

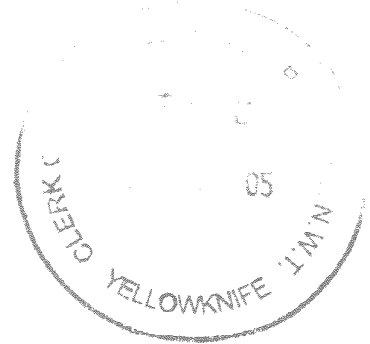
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

TOMMY CHARLES BIRD



Transcript of the Reasons for Sentence delivered by The Honourable Justice J. Z. Vertes, in Inuvik, in the Northwest Territories, on the 28th day of July, A.D. 2005.

APPEARANCES:

Mr. S. Hinkley: Counsel on behalf of the Crown
Mr. T. Boyd: Counsel on behalf of the Accused

Charge under s. 271 C.C.

**Ban on Publication of Identity of Complainant/
Witness Pursuant to Section 486 of the
Criminal Code.**

1 THE COURT: The accused was convicted,
2 after trial before a local jury, of the offence
3 of sexual assault.

4 The facts of the offence are
5 straightforward. The complainant, 18 years old
6 at the time of the offence, testified that she
7 was drinking alcohol with some friends. She left
8 with a fellow named Darren to go back to his
9 place to get some beer to take back to the party.
10 Darren was staying in a staff house here in
11 Inuvik provided by his employer. The complainant
12 could not remember anything from the time she got
13 into a taxi to go to Darren's place until she
14 woke up the following morning, lying in Darren's
15 bed, with the accused on top of her, "pulling out
16 of her" as she said, and touching her. She was
17 half-naked. She pushed the accused off and then
18 located Darren in another room in bed with
19 another woman. She woke him up and then he took
20 her away from there. The complainant did not
21 report this assault until six days later when she
22 went to the local hospital. Photographs taken at
23 that time showed bruises which the complainant
24 said she did not have prior to the assault.

25 The complainant had not seen the accused the
26 night before at the party where she was drinking,
27 but she had met him some months before at another

1 party and knew who he was.

2 The accused testified and denied that this
3 incident occurred at all. He denied seeing the
4 complainant or assaulting her. He too, however,
5 lived at the same staff house as Darren at the
6 time.

7 The jury deliberated for approximately six
8 hours. The evidence, consisting only of the
9 testimony of the complainant and the accused,
10 took less than two hours. So the jury obviously
11 looked at it very carefully.

12 I am satisfied that, by returning a verdict
13 of guilty, the jury accepted what the complainant
14 said as the true facts of what occurred that
15 night.

16 This set of facts reveals what was described
17 by Crown counsel as an opportunistic assault, one
18 whereby the accused obviously took advantage of a
19 defenceless person.

20 Defence counsel described the incident as an
21 aberration, a one-time incident out of character
22 for the accused. He has a point.

23 The accused is now 34 years old. He grew up
24 in Alberta. He is certified as a heavy-equipment
25 operator and has a history of steady employment.
26 There is no doubt that he has been and can be a
27 contributing member of society. But this one

1 incident, aberration as it may be, was a serious
2 and violent invasion of another person's dignity
3 and physical integrity. He took advantage of a
4 defenceless person for his own momentary
5 gratification. That is a serious crime and it is
6 for that crime, not because of the type of person
7 that he is, for which he is being punished.

8 The accused has an unrelated criminal
9 record. He has been convicted, since 1989, of
10 four charges of impaired driving and six charges
11 of failing to appear in court. While this record
12 is unrelated it does reveal, however, a recurring
13 problem in abiding by the standards set by
14 society. And, one could hardly say that impaired
15 driving is not a danger to the community.

16 The accused has spent seven and a half
17 months in pre-trial custody and I must give him
18 credit for that. But the remand time requires
19 some explanation.

20 This offence occurred in September 2001.
21 The accused was arrested and released. He made
22 his first appearance in January 2002 at which
23 time the preliminary hearing was set for February
24 2002. The accused failed to appear in February
25 and the preliminary hearing proceeded in his
26 absence. A warrant was issued but the accused
27 was not apprehended until November 2004. It

1 turns out that for part of that time the accused
2 was attending a community college in Alberta.
3 And when he was eventually apprehended, he was
4 apprehended here in Inuvik. Why it took almost
5 three years to apprehend the accused in these
6 circumstances is inexplicable. In any event, the
7 accused was detained in custody. He then was
8 convicted of failing to attend court and
9 sentenced to 45 days in jail. Of that total time
10 in custody since his re-arrest, seven and a half
11 months were taken up by simply being on remand.

12 I will credit the seven and a half months at
13 the customary rate of two for one, resulting in
14 the equivalent of 15 months. I recognize that in
15 some cases the credit could be less since the
16 reason for his being on remand was his failure to
17 appear at his preliminary hearing. However, in
18 this case, part of the remand time was also due
19 to a Crown request for an adjournment of the
20 original trial date set last February.

21 The issue I must decide of course is the
22 appropriate sentence for this crime. Sentencing
23 is always an individual exercise, taking into
24 account the particular circumstances of the
25 offence and the circumstances of the offender.
26 Defence counsel has referred to a number of cases
27 and argued that the appropriate sentence would be

1 one of less than two years to be served
2 conditionally in the community. I respectfully
3 disagree.

4 In my opinion, the circumstances of this
5 offence are deserving of a penitentiary sentence.
6 That, by itself, takes this sentence out of
7 consideration for a conditional sentence. And,
8 by reason of the recent Supreme Court of Canada
9 decision in *Fice*, any credit for pre-trial
10 custody does not qualify to bring the sentence
11 within the statutory requirements for a
12 conditional sentence.

13 I say the circumstances of this offence
14 deserve a penitentiary sentence for the following
15 reasons. It is a case of serious bodily
16 interference (intercourse); the victim was
17 defenceless, being asleep or passed out from
18 excessive alcohol consumption; and, the
19 relatively young age of the victim (18 at the
20 time) compared to the relative maturity of the
21 offender (30 years old at the time).

22 I also do not ignore the prevalence of this
23 type of offence in the Northwest Territories, a
24 factor noted by the Northwest Territories Court
25 of Appeal in its recently released decision in
26 *Regina v. Khatib*, 2005 NWTCA 03, where the court
27 said, in reference to a case with similar

1 circumstances, that, in any jurisdiction, this
2 crime would attract a significant sentence unless
3 there were some factor out of the ordinary, such
4 as reduced mental capacity or great youth and
5 immaturity. The court also said (at paragraph
6 41):

7 "This particular scenario and type
8 of sexual assault is extremely
9 common in this Territory, much more
10 than in southern Canada. So it
11 needs general deterrence,
12 denunciation, and promotion of a
13 sense of responsibility."

14 I have not ignored the accused's personal
15 circumstances but, apart from the fact that this
16 act seems to be out of character for him, I find
17 no mitigating circumstances.

18 I have also considered, as I must, the
19 circumstances of the accused as an aboriginal
20 offender. He is a member of the Paul First
21 Nation of Alberta. I recognize that there are
22 wide-spread systemic factors of a general nature
23 affecting all aboriginal Canadians that have
24 placed them at a disadvantage. However, in this
25 case, I have not been told of any systemic
26 factors specific to this accused that may have
27 played a part in bringing him before this court.

1 Quite the contrary, he appears to have had a
2 stable upbringing; he has family support; and he
3 has valuable and useful skills.

4 For all of these reasons, I have decided
5 that an appropriate sentence for this crime would
6 be one of three years' incarceration. Of that, I
7 credit the period of 15 months for pre-trial
8 custody, and I therefore sentence the accused to
9 a total term of imprisonment of 21 months in
10 custody.

11 In addition, since a conviction for sexual
12 assault brings in to play various mandatory terms
13 of the *Criminal Code*, and in the absence of
14 information and evidence to suggest that the
15 making of these orders would be grossly
16 disproportionate as between the interests of the
17 accused and the interests of society, I make the
18 following orders:

19 1. There will be an order requiring the accused
20 to provide a sample for DNA analysis and
21 submission to the DNA data bank pursuant to
22 section 487.051 of the *Criminal Code*.

23 2. I make an order that the accused must comply
24 with the provisions of the *Sexual Offender*
25 *Information Registration Act* for the designated
26 period of 20 years pursuant to section 487.012 of
27 the *Criminal Code*.

1 3. I make an order under the mandatory
2 provisions of section 109 of the *Criminal Code*
3 prohibiting the accused from having in his
4 possession any firearms, ammunition, or
5 explosives for a period of no less than ten years
6 from the date of his release from his sentence of
7 imprisonment, ending ten years from that date.

8 I will rely on Crown counsel to provide the
9 necessary and appropriate formal orders for entry
10 on the court record.

11 Under the circumstances, there will be no
12 victim of crime fine surcharge.

13 Is there anything I've neglected, counsel?

14 MR. HINKLEY: No, sir.

15 MR. BOYD: No, sir.

16 THE COURT: Thank you for your
17 submissions. Court is closed.

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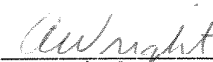
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20 Certified to be a true and
21 accurate transcript pursuant
22 to Rule 723 and 724 of the
Supreme Court Rules of Court.

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Annette Wright, RPR, CSR(A)
Court Reporter

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