

IN THE TERRITORIAL COURT
OF THE
NORTHWEST TERRITORIES

ORIGINAL

R E G I N A

vs.

LEROY JOHNSON OMILGOITUK

REASONS FOR JUDGMENT

AND

JUDGMENT

Chief Judge J.R. Slaven, Presiding

T.R. Humphries, Esq.,

Appeared for the Crown

J.I. Lillegran, Ms.,

Appeared for the Defence

C.F. Cameron, CSR(A)

Official Court Reporter

Inuvik, Northwest Territories

April 4, A.D. 1989

(Charge under Section 246.1 of the Criminal Code)

THE COURT: Thank you. The alleged victim, Marilyn Kasook, appears to me to be in her mid or late 20's, and is apparently, from her testimony, a regular heavy drinker. On the day in question, by arrangement, she met Mr. Omilgoituk at the liquor store when it opened at 1 o'clock. Two other fellows were with him. They got a 26 of vodka and went to Twin Lakes to drink it.

Apparently the day before she had also started drinking right after 1 o'clock when the liquor store opened, carried on until 1 o'clock in the evening or the night, and it's not clear from her testimony as to how many days that had been going on. She says at Twin Lakes that day she drank the equivalent of one straight cupful of vodka, and that would make sense if four of them were sharing a 26. She says she was drunk, but knew what she was doing. Constable Harrish said she was quite intoxicated, also emotional and upset about what had happened to her.

She says that Lena Wainwright came by when they were at Twin Lakes. Lena Wainwright testified that she didn't. I think we have to prefer the testimony of Miss Wainwright on that point. But we must remember that all these events took place ten months ago. Miss Wainwright's statement was only taken December 23 of this year, more than half a year after the occurrence.

But Miss Kasook, as characterized by Mr. Humphries, appeared to be truthful; she wasn't shaken on cross-examination. There was an empty bottle of vodka, Smirnoff,



1 there. There was a bag with a sales slip for a 26 of
2 Smirnoff purchased at 1:04 p.m. on that date, and I feel
3 that this is some corroboration that they were there,
4 although obviously that doesn't corroborate the alleged
5 assault.

6 But the fact is that she says, I closed my eyes, I
7 don't know who kicked me or who hit me, I don't know if
8 anyone kicked me, I don't know who tore the chain off my
9 neck, which I think is when I incurred the injury to my
10 chin, I don't know who did all of that because I had my eyes
11 closed; but I do know that the other fellow attempted to
12 have sexual intercourse with me, apparently he achieved
13 penetration, but she's adamant that he did not ejaculate.
14 She's quite clear, and I take it that it was after that
15 occurrence that with her pants down to her ankles, with her
16 privates bare, Leroy Omilgoituk bothered her by placing his
17 hand between her bare legs.

18 I don't feel she imagined this, made it up, or
19 dreamed it in drunkenness. She was quite clear about it,
20 and I am satisfied that I can on the basis of her evidence
21 and the slight corroboration offered, I am satisfied
22 beyond a reasonable doubt that the sexual assault by Mr.
23 Omilgoituk on Miss Kasook took place as described by her,
24 and I find him guilty as charged. Am I to sentence
25 now?

26 MR. HUMPHRIES: Yes, Your Honour.

27 MS. LILLEGRAN: Yes, Your Honour.

1 MR. HUMPHRIES: Sir, I'm showing Ms. Lillegran the
2 record.

3 MS. LILLEGRAN: The record's admitted, Your Honour.

4 MR. HUMPHRIES: Sir, the record is generally, I think
5 it's fair to say, unrelated to this sort of incident. Sir,
6 the bench mark, if you will, of a major sexual assault is
7 three years, according to the Sandercock case. I'm not
8 characterizing this as a major sexual assault. Mr.
9 Omilgoituk's participation in it, if you will, does not
0 amount to -- doesn't take it into that major category.
1 It's aggravating that he was with another person at the
2 time. The other person, perhaps, might be characterized
3 as having committed a major sexual assault, but not Mr.
4 Omilgoituk.

5 In my submission, sir, the offense as well, of course,
6 there is the injuries suffered to the chin which is
7 aggravating. In my submission, the offense does call for a
8 short gaol term, however, regarding Mr. Omilgoituk. Those
9 are my submissions.

0 THE COURT: Miss Lillegran?

1 MS. LILLEGRAN: Yes, Your Honour, Mr. Omilgoituk is
2 28, had a Grade 9 education. He is divorced. There are two
3 children from a previous marriage, ages 10 and 7. Mr.
4 Omilgoituk looks after the 10 year old, and his sister,
5 Ann Kasook, has the care of the 7 year old. Mr. Omilgoituk
6 is employed. He's working for Sonex Exploration. He's
7 worked for them as a line truck driver for the past three

1 years, and before that for the -- in total he's been
2 involved in the same occupation for five or six years, but
3 for a different company other than Sonex. When he -- that's
4 seasonal employment, Your Honour.

5 When he is not involved in that, he traps, and he has an
6 arrangement or assists Mr. Sembler who has a store in
7 Inuvik. As well, he has a camp and one of the arrangements
8 that he has with Mr. Omilgoituk is for Mr. Omilgoituk to go
9 out and look after his trap line and so forth, and they
10 split the furs and Mr. Sembler sells them. He's been doing
11 that for a number of years.

12 With regard to the circumstances of this particular
13 offense, Mr. Omilgoituk was -- has no memory of the events.
14 He had been drinking on that day, and I think my friend
15 also quite fairly categorized this as not a major sexual
16 assault. My friend makes the point that it's aggravating
17 that he was with another fellow, but there's no evidence
18 here of -- of a plan or a concerted effort on Mr.
19 Omilgoituk to assist the other individual.

20 If anything respectfully, I would submit, that whatever
21 Mr. Omilgoituk -- it appears sort of as a spur of the
22 moment. It's not a very major involvement. Miss Kasook's
23 words were that -- got it straight, the touching didn't go
24 on for very long, and it appeared to not turn into anything
25 further. Would appear that definitely all parties involved
26 had been drinking, and to considerable level of
27 intoxication.

1 Mr. Omilgoituk has no related record, and respectfully
2 I'd submit that Your Honour can also consider instead of
3 imposing a short gaol short sentence, imposing perhaps a
4 substantial fine. And Mr. Omilgoituk is scheduled to -- he
5 was scheduled, unfortunately didn't appear for court
6 yesterday. He was scheduled to leave today, but depending
7 on what happens here, he is required to return to work to
8 finish the season, and he would be leaving tomorrow,
9 depending on what the disposition is today. Those are my
10 submissions.

11 THE COURT: Thank you. Well, as counsel quite
12 properly point out, what Mr. Omilgoituk did is not in the
13 field of a major sexual offense. What the other man did
14 likely is, but apparently as far as the sexual assault is
15 concerned, after the other was finished, Mr. Omilgoituk put
16 his hand around Miss Kasook's privates. She says that he
17 didn't touch her for long, he was holding me and touching
18 me, and she was crying and saying, please, leave me alone,
19 and then he stopped. Here the other fellow said, all right,
20 take off. She did. But Miss Kasook says, you know, he
21 didn't try to stop her from leaving at that time, but both
22 of them stopped her from leaving earlier on.

23 I think Mr. Omilgoituk has just a short record. I
24 suppose the only really significant one is the break-enter
25 in October last year, and that was dealt with by just a fine.
26 And he apparently keeps himself occupied working at various
27 endeavours. He does a lot better than a lot of young men

1 around here in Inuvik in that respect.

2 But the aggravating factor is that these men kept Miss
3 Kasook there against her will, and a bit of a beating was
4 laid on her by one or both, and I can't find on the evidence
5 that Mr. Omilgoituk did that, but certainly she was kept
6 there against her will for some period of time. And Mr.
7 Omilgoituk availed himself of the opportunity of touching
8 her around her privates when her pants were down to her
9 ankles. And it's not the type of thing the community
10 accepts. Miss Kasook was drinking a lot, but she's still
11 entitled to the protection of the courts against things like
12 this occurrence.

13 And I think she was particularly upset that she said
14 she is, in effect, related to Mr. Omilgoituk. Her brother's
15 married to his sister or vice versa. She's known him all
16 her life, and she never thought that he would do anything
17 like that to her; in other words, going with him, even
18 though the others were strangers to her, she felt that she
19 was safe. Certainly it proved otherwise.

20 Stand up, please, Mr. Omilgoituk. Despite the fact
21 you've never been in gaol before, I do feel a gaol sentence
22 is demanded for this occurrence. I convict you as charged
23 and direct you be imprisoned for a period of four
24 months.

25 MR. HUMPHRIES: Sir, I believe a Section 100 order
26 is mandatory in this situation.

27 THE COURT: There is no evidence that violence



1 was used or threatened by Mr. Omilgoituk. I don't suggest
2 there was no evidence, but I haven't made that finding. I
3 think violence has to be used or threatened.

4 MR. HUMPHRIES: Well, sir, in my submission it
5 seems a part of the case, a part of the result that Miss
6 Kasook received an injury in the course of this. In any
7 case sexual assault is assault by definition.

8 THE COURT: The commission of which violence
9 against a person is used, doesn't necessarily say by him.

10 MR. HUMPHRIES: Well, sir, even if it's not found
11 as a fact that he participated in the cutting of the chin,
12 then as I say, assault -- sexual assault is assault by
13 definition. Degree of violence I suppose is a question of
14 fact, but there was an assault. Anyway, sir, in my
15 submission it's mandatory, that's the Crown's position.

16 THE COURT: Care to address that, Miss Lillegran?

17 MS. LILLEGRAN: Yes, Your Honour, by definition I
18 disagree with my friend's submissions there. What, as Your
19 Honour said, I respectfully submit that there was no
20 evidence that Mr. Omilgoituk used or threatened violence.
21 In fact all we ended up with was a touching. Now, whether
22 that's submit -- in the definition of assault, I mean that's
23 a non-consensual touching, whether that is equivalent to
24 violence, I submit that respectfully that it's not because
25 if my friend's correct, in the case of simple assault we'd
26 have Section 100 orders imposed.

27 MR. HUMPHRIES: No, that's not true, sir, 10 year



1 maximum.

2 THE COURT: And the maximum here is 10 years,
3 I believe.

4 MR. HUMPHRIES: I believe it's either 14 or 10,
5 sir, it's at least 10.

6 THE COURT: I think it's 10. What is the
7 number of the section now?

8 MR. HUMPHRIES: I believe it's now 271, sir, it's
9 10 years, that's correct.

10 THE COURT: Well, reading subsection 1 of
11 Section 100, applies where an offender is convicted of an
12 offence in the commission of which violence against a person
13 is used, threatened or attempted, violence was used against
14 her in this case, but there was no strong evidence that the
15 accused used the violence. The subsection, by it's own
16 terms is specific, in that it's a penal section. It says an
17 order will be made in addition to any other punishment, so
18 it is a form of punishment, and is penal rather than any
19 type of regulatory thing. Being a penal section I feel it
20 must be construed narrowly. Although violence was used
21 against her, I have no evidence that the offender used
22 violence. By the definition of assault, an assault is where
23 force is used intentionally, in this case any force used by
24 the accused was minimal, and I take it the word violence is
25 used for a purpose in subsection 1 of Section 100, and to me
26 violence is much more than some types of force. And
27 certainly the minimal force that was used in committing the

1 sexual assault by placing his hand on her here, is in my
2 opinion, such that subsection 100 (1) does not apply and I
3 will not make an order under that section. So if you want
4 to get your name in the law books, Mr. Humphries, you can
5 take that to the Supreme Court. Might be worth it to keep
6 testing it.

7 MR. HUMPHRIES: It's an unusual section, sir.

8 THE COURT: Someone say Mr. Storr was here?

9 MR. HUMPHRIES: He was here.

10 MS. LILLEGRAN: Yes, he is, Your Honour. I've
11 spoken to him. Sir, I wonder if we might take a very short
12 adjournment?

13 THE COURT: Take five minutes.

14 (PROCEEDINGS ADJOURNED)

15 -----
16 I, C.F. Cameron, CSR(A), Official Court Reporter, hereby
17 certify that I attended at the above trial and took faithful and
18 accurate shorthand notes and the foregoing is a true and accurate
19 transcript of my shorthand notes to the best of my skill and
20 ability.

21 Dated at the City of Calgary, in the Province of Alberta,
22 on this 25th day of May, A.D. 1989.

23
24
25 C.F. Cameron per DeLenny
26 C.F. Cameron, CSR(A)
27 Official Court Reporter

CC/cc

