

# ORIGINAL

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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

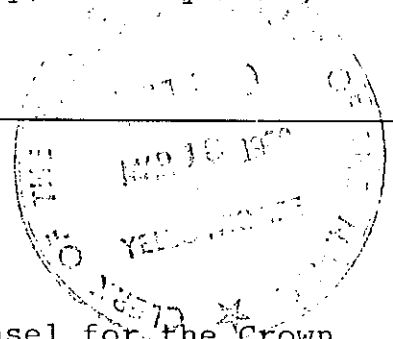
VS

JAMES EKPAKOHAK

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Transcript of the Proceedings held before His Honour  
Judge R. M. Bourassa, sitting at Cambridge Bay in the  
Northwest Territories, on Wednesday, January 13th,  
A.D., 1988.

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APPEARANCES:

MS. S. AITKEN: Counsel for the Crown  
MS. V. SCHULER: Counsel for the Defence

FACTS AND SUBMISSIONS BY COUNSEL.

1 MS. SCHULER: Your Honour, perhaps we could deal with the  
2 matter of James Ekpakohak. That is in adult court as well.

3 THE CLERK: James Ekpakohak.

4 THE COURT: Do you want to give me the facts, please, Miss  
5 Aitken.

6 MS. AITKEN: Yes, Your Honour. On October 30, 1987, here in  
7 Cambridge Bay, J. T. , who was 16 years old at  
8 the time, and James Ekpakohak and two other males were drinking  
9 at James Ekpakohak's house. During this time, J  
10 became quite intoxicated, and she went to the washroom  
11 where she passed out. The other men continued to drink.  
12 Later on, James went to the washroom and discovered J  
13 on the floor. He removed her pants and panties and had  
14 sexual intercourse with her. Another one of the males  
15 knocked on the washroom door and asked James when it was his  
16 turn. The other male then went into the washroom. At that  
17 point James left the washroom, and at that point the other  
18 male had sexual intercourse with J as well.

19 During the time that both James and the other man were  
20 having intercourse with J , she appeared to be passed  
21 out. However, she in fact was not passed out, and did  
22 realize what was happening, but did not say anything to  
23 them as she was scared. When the second man was in the  
24 act of intercourse, J asked him what was going on,  
25 and at that point he got off her and left her alone.

26 J then ran from the house and sought help. Both  
27 Mr. Ekpakohak and the other individual were arrested and

1 admitted to the police to having sexual intercourse with  
2 J . Both indicated to the police that they thought  
3 she was passed out.

4 THE COURT: Are those facts admitted as true?

5 MS. SCHULER: The facts are admitted, sir. I just want to  
6 make it clear that with respect to Mr. Ekpakohak, he did not  
7 have involvement with the second person. I understand the  
8 Crown will be alleging that as an aggravating circumstance.  
9 He has admitted to his involvement in the offence.

10 THE COURT: Where does the victim live?

11 MS. AITKEN: She lives here in Cambridge Bay.

12 THE COURT: In a group home?

13 MS. AITKEN: No, Your Honour.

14 THE COURT: Go ahead.

15 MS. AITKEN: Yes, Your Honour, the Crown alleges a record.

16 MS. SCHULER: The record is admitted, Your Honour.

17 THE COURT: Exhibit 1.

18 MS. AITKEN: Your Honour will see from the record that Mr.  
19 Ekpakohak has a lengthy criminal record dating back to 1978.  
20 His most recent conviction was in December of 1986. Your  
21 Honour will see from that record the majority of his  
22 offences are property related.

23 Your Honour, I believe there is a presentence report  
24 as well that has been prepared.

25 THE COURT: Yes, I have read it. I take it counsel have both  
26 seen it and read it, and are there any objections to any  
27 portions thereof, or do either of you wish to cross-examine

1 the author?

2 MS. SCHULER: No, Your Honour.

3 MS. AITKEN: No, Your Honour. It would appear from the  
4 presentence report that James has indicated that he has a  
5 problem with alcohol, and it would appear that he has not  
6 been able to do anything about that problem, and he still  
7 feels that he has a problem, and hopes that he will be able  
8 to get help and is willing apparently to seek help about  
9 his problem.

10 However, we have seen from his record that he has been  
11 in court many times in the past, and although, as I mentioned,  
12 they are not related convictions, we see that from the  
13 dispositions he received, which have been all the way from  
14 fines and probation, and then periods of incarceration, that  
15 he has not been deterred from becoming involved with further  
16 criminal activity.

17 We are dealing here again with a very serious offence.  
18 In my submission the courts in this jurisdiction have held  
19 that in offences of this nature, general deterrence is a  
20 prime consideration. In my submission, the circumstances  
21 here are what can be termed a major sexual assault as those  
22 words are used in the Court of Appeal case of R. v. Sandercock  
23 which Your Honour is familiar with. As Your Honour is  
24 aware, in the Sandercock case the court expressed that  
25 the starting point for a major sexual assault is a term  
26 of imprisonment of three years, and this is assuming that  
27 we are dealing with a mature accused who is of previous

good character and no criminal record.

Our Court of Appeal in R. vs. J.N. which has been reported in the 1986 Northwest Territories Reports at page 128, and Your Honour is well aware that that case has adopted the Sandercock case, and in some cases it may have to be modified when we are dealing with areas of northern Canada. However, the court does mention in that case that Sandercock offers the general guideline for offences of this nature. The Sandercock case also mentioned that some psychological harm to the victim can be inferred from the circumstances of the assault itself. If there is anything in addition to that, of course the Crown would have to prove that.

In terms of the facts before the court today, Your Honour, I would suggest that there are some mitigating and some aggravating factors. To his benefit, Mr. Ekpakohak entered a plea at an early date, and there would appear to be no violence here other than the assault itself. In terms of aggravation, we have the age of the victim. Miss T was 16 years old. I would suggest it is somewhat aggravating about the other individual we have heard about. The other man knocked at the door. Mr. Ekpakohak let the man in knowing full well what that man's intentions were as the man had asked when was his turn. In my submission James knew full well what that other man was going to do, and although he did not encourage what the other man has done and may not have known what that other man did as he

1 left the room before it happened, he clearly did not do  
2 anything to stop it, and he let it happen by leaving the  
3 room and leaving the girl, who appears to be passed out,  
4 on the ground.

5 There is one last case I would like to refer Your  
6 Honour to, and I only have one copy of it, and perhaps I  
7 could just refer to it. It is the case of R. v. John  
8 Ignirjuk which is a decision of the Northwest Territories  
9 Supreme Court in 1986. The facts are somewhat different  
10 in that case, but there is one point I would like to draw  
11 from it. The facts in that case were that it was heard  
12 in Arctic Bay. The accused was the 48 year old uncle of  
13 a 15 year old girl. A few days before the offence he had  
14 approached her apparently, and she rebuked him. A few days  
15 later she was in her own home, and she was asleep. Her  
16 uncle came into the home. He fondled her. He then had  
17 sexual intercourse with her while she was sleeping. She  
18 woke up when the act was complete, and when she woke up  
19 she pushed him away and he left the residence. There was  
20 a trial in that case, and he was found guilty.

21 In terms of his own circumstances, he did not have  
22 a previous criminal record. He was found to be of previous  
23 good character. He apparently was employed and supported  
24 his family, and it was found as well that he was an  
25 unsophisticated person, and had not had much dealings in  
26 matters such as that. The court imposed a period of  
27 imprisonment of three years.

1 I am not suggesting that the factual situation is  
2 the same as the one before the court today, as there are  
3 clearly some aggravating factors in that case that are not  
4 present here, but the court in that case did not retract  
5 from the sentence that the accused received because the girl  
6 was asleep, and perhaps did not realize what was going on  
7 until she awoke. In fact, the fact that she was asleep was  
8 mentioned in aggravation in Ignirjuk.

9 In the circumstances that we are dealing with here  
10 before the court, Mr. Ekpakohak may not have known the  
11 victim was alert and aware of what was going on, but  
12 clearly he knew what he was doing was wrong. He just took  
13 advantage of the situation that he found himself in. We  
14 have heard here from the circumstances that in fact she was  
15 alert and that she did know what was going on, but that she  
16 was too scared to do anything. Clearly this act must have  
17 been very degrading to her. It isn't a situation where she  
18 did not know what was going on. She in fact did, and was  
19 scared.

20 For this particular accused, we are not dealing here  
21 with a person of previous good character. Although he does  
22 not have any convictions for violence or anything of that  
23 nature, he personally is experienced before the courts, and  
24 again, it would appear that many of his offences may be in  
25 relation to alcohol.

26 From the presentence report that has been prepared, and  
27 I am speaking of the writer of that report speaking to James

1 about it, when asked on page three if it would happen again  
2 in the future James apparently replied that he didn't know  
3 if it will happen again if he is drinking. Again, it is  
4 a situation where James likely would not have done something  
5 like this if he hadn't been drinking, but clearly when he  
6 is drinking, he is a danger, and in my submission, it is  
7 clear from the writer of that report from the comments that  
8 he made that he is not sure if he would be able to control  
9 himself again in the future if he had been drinking.

10 In my submission, from all the circumstances here,  
11 taking into account the mitigating factors and the  
12 aggravating factors, in my submission a penitentiary  
13 term is required. I would suggest that this is necessary  
14 both to deter Mr. Ekpakohak himself, but also to satisfy  
15 the principles of general deterrence and protecting the  
16 people in this community from this offender and from further  
17 offences of this kind, and I would be suggesting that a term  
18 of imprisonment in the area of three years would be an  
19 appropriate disposition for this accused. Those are my  
20 submissions.

21 THE COURT: Miss Schuler?

22 MS. SCHULER: Your Honour, I think Mr. Ekpakohak's background  
23 is well set out in the presentence report. There is nothing  
24 really that I can add to that. There is one point of  
25 clarification. I understand that in fact he lives here in  
26 Cambridge Bay with his brother. There are just the two of  
27 them living together. The report indicates that the



1 parents are deceased, so that the two brothers are on  
2 their own.

3 The report, sir, I would submit obviously does indicate  
4 a problem with alcohol. I don't think that there is any  
5 question about that. I spoke with Mr. Kaosoni, the social  
6 worker, about Mr. Ekpakohak before the report was prepared,  
7 and he indicated to me that really, when he isn't drinking,  
8 he isn't considered to be a problem, but when he is  
9 drinking, obviously there is a problem.

10 The report indicates, sir, that he has, I would submit,  
11 thought about the offence, and indicates on page three that  
12 he feels very angry with himself for what he has done. He  
13 feels embarrassed and humiliated. He obviously has thought  
14 about the offence and is feeling remorseful. He also  
15 indicated to me, sir, that he wanted to make it very clear  
16 that this girl apparently is a friend. He still considers  
17 her a friend. He doesn't in any way try to foist off any  
18 blame on her or responsibility on her. He knows that what he  
19 did was wrong, and that it was his fault, and I think he  
20 is hoping that their relationship doesn't change.

21 One of the factors about this offence, sir, that  
22 distinguish it from some of the others, and I think  
23 distinguish it from the Ignirjuk case that Miss Aitken  
24 has mentioned, is that here there was a drinking party in  
25 progress preceding the assault. Clearly Mr. Ekpakohak took  
26 advantage of the girl, took advantage of the situation, but  
27 this is not a situation of a going into a home where someone

1 doesn't know that you are there, or isn't involved with  
2 the person prior to the offence. Here they were drinking.  
3 They were partying essentially, as I understand it, when  
4 the offence happened in the midst of those circumstances.  
5 There was no violence involved. There was no force beyond  
6 the offence itself.

7 As Miss Aitken has pointed out, the record doesn't  
8 indicate any previous assaults or any offences of a forceful  
9 nature against the person, and I think that ought to be  
10 distinguished on that basis. The only offence that comes  
11 anywhere close to that is, I believe there is a recent  
12 conviction for obstructing a peace officer, and certainly  
13 that doesn't indicate that this was an assault, so that it  
14 can be distinguished on that basis. That was, I believe in  
15 1985 or thereabouts.

16 It does appear as though he was able to stay out of  
17 trouble for almost a year. This offence occurred in  
18 October, and his last conviction was in December, so that  
19 he did make some effort to stay out of trouble during that  
20 time.

21 He has been in custody, sir, since the 27th of November.  
22 Now, that was as a result of a breach of undertaking for  
23 drinking, as I understand it. And he was sentenced to a  
24 term so that he has actually been serving some time as a  
25 result of that, a term of two months plus 15 days imprisonment.

26 I would submit, sir, that beyond the offence itself,  
27 and looking at it in isolation, really there are no

1       aggravating factors with respect to this particular offence  
2       and I say that because of the lack of violence, the lack  
3       of planning. Obviously he was intoxicated, as was the girl  
4       involved.

5               With respect to his record, again I think it can be  
6       distinguished in the sense that there is no indication of  
7       violence or force on that record. And if we look at the  
8       Sandercock case, in my submission it is a case where the  
9       court could consider an adjustment downward from the three  
10      year mark referred to in that case.

11             A case that I would refer to the court is that of  
12      Alfred Thomas Nahanni, and I understand it was a sentencing  
13      in the Territorial Court in front of His Honour Judge  
14      Davis. I understand the Crown appealed the case, and the  
15      Court of Appeal dismissed the appeal. Mr. Nahanni  
16      received a sentence of 18 months imprisonment on a charge  
17      of sexual assault. Basically the circumstances were that  
18      the accused and his brother and his brother's common-law  
19      wife, who was the victim of the assault, were all together.  
20      The accused had been drinking. Apparently the accused's  
21      brother, who had also been drinking, assaulted his own  
22      common-law wife. The brother was removed from the premises.  
23      The accused was then asked to leave the premises. He did,  
24      but he came back. He was voluntarily admitted by the  
25      victim. They had some discussion about him staying over  
26      night, because his own house was locked up, and apparently  
27      they talked about the assault, and basically were talking

1 and getting along. They both went to sleep. I believe  
2 she was on the floor and he was sleeping on the couch,  
3 and when the woman woke up, she had taken some prescription  
4 drugs and she woke up and found the accused lying on her  
5 and having sexual relations with her. He immediately stopped  
6 when she directed him to do so, and apparently in that  
7 case he attempted to apologize to her before he left the  
8 premises. He had two previous assault charges on his  
9 record. One was a common assault in 1981. The other was  
10 assault causing bodily harm in 1982 for which he received  
11 fines, so he didn't have a lengthy criminal record, but he  
12 did have a record of previous violence. So there is that  
13 distinguishing factor.

14 In some respects, this case, I would submit, or those  
15 circumstances are similar to the case at bar. That could  
16 be considered as mitigating as the Court of Appeal dismissed  
17 the Crown appeal on that sentence.

18 Another case, sir, that again is not exactly on point,  
19 but is somewhat similar was a decision by Mr. Justice  
20 Rothman of the Supreme Court of the Northwest Territories  
21 in May of 1983. That was, I believe a trial, and the accused  
22 was charged in that case under the old law, so that it was  
23 a rape charge. The complainant, or the victim, was asleep  
24 in her bed at her own home in Clyde River. The accused  
25 came to the house apparently wanting to drink with her  
26 husband, but the husband wasn't there, and he saw her  
27 sleeping in bed, and he decided to attempt to have sexual

1 intercourse with her. He apparently didn't know her very  
2 well at all. It is not clear whether he knew her at all.  
3 He turned off the lights that were on in the living room,  
4 and apparently got into bed with her and began kissing  
5 her. She thought he was her husband, and when she called  
6 her husband by name, he replied, and obviously tried to  
7 deceive her and pretend that he was the husband, and she  
8 finally realized that he wasn't, and basically then it  
9 is a situation of a trick, and he tricked her into having  
10 sexual intercourse with her. He had a record of convictions,  
11 but they appear to be--this case was in 1983. These  
12 convictions were prior to 1978, it would appear. It  
13 doesn't look like he had any violence on his record. He  
14 received a sentence of two years less a day imprisonment  
15 for that particular offence.

16 With respect to the case that Miss Aitken has referred  
17 to, the Ignirjuk case, a couple of distinguishing factors  
18 in that case I would submit are first of all that the accused  
19 had been rebuffed before by the victim. There was quite  
20 a big disparity in their ages. He was 48 years old and she  
21 was 15 years old. She was a friend of his daughter's, so  
22 that it wasn't a situation where she and he were friends as  
23 it is in this case. That was a situation of one of her  
24 friend's father assaulting her. Before that particular  
25 incident there hadn't been any contact. In other words,  
26 he wasn't already in the house or talking to her. He had  
27 come into the house unbeknownst to her. So those

factors I submit distinguish that case somewhat.

Those are all my submissions, Your Honour.

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3 THE COURT: Thank you, Miss Schuler.

4 MS. AITKEN: Your Honour, if I could just point out the one  
5 factor about the conviction I had failed to mention. He  
6 did plead guilty on December 3rd of 1987 before Your Honour  
7 for a charge under Section 133, and he received two months  
8 and 15 days imprisonment.

9 THE COURT: Thank you.  
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Certified a correct transcript,

*Laurie Ann Young*  
Laurie Ann Young  
Court Reporter