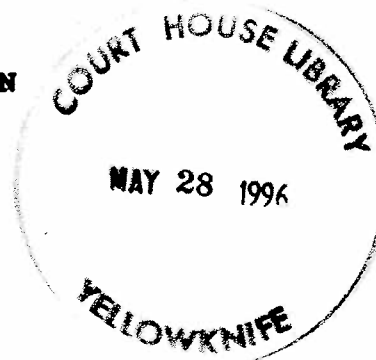


CR 02991

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN



- and -

JAMES ARVALUK

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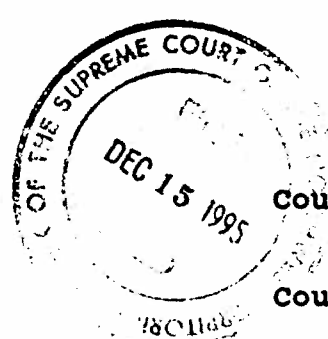
Transcript of the Voir Dire Ruling Delivered by The  
Honourable Mr. Justice J. E. Richard, sitting at Yellowknife  
in the Northwest Territories, on December 11th, A.D., 1995.

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APPEARANCES:

MS. U. ARVANETES: Counsel for the Crown

MR. V. FOLDATS: Counsel for the Defence



1 THE COURT: In the indictment filed by the Crown,  
2 the accused is charged with two counts of sexual  
3 assault which allegedly occurred at his home in  
4 Yellowknife in the early morning hours of February  
5 19th.

6 I am told that the expected testimony of the Crown  
7 witnesses will be to the effect that each of the two  
8 complainants had been invited to a hot tub party at  
9 the accused's home. The people in attendance at the  
10 party were drinking and using the hot tub. Each of  
11 the complainants became intoxicated.

12 The first complainant says that after exiting the  
13 hot tub in an intoxicated condition she received  
14 permission from the accused to lie down in his bed in  
15 his bedroom. She says that she awoke at one point to  
16 find the accused lying with her in the bed having  
17 sexual intercourse with her without her consent.

18 The second complainant says that at one point in  
19 the party she exited the hot tub in an intoxicated  
20 condition, and the accused offered her a blanket to  
21 wrap around herself. She says she then passed out on  
22 the living room floor. She says at one point she woke  
23 up to find the accused lying on top of her having  
24 sexual intercourse with her without her consent.

25 On this voir dire the Crown seeks a ruling on the  
26 admissibility of the evidence of the count 1 sexual  
27 assault as similar fact evidence to be considered by

1 the jury in determining the guilt of the accused on  
2 count 2, and vice versa.

3 For his part, the accused makes application for  
4 severance of the two counts pursuant to Section 591(3)  
5 of the Criminal Code. The accused acknowledges  
6 through his counsel that he participated in sexual  
7 activity with each of these complainants. His  
8 position on count number 1 is that the complainant  
9 consented to the sexual activity, or alternatively  
10 that he honestly believed at the time that she was  
11 consenting. His position on count 2 is that that  
12 complainant consented to the sexual activity.

13 Counsel advise that the credibility of each of the  
14 two complainants will very definitely be an issue at  
15 the trial or trials with particular focus on the  
16 effect of intoxication on the accuracy of the  
17 complainants' memory.

18 Counsel have kindly provided the court with many  
19 case authorities regarding the admission or exclusion  
20 of similar fact or similar act evidence. In L.E.D. the  
21 Supreme Court of Canada summarized the inherent  
22 dangers of allowing similar fact evidence to be used  
23 in support of a criminal charge being tried by a jury.  
24 Mr. Justice Sopinka in that decision described the  
25 process that the trial judge should use before  
26 exercising his or her discretion in favour of  
27 admitting such evidence and I quote at page 156:

1 "The process of reasoning therefore is  
2 to determine whether the evidence of  
3 similar acts has probative value in  
4 relation to a fact in issue, other  
5 than its tendency to lead to the  
6 conclusion that the accused is guilty  
7 because of the disposition to commit  
8 certain types of wrongful acts. If  
9 the evidence has such probative value,  
10 the court must then determine whether  
11 its probative value is sufficient to  
12 justify its admissibility, notwithstanding  
13 the prejudicial tendency of such evidence".

14 In the present case, I acknowledge the many common  
15 characteristics of the sexual assaults alleged by the  
16 two complainants. The act alleged by the one  
17 complainant is indeed similar to the other act alleged  
18 by the other complainant. There is no question but  
19 that these are similar acts alleged.

20 However, upon reflection, I cannot find that the  
21 evidence of a similar act just an hour or so earlier  
22 or later is probative of any fact in issue. The fact  
23 in issue in count 2 is whether that complainant, the  
24 second complainant, consented to the sexual activity  
25 with the accused. There is no basis in logic for  
26 asserting that the fact that the accused had  
27 non-consensual sex with the first complainant is  
probative of the fact that the second complainant was  
not consenting as well. There is also no basis in  
logic to assert that because the accused had  
non-consensual sex with an unconscious woman on one  
occasion that he is likely to have had non-consensual  
sex with an unconscious woman on another occasion.

1           In that respect, this case is distinguishable from  
2 other cases where the fact that is in issue is the  
3 identity of the perpetrator of a crime or the mens rea  
4 or motive of the accused person, or whether an event  
5 occurred at all. In those other examples, the similar  
6 fact evidence may indeed have probative value for the  
7 jury in determining the particular fact in issue.

8           Here in my respectful view the probative value of  
9 the similar fact evidence is nonexistent. Having made  
10 that determination, that there is no probative value  
11 in the similar fact evidence, it is therefore not  
12 necessary for me to proceed with the second step  
13 suggested by Mr. Justice Sopinka in the excerpt  
14 quoted, that is a balancing of the probative value  
15 with the prejudicial effect of the evidence.

16           At this point I rule, therefore, that the evidence  
17 in support of the allegation in count 1 is not  
18 admissible in support of the allegation in count 2,  
19 and vice versa. As always this kind of ruling is  
20 subject to being revisited as necessary as the  
21 evidence at trial unfolds.

22           I turn now to the accused's application for  
23 severance of the two counts. On this application, the  
24 onus is on the accused to show on a balance of  
25 probabilities that the interests of justice require  
26 separate trials for these two criminal charges. The  
27 interests of justice include the accused's interests,

1 in particular the right to a fair trial, and also the  
2 interests of the administration of justice generally.

3 Upon consideration of all of the relevant factors,  
4 and the submissions of counsel, I find that the  
5 accused has not met the onus of establishing that  
6 separate trials are required in the interests of  
7 justice.

8 As the Alberta Court of Appeal recently confirmed  
9 in *R. vs Ryman*, one of the main factors in a severance  
10 application is whether there is a sufficient nexus in  
11 time, place, or other circumstances between the two  
12 charges. Here there is clearly such a nexus. Crown  
13 counsel advises that the Crown intends to call the  
14 same witnesses, a number of whom are travelling from  
15 Baffin Island and elsewhere, to testify regarding both  
16 charges brought by the Crown.

17 I fail to see that there is prejudice to the  
18 accused to have one jury decide these two matters at  
19 the same time. The jury can receive adequate  
20 instructions to avoid any improper inferences. Those  
21 instructions are fairly clear and easy to understand,  
22 and that is simply that the evidence on count 1 cannot  
23 be used to prove the guilt of the accused on count 2  
24 and vice versa, and the jury's decision of guilty or  
25 not guilty on each count must be made independently of  
26 the decision on the other count.


27 Accordingly the application for severance is

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dismissed or denied. Counsel, unless there is anything further at this time, we will adjourn until 10:00 a.m. at which time we will proceed with the jury selection.

(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED)

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

  
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Laurie Ann Young  
Court Reporter