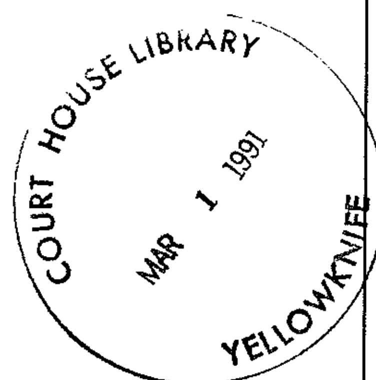
TC CR 89 034

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:



HER MAJESTY THE QUEEN

- and -

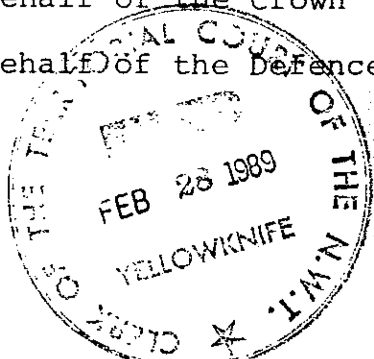
MATTHEW ARNGNA'NAAQ

Transcript of the Oral Sentencing of His Honour Judge T. B. Davis, sitting at Baker Lake, in the Northwest Territories, on Wednesday, November 16th, A.D., 1988.

APPEARANCES:

R. PEACH, ESQ.: On behalf of the Crown

A. REGEL, ESQ.: On behalf of the Defence



(Two charges under Sections 150 and 84(2) CRIMINAL CODE)

THE COURT: Matthew Arngna'naaq comes before the Court admitting that between January 1980 and December 1985, at Baker Lake, he had sexual intercourse with Rhoda Arngna'naaq while knowing that she was his sister, and therefore violated Section 150 of the Criminal Code. He also admits that he had in his possession a weapon and was handling it in a careless manner, in violation of Section 84(2) of the Criminal Code.

I have had a chance to hear submissions by counsel, which I felt were extremely helpful, in that both counsel have presented to me the position of the Crown, that is, representing the public and the people of Canada, indicating that these offences are of a serious nature and are ones that society does not approve of; and, as well, from defence counsel, who has referred to a number of other cases in similar circumstances and situations, and suggested that the accused is in a rather special particular situation, because he comes before the Court for the first time, no criminal record, and the circumstances are different than in many other cases in which jail terms have been imposed for substantial periods.

Section 150 of the Code is an incest charge. Incest is having relationships, sexual, between members of the same family. It is acknowledged that in this instance there was no violence or force used by the accused. Therefore, I am classifying this incest charge as somewhat different than the usual sexual offence charges that we see before the

Court where any force or a threat has been used on another person, in order to have her, ordinarily, participate in sexual activity.

In this instance, the relationship had existed over a period of years between a brother and sister, the sister being between 12 and 16 years of age, and the brother at the time being between 15 and about 19 years of age. There was no actual resistance by the sister to the advances of this accused, but there was also no actual consent, because she did not resist and did not call for the assistance of her family or others, because she was afraid that in doing so it would wake other persons when he went to her room during the night.

The accused acknowledges that there was at least one penetration, and the Court is finding that there had been sexual intercourse and at least fondling on a number of occasions, on a periodic basis, over the period of time mentioned.

In many of the incest charges that come before the Court, we see the influence of an older person, a relative or a parent, on a younger child, which is ordinarily referred to in law as "in loco parentis," where the influence causes a child to participate in sexual activities against the desires, often, of the child, but because of the pressure and influence of the parent or adult.

In this instance, I do not find that that situation existed, because there was not a parent or a person of influence

of any substance using that influence or authority over the victim.

There has been a substantial delay in bringing this matter to the Court, because it is only recently, it appears, that the victim has notified the authorities that the offences had occurred more than three years ago. There is, therefore, some loss of deterrent effect on the accused, himself, because it's preferable and more effective if, when an offence is detected, a person is arrested shortly thereafter and dealt with before the Courts. That doesn't, however, eliminate the deterrent effect, generally, because the public should know that if offences are committed, even if they have taken place some time ago, the penalty can be, and often should be, imposed. As a result of that, the general deterrent effect is still prevalent in the theory of sentencing.

I was referred to a case of The Queen vs. Teemotee, which was in the Supreme Court of the Northwest Territories, dealt with in April 1985, that involved a sexual assault between a brother and a sister. It was not an incest case. It actually involved force and threats and involved some injury to the victim, who certainly was in fear. Teemotee, himself, had a serious criminal record of almost every type of offence and had been in jail previously for two and a half years for earlier assaults. The Supreme Court imposed on that sexual assault charge between a brother and a sister four years in jail.

The accused before me was a juvenile or a youth, it appears, for most of the period when these relations were taking place between the accused and his sister. There was no violence used at any time, and, therefore, I would classify it as an incest charge, but not involving an assault in the usual way that we observe offences that occur between an adult and a younger person. I must recognize, however, that at age 13, Courts have indicated that even if there is no resistance, a child of that age cannot consent to sexual approaches by a person in authority. I am not, of course, today finding that the accused was a person in authority or with any influence over his sister. There was only a few years difference in age.

The accused has never had any previous jail terms and has never, in fact, been before the Court in the past. He is youthful and, therefore, the emphasis in sentencing for the specific person -- that's the accused -- should be on rehabilitation, not punishment, and not general deterrence. He now recognizes, according to the pre-sentence report, that he has an alcohol problem and has had for a while and knows that he should do something about it.

Defence counsel has pointed out some cases to me, as well, and I am going to be substantially influenced today by the case of The Queen vs. Joadamie Amagoalik, that was filed on June the 21st, 1984, in the Supreme Court of the Northwest Territories. That was a brother and sister relationship, the brother being 22 years of age and the sister, 16, and

they had intercourse on two occasions, but in that instance, the sister had agreed to and participated in sexual relations from fear, not fear that she'd wake somebody in the house, but fear of what would happen to her by her brother. The judge said in that instance, with which I agree, that incest is to be repudiated and condemned by society. Different considerations may exist if the incestuous relationship is between siblings, brothers and sisters in the same family, from those between the parent and a child. It is still a serious offence, it is still denounced by society, but there is no breach of trust in the type of relationship between brother and sister.

A Justice of the Supreme Court, Mr. Justice Jean Guy Boillard, who was a visiting judge to the Northwest Territories, said such occurrences of incest between brothers and sisters may not warrant the same harsh sentences imposed by Canadian Courts confronted with an incestuous relationship between a father and his daughter. He, therefore, distinguishes the penalty that should be imposed when there is no influence and authority being used to force a child to participate in sex. In that instance, the Court felt that there are times when it's not necessary to impose a custodial sentence if no good is to be served by that. If an accused person seems to have realized the wrong he has done and has entered a plea of guilty and he also realizes the shamefulness of his conduct, then that, in itself, may be considered a penalty or part of a penalty

that he's imposed upon himself. I am taking the same approach with the accused today on this charge, even though I recognize that this type of offence is of a serious nature.

The accused has obviously suffered emotionally, himself, already. He was observed in a situation where he was considering suicide, with a gun pointed at himself and indicating that he felt that that might be what he was contemplating doing.

The pre-sentence report indicates that he's a loner, that he doesn't discuss things with other persons, that he has difficulty expressing his feelings. It would seem to me, therefore, that society might be better served if a person of this type is required to take counselling and discuss his situation, over a period of time, with counsellors who will assist him, and I hope, therefore, assist the community in knowing that these activities are wrong and must not be condoned.

I had considered imposing a short period of time in jail on the accused, so as to indicate to the public that that is usually the result of this type of offence, but considering the factors that I have and the age of the accused at which time these offences were taking place and the fact that it was over three years ago that the last offence occurred, I am instead going to impose the suspending of sentence on the Section 150 charge, the incest charge, and instead place the accused on probation for a two-year period. To remind him

that the offence is of a serious nature and that he's being dealt with leniently by not going to jail, I am going to require that he perform 200 hours of community service work when and as directed to do so by the probation officer. He, therefore, will be required to report to the probation officer when and as directed. He will also be required to take any counselling as directed by the probation officer.

On the weapons charge, I want the accused to realize that no matter what his feelings are -- and, therefore, the public to be aware -- that no matter what they wish to do with a gun, it is against the law to use a weapon in a careless manner or to handle a gun in a careless manner. On that charge I am going to impose a fine in the amount of one hundred dollars, or in default thereof, two weeks in jail. And I'll hear from counsel as to how long it will take to pay the fine.

MR. REGEL: Two months, Your Honour.

THE COURT: He will be allowed two months within which to pay the fine.

Crown counsel has suggested that the Court should consider a Section 98 order and that if the accused used violence or threatened violence to any person in either of the charges before the Court, that it would be appropriate and necessary to restrict the possession of weapons and ammunition for a five-year period. If there was no violence, the Court then has the discretion to impose a restriction on weapons, if it seems appropriate. I have made a finding on the Section 150

charge that there was no violence used, and with regard to the use of the weapon and the handling of the weapon by the accused in a careless manner, he made no threats to any other person, and it was acknowledged that nobody else was in a situation where they were threatened in any way or were in a position where they could have been harmed. Because there was no indication that the accused had intended to do anybody any harm or that he was not intending harm to the public, I am, therefore, not making an order under Section 98(1), but because the accused had the possession of the weapon and could have been harming himself and was indicating that he might have or was considering using the weapon for harm to himself, I am going to prohibit the accused from having possession of a weapon for a period of one year, even though that might interfere with his way of life. The purpose of this order is to deter the accused and others from taking weapons when it's not for an appropriate and proper purpose. And although it might interfere with him and his way of life, it will be a reminder to him that he's not to have possession of any weapons.

Does the accused have any weapons, himself?

MR. REGEL: Yes, Your Honour, he does. He advises me that they're his dad's guns that he uses, so they could be surrendered forthwith.

THE COURT: Thank you.

Even though weapons are not owned by yourself, you will be restricted from having possession of any weapons, and if

you have any that you have control over or own, you will have to remove them from your own possession and control within a period of one month. I am recognizing, of course, at this time, that counsel had indicated you do not have any weapons, yourself.

The clerk will be preparing a probation order, and you will be required to stay around until that's signed.

(AT WHICH TIME THIS MATTER WAS CONCLUDED)

Certified a correct transcript,

Debora Chipperfield

Debora Chipperfield,
Court Reporter.