Tc CR 86 005

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.P. 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(JUDGMENT CONCLUDED)

Certified a correct transcript,

Debora Chipperfield

Debora Chipperfield,
Court Reporter.