- TC CR 86 016

C.A. 659

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER BETWEEN:

HER MAJESTY THE QUEEN

- and -

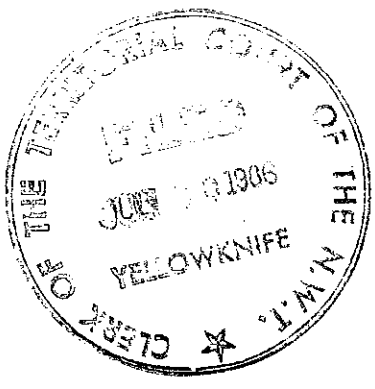
DANNY APAWKOK

Transcript of Oral Judgment rendered by His Honour Judge T. B. Davis, sitting at Yellowknife, in the Northwest Territories, on Wednesday, June 4th, A.D., 1986.

APPEARANCES:

MS. S. AITKEN: Counsel for the Crown

S. TATE, ESQ.: Counsel for the Defence.



THE COURT: Danny Apawkok appears before the Court admitting to two sexual assaults occurring on the 18th of February and the 21st of February, where on both occasions he was in an intoxicated state and used force to be involved with sexual activities with his sister, who was a 20 year old person living with him in the same apartment temporarily, in Frobisher Bay, in the Northwest Territories at the time of the offences.

The facts as presented to the Court by counsel are to be considered part of the decision of this Court today, because they have been acknowledged and, therefore, do not have to be repeated in detail.

A major factor for the consideration of the Court is whether or not the two assaults are, in fact, within the definition of the major sexual assault, presented by the Appeal Court of Alberta in the case against Herbert Mark Sandercock, which decision was filed on the 11th day of February, 1985 as appeal number 17265.

Briefly, the Alberta Appeal Court said that a major sexual assault is an assault in which there is violence that forces an adult victim to submit to sexual activity, resulting in some lasting or psychological injury. The Court also found that a trial judge may assume that there is some emotional harm from any sexual assault; and in an effort to avoid disparity in sentencing for assaults, if they are within that definition or category, the Court should consider a base from which to work, that being three years for a serious sexual assault or a major sexual assault. The Court acknowledged that there is a very

huge spectrum covered by that definition, from a stolen kiss to the worst type of human degradation involving sexual activity.

There are a number of matters that are classified as factors, both mitigating and the opposite, that are referred to in the case, with the mitigating factors being those referred to very eloquently today by Mr. Tate, acting on behalf of the accused. I don't think, basically, that he missed any of the mitigating factors referred to, and for the purposes of my sentencing today I am going to just summarize briefly the factors that I can take into account, because I feel that the assaults before the Court today were of a sexual nature, they did involve adults and they did involve force or violence, and although the submissions were such that there was a possibility that I should be able to or could consider the assaults not to be within the definition, I, at this time, must indicate that I find that the assaults do fall within the category of the broad definition in the Sandercock case.

The accused has been a special constable with the RCMP, with an extremely fine work record during that time, as well as prior to joining the force when he was a carver for a number of years and gave up that work to join the RCMP in 1980. Some drinking problems did result from the stress and strain of that position, which, as pointed out in submissions, was an extremely difficult task for a native police officer in small communities, especially in the more isolated communities. And unfortunately the accused had suffered under those stresses and strains, which naturally do exist.

As a result of the offences before the Court today, he has lost his job and seems to have suffered in other ways, as well.

Mr. Apawkok has apologized to his sister, and after the first sexual assault, upon waking up in the morning and finding that he was lying with his sister, who was obviously injured, he offered to separate from her at the time or to send her back to the community from which she had recently been brought, but because of her condition she felt embarrassed and chose to remain in the apartment with the accused for some further period of time. He did show some concern and remorse by acting in the way he did, even on that occasion.

Unfortunately, on the next occasion, the facts do not indicate that he was then also friendly with his sister, because he came home in an intoxicated state and,on a second occasion, forced her again to participate in some sexual activity.

The accused seems to have realized that he has had a problem as an alcoholic, which problem has destroyed his family and now appears to have destroyed his career, but also it causes him to realize that he may need some help, because he still is concerned about his family and about his activity and relationships with them or, at least, with other members of his family.

His excellent work history is such that the Court must acknowledge him to be a first offender, therefore, until the present time, as a 34 year old coming before the Court and never having been in trouble with the law in the past.

The state of intoxication of the accused in both offences was such that the Court can acknowledge that it probably had

reduced the intent to commit an offence, and therefore, there was probably no premeditation, but it is not an excuse for committing offences.

I do acknowledge that personal difficulties sometimes do allow the Courts to consider a lesser penalty and, therefore, can be a mitigating factor if they seem to have an effect on the ability of the accused to avoid committing offences. Acknowledging, therefore, some of the factors referred to in the Sandercock case, in that a plea of guilty was entered at an early date by the accused on both offences and, therefore, his sister was spared the difficulty and embarrassment of appearing before the Courts, he has shown remorse, as I had indicated, and through his counsel he has indicated that his feelings were that he was "sick to his insides."

The Sandercock case says that upon entering a plea of guilty and sparing the victim the need to attend, that the accused also waived some of his constitutional rights and some of the possible defences that he might have. The Sandercock case also acknowledges that the Court may consider the totality of a sentence to be imposed on the accused, and even though there are two offences before the Court today, both occurring within a short period of time, either of which might cause the Court to impose a substantial period in gaol, it is not necessary to double that penalty because there are two offences, because I can take into account the totality of the sentence and its effect on the accused and on the general public in the form of deterrence.

I also acknowledge that there was no penetration, in that

in neither case did the accused have sexual intercourse with his sister, but fondled her and sexually involved himself with her in other ways, but not in the form of penetration.

One of the factors that the Sandercock case indicates is available for consideration by the Court is the lack of full appreciation by the accused, and because of the state of intoxication, there might have been a decrease in his amount of appreciation, but I am governed to some extent by a recent case in which the Appeal Court increased a gaol term for Willy Adams, reported as Appeal Court Number 591, in 1985. In that case, the Court found that the accused was a responsible leader in the community, he had no criminal record, was well educated and was, according to the community standards, a sophisticated person, and even though the 15 year old daughter that was involved with him was not suffering psychologically, the Court increased the gaol term to two years less one day, plus one year of probation. And that was subsequently reported in 1986, Northwest Territories Reports, I believe.

In this circumstance, I must also acknowledge that the accused is not an unsophisticated person, in that he has lived in the south, he has had experience and was a well thought of and highly respected person in his position.

I also can acknowledge that factors that are aggravating to the circumstances would be such things as confinement or kidnapping, repeated assaults or acts of degradation, acts of horror, invasions of a home or the use of weapons and whether or not there are several assailants and whether or not there is more

than one victim. In this instance, the age of the victim is such that there is no major aggravation of the circumstances, because the victim was not a child, being about 20 years of age. One of the aggravating factors is, however, pain to the victim and the effort to resist the assault.

In the first instance, the photographs before me indicate that even a week after the violence that was used the victim still had bruises on her eye and face and chin and, therefore, I presume that she did suffer some pain and that she made substantial efforts to resist.

On the second occasion there was not the same use of violence, in that the victim gave into the approach by the accused by saying that there was nothing much she could do about his request for sexual participation, anyway.

It is helpful to have some recent cases brought to my attention that had been determined on sexual assault by the Supreme Court, to note that in May 1986, in the case of the Queen v. John J. Koe, Mr. Justice de Weerdt had imposed a substantial number of months after having given credit for remand time, resulting in an 18 month sentence for a sexual assault when the accused was drinking with his sister, but he subsequently assaulted his sister-in-law and used threats and violence and force but didn't on that occasion have penetration. He showed genuine remorse, and Justice de Weerdt found that the situation was defined as a sexual assault under the Sandercock definition.

There are, however, at times, cases that have allowed short

periods of time in gaol and even such things as a suspended sentence, which defence was asking for today, although I don't think that is possible to deal with before the Court since the Sandercock case, but I do acknowledge that in 1984, Mr. Justice Boilard, in the Northwest Territories as a visiting judge, imposed a suspended sentence plus two years probation in the case of The Queen v. J.A. He was a 22 year old intoxicated male who ordered his 16 year old sister to undress, which she did from fear, and they had intercourse. He had no previous record, he was remorseful and ashamed for what he had done. And because he supported his family and there didn't appear to be any psychological, lasting damage evident, he was given a suspended sentence.

I do not, however, feel that I can go to the extent of considering a suspended sentence for the accused today, and I feel that a gaol term is required. Because of the special circumstances in which the accused will find himself when he is in gaol, I do feel that I can keep that to a minimum, because it has been recognized that persons involved with sexual assaults and police officers when they are sentenced to gaol, and persons in a few other categories, do have a harder time in living within an institution in the ordinary circumstances and sometimes have to be separated from the general group of prisoners.

There are two offences before the Court today, both of them of a serious nature, but because they occurred within a relatively short time of one another, I am going to allow the sentences to be served concurrently. Taking into account the factors that I

have reviewed and the directions that I feel have been given by the Appeal Court of Alberta, which is generally also the Appeal Court of the Northwest Territories and then, to some extent, has some strong persuasive effect on us, I do feel a period of time is necessary, and on both of these offences I am going to impose a period of 14 months in gaol. I am going to allow them to be served concurrently. Following the second conviction, I am going to place the accused on probation for a period of one year and during that time, require that he report to the probation officer when and as directed; and the reason I am requiring reporting is that I am going to require that the accused participate in any alcohol counselling program directed by the probation officer.

Do you understand all of that, now?

THE ACCUSED: Yes.

MS. AITKEN: Your Honour, I did ask for an order under section 98.

THE COURT: Yes, thank you.

The Court is required, as well, because there was violence involved, to impose an order under section 98(1) of the Code, so that the accused will not be allowed to have in his possession any firearms or ammunition or explosive substances for a period of five years.

Do you have some firearms that you now can dispose of or transfer? And how long will it take to do so?

MR. TATE: Your Honour, Mr. Apawkok advises me he has one firearm in Yellowknife; he has two more, he believes, in Rankin. He feels that if he had two weeks, he could make arrangements.

THE COURT: The accused is to be allowed to have one month to make arrengemenets for the transfer or removal of them from his possession.

MR. TATE: Your Honour, I would ask that the warrant be endorsed with a strong recommendation that Mr. Apawkok serve his time in a facility designed for police officers in conflict with the law.

THE COURT: Is there somewhere specifically that I can refer to? What terminology would be appropriate for that?

MR. TATE: Your Honour, Mr. Clark advises me that protective custody is the proper terminology.

THE COURT: Well, then if it is protective custody, I'm probably not required to make a recommendation; that would be done automatically by the Department.

MR. TATE: Perhaps, sir, there could be made a recommendation that he either be placed in protective custody or in a facility where other police officers are housed.

THE COURT: Is there a specific place that Crown had referred to, a location or some facility that I might suggest could be considered?

MS. AITKEN: I understand there are special facilities, but I do not know the name. I understand there may be one in Ontario, and I am not sure if there is one in another province.

THE COURT: Maybe, then, I will undertake to write a letter to the Correctional Services, indicating that part of the consideration of the Court at this time was that we understood there is somewhere that police officers sometimes can spend time, if it

is their choice, and make that recommendation.

In the mean time, however, I will recommend that counselling be made available to the accused, at this request by defence counsel.

MR. TATE: Thank you, Your Honour.

(AT WHICH TIME THE ORAL JUDGMENT WAS CONCLUDED)

Certified correct,

Debora I. Chipperfield.
Debora I. Chipperfield,
Court Reporter.