

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER BETWEEN:

HER MAJESTY THE QUEEN

- and -

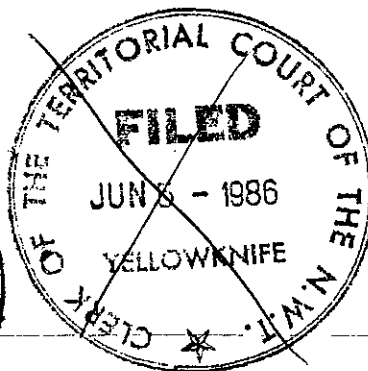
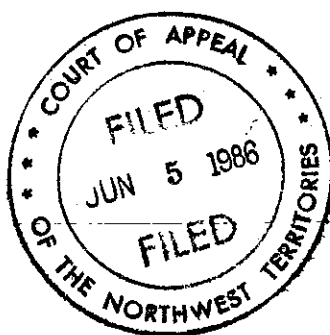
ESHUAKTOO MICHAEL

Transcript of the Sentencing Judgment of His Honour
Justice T.F. Davis, sitting at Frobisher Bay, in the
Northwest Territories, on Friday, April 11th, A.D.,
1986.

APPEARANCES:

MS. N. BOILLAT: Counsel for the Crown

N. SHARKEY, ESQ.: Counsel for the Defence



1 THE COURT: The Queen versus Eshuaktoo Michael is a case
2 whereby he is charged that between the 5th of February, 1985
3 and the 28th of April, 1985, at Lake Harbour, he committed a
4 sexual assault on a female, contrary to section 246.1 of the
5 Criminal Code. The facts as accepted indicate that while at
6 the accused's residence, a seven year old young lady of the
7 same surname entered his bedroom, and he then took off her
8 pants and panties and his own pants and laid on top of her, to
9 the extent that he was pretending to have sex, and finally
10 ejaculated on this young girl. There was no penetration and
11 no efforts at penetration at the time that this offence occurred.

12 It is obvious to the Court that a person commits a sexual
13 assault on somebody else if they are of a young enough age,
14 because they are unable to consent, although I do understand
15 from the evidence as submitted that there was no outright
16 objection shown by any noise or indications of opposition to
17 the assault that had taken place.

18 The accused, who is a quiet young man, 20 years of age,
19 has had a presentence report prepared, and he comes before the
20 Court with no criminal record in the past. The Crown counsel
21 has suggested that the responsibility of the Court is, as has
22 been shown in many cases, to balance the protection of the
23 public with the factors relating to the accused, himself, and to
24 take into account his possible rehabilitation.

25 The maximum sentence in this instance is a ten-year term,
26 and it is interesting to review the theories suggested in the
27 Sandercock case, a recent decision of the Appeal Court of Alberta,

1 under appeal number 17265, which decision was rendered on the
2 6th day of September, 1985. The Sandercock case, as many
3 others, states that the Court must attempt to avoid disparity
4 in sentences for offences of a similar nature, and it also
5 recognizes that in sexual charges there is a huge spectrum
6 noted therein, being from a stolen kiss to the worst form of
7 human degradation.

8 The major sexual assault referred to in the Sandercock
9 case does involve some violence in the form of force when an
10 adult victim is forced to submit to sexual activity that results
11 in likely lasting psychological injury. For that type of
12 major sexual offence, the Appeal Court directs that the Courts
13 should think of a three year sentencing period, and on
14 variations of circumstances of the offence and on the
15 circumstances of the accused, the sentencing can be varied both
16 up and down, depending on the findings of the facts of the case.
17 The direction is that we should acknowledge some starting point
18 and then try to suggest what the factors are that are taken into
19 account to have a variance from the starting point.

20 The Court is entitled to assume some emotional harm from
21 any sexual assault, but if it is to be considered a substantial
22 emotional harm, then the Crown has the responsibility of proving
23 that type of emotional or psychological injury.

24 Because of the various factors referred to in the Sandercock
25 decision, which are not necessarily complete, but certainly are
26 a major effort at listing them, the Court is entitled to take
27 into account factors mitigating on behalf of the accused, such

1 things as a plea of guilty, because it avoids the embarrassment
2 and difficulty of having a victim come before the Court. The
3 Court can also consider the immaturity of the accused person,
4 the expression of remorse and the totality of the sentence,
5 whether there has been any penetration or not, the spontaneity
6 of the offence, and the lack of full appreciation of the
7 consequences of the offence by an accused person, as well as
8 whether there is any provocation.

9 The Court indicates that the accused is to be punished for
10 the blameworthiness of the offence, not for the actual
11 consequences.

12 As factors that would be considered to be detrimental to
13 the accused and deserving of increased punishment, the Appeal
14 Court has indicated that confinement over a period of time and
15 kidnapping are acts that are considered to be harmful, as well
16 as repeated assaults or acts of degradation, acts of horror,
17 the invasion of a home or a residence, the use of a weapon,
18 whether or not there are several assailants or whether or not
19 there is more than one victim. The age of both the victim and
20 the accused can be taken into account, as well as the pain and
21 suffering to the victim and the efforts of the victim to resist
22 the attack or the assault.

23 I, therefore, on the sentencing of the accused before me
24 today, must acknowledge that this is, if anything, a sexual
25 assault of a somewhat minor nature, compared to the forced
26 violation of a person through penetration, in that there was no
27 penetration and there appears to be no violence and, possibly,
no force.

1 The accused did plead guilty at the earliest opportunity,
2 and the presentence report and the accompanying reports from
3 the psychiatric examinations done on the accused indicate that
4 he himself has had feelings that he is deserving of punishment
5 for having committed the offence.

6 He is a very shy and quiet person and has had some difficulty
7 as a slow learner in school, going to the grade 4 level. He
8 has lived in the traditional life-style of the north, but is
9 now living away from his own residence and living in Frobisher
10 Bay, being employed at the local jewellery shop as a carver.
11 He does not drink, does not hang out with persons that are in
12 trouble, and has had no previous criminal convictions, but
13 has suffered some emotional problems in the past and has even
14 contemplated suicide.

15 He occasionally uses soft drugs, but it doesn't appear to
16 be a problem to him. He has made some friends, but has a poor
17 self-image. And although the presentence report indicates that
18 the interviewer felt that there did not appear to be any signs
19 of remorse, I can take into account the fact that the accused
20 entered a plea of guilty, as an indication of some remorse.
21 And in addition thereto, I have heard submissions by defence
22 counsel and accept those submissions, to some extent, to indicate
23 that there is some substantial remorse shown by the accused,
24 other than what was expressed to the Social Services officer,
25 who acknowledges that it was difficult to interview the accused
26 since he is somewhat downcast and hesitant to talk about his
27 offence or the problem before the Court. Medical officers

1 have also found the same hesitancy by the accused to discuss
2 his problems.

3 The reports both indicate that it would be of some benefit
4 to have Mr. Michael take counselling for his emotional state,
5 as well as for the possibility of improving his understanding
6 of his relationship with the opposite sex. He seems to have,
7 therefore, had tendencies towards depressions in the past, but
8 even at that, he still acknowledges that he is prepared to accept
9 responsibility for his offence today and to accept the punish-
10 ment of the Court.

11 As a result of the case, I have glanced over a few cases to
12 determine or to try to determine what might be an appropriate
13 level for incarceration for the accused, because I am not of the
14 opinion that a long term in gaol would be of any particular
15 need or benefit. And I have looked at some cases where the
16 range of sentences are between a couple of months and up to
17 six months and more, but can find that some of the Northwest
18 Territorial cases, as well as cases in other provinces, have
19 made it possible for persons to go to gaol for less than what
20 otherwise might be considered likely, especially since the
21 Sandercock case has indicated a three year term for a full-
22 fledged sexual assault with force.

23 In The Queen v. J.S.B., in 1984, Justice Marshall imposed a
24 three-month gaol term and two years probation on a 35 year old
25 man who sexually assaulted his 16 year old stepdaughter when he
26 was intoxicated. And he did not have sexual relations with her,
27 but merely pulled her legs apart and put his hand on her vagina.

1 He had one prior indecent assault charge, on the same
2 stepdaughter, and a number of liquor offences. Justice Marshall
3 felt that since the members of the community in which he was
4 living, which is a small native community, were prepared to
5 assist him, that a short gaol term would be appropriate for that
6 type of offence.

7 In the case of The Queen v. J.A., (1984), reported in the
8 Northwest Territories Reports at page 219, Justice Boilard,
9 of the Supreme Court, had a 22 year old intoxicated male before
10 him, who had ordered his 16 year old sister to undress, which
11 she did from fear, and then had sexual relations with her.
12 He had no previous record and did show remorse and felt ashamed.
13 The judge did not feel that severe punishment was necessary
14 under the circumstances, because the accused was a person at that time,
15 although only 22, who was supporting a family, and he imposed a
16 suspended sentence and a two year probation period.

17 The Appeal Court, in the case of The Queen v. Nakoolak,
18 1985, had reduced a term to six months in gaol when a girl who
19 was 14 years of age had consensual sexual intercourse with
20 another person, being the accused, in a single incident, when
21 the accused was 23 years of age and there was no affection, just
22 sexual activity, which the Court considered to be abuse even
23 though the accused had believed the girl to be over 14 years of
24 age.

25 In the case of The Queen v. P.J.L., the Manitoba Court of Appeal
26 was reported in 1985 in 35 Manitoba Reports, at page 233, to have
27 dealt with a father who was a first offender, who did not have

1 intercourse with his 12 year old daughter. It was an isolated
2 incident. He was a good provider and was likely to be fired
3 from his job if he spent a long period of time in gaol, and the
4 Court approved a 30 day gaol term and a two year supervised
5 period of probation.

6 I mentioned those cases only to indicate that it is possible
7 for the Court to consider a gaol term in months, rather than in
8 years.

9 In this instance, having considered the factors concerning
10 the offence, itself, and the problems that the accused has had,
11 and believing that a relatively short gaol term would be
12 appropriate for him, so long as he receives counselling and is
13 directed to participate in counselling thereafter, I am
14 satisfied that a six month gaol term would be appropriate for
15 the accused.

16 In addition thereto, I place the accused on probation for
17 a period of one year, to commence upon the release from gaol,
18 and I require that he report to the probation services when and
19 as directed. And in addition thereto, I am going to require that
20 he participate in any counselling or treatment programs
21 directed by the probation officer.

22 (JUDGMENT CONCLUDED)

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24 Certified a correct transcript,

25 Debora Chippenfield
26 Debora Chippenfield,
27 Court Reporter.