behind her and get on with her life.

The offender, Esau Tatatoapik, is 38 years old and is married with six children. Since being suspended from the police force when the charge was laid earlier this year, he has resided much of the time in Arctic Bay with his family and extended family.

Mr. Tatatoapik does have a criminal record consisting of one conviction for careless use of a firearm in 1991 in Iqaluit. The details of that crime have been provided to the Court on the sentencing hearing, and I note that the sentence imposed was a $350 fine. In my view the fact of that sole conviction is not a significant factor in the determination of the sentence to be imposed today for this sexual assault.

In summary, we have a sexual assault amounting to an attempted rape. It is an aggravating factor that the offender assaulted the victim for his own sexual pleasure when she was in a vulnerable state.

In mitigation we have an offender who, with the exception of the isolated conviction for a minor firearms offence, is of previous good character, and who has by this mistake and his criminal conduct on this occasion, already lost a respected career as a police officer.

The sentencing principles of deterrence and denunciation, and the overall objective of the protection of the public, compel me to impose a significant term of incarceration. In the circumstances of this case, it is my view that the duration of that term should be just short of a penitentiary term.

I wish to turn now to the matter of the firearms

prohibition order pursuant to Section 100 of the Criminal Code. This offender's crime falls within the ambit of Section 100 (1) of the Criminal Code, and therefore the Court is required to impose a 10 year firearms prohibition order in addition to any other punishment, as directed by Parliament, unless this offender satisfies the Court that he should be granted relief from the mandatory order pursuant to Subsection 1.1 of Section 100.

It is my view that Mr. Tatatoapik has put sufficient evidence before the Court to entitle him to the relief he seeks from a mandatory Section 100 order. Quite apart from his life as a professional police officer in five different Baffin Island communities these past 10 years, Mr. Tatatoapik has, during that time and throughout his life, followed the traditional culture and lifestyle of the Inuit in hunting for food for his family and his community. Indeed on the very evening prior to committing his crime, he had invited a number of Inuit residents of Nanavisik to his home to share char and caribou that he had recently harvested. On the evidence before me I am satisfied that for this man, Esau Tatatoapik, hunting for food for family and community is simply part of being an Inuk man, no less than for the offender in R v Iyorak [1991] N.W.T.R. 40.

In seeking relief from a Section 100 order an

offender is required to establish two things, firstly, and using the interpretation used by the British Columbia Court of Appeal in R v Austin (1994) 36 C.R. (4th) 241, the offender must establish that there is no reason to believe that he will be a danger to himself or others if he has a firearm in the future. Secondly, he must establish that the circumstances are such that it would not be appropriate to make the order.

I am satisfied that this offender, Esau Tatatoapik, has met these requirements. In this context I again acknowledge the existence of his 1991 conviction for a firearms offence. However, in my view, given the circumstances of that offence, that it happened four years ago, that he has served his sentence for that crime, the existence of that conviction is not a major factor here and certainly not a determinitive one. In the context of the other factors listed in Subsection 1.2 of Section 100, and required to be taken into consideration here, I note that no firearm and no excessive violence were used by the offender in the commission of the present offence. I am satisfied that he does require a firearm for the sustenance of himself and his family. A Section 100 firearm prohibition order would constitute a virtual prohibition against this man continuing to pursue his cultural identity as an Inuk.

In my view this man would qualify for a constitutional exemption under the previous statutory regime, and I have little difficulty in deciding that he comes within the less stringent requirements of the legislated exemption that is written into the present statutory regime.

Would you please stand, Mr. Tatatoapik. Mr. Tatatoapik, for the crime that you have committed, sexual assault, it is the sentence of this Court that you serve a term of imprisonment of two years less one day. I decline to impose a Section 100 order for the reasons that I have mentioned. Also there will be no $35 victim fine surcharge. You may sit down now, sir.

Counsel, is there anything further in this matter?

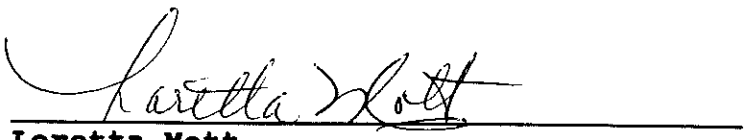
MR. MACDONALD: Nothing from the Crown, My Lord.

MR. BRICE-BENNETT: No, My Lord

THE COURT: We will close court, and before we close court I want to take this opportunity to commend both counsel for their conduct of this difficult case.

MR. BRICE-BENNETT: Thank you, My Lord.

Certified Pursuant to Practice Direction #20 dated December 28, 1987.



Loretta Mott,
Court Reporter