

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

HER MAJESTY THE QUEEN

vs

OWEN LYNE FAIRALL

BEFORE THE HONOURABLE  
MR. JUSTICE W.G. MORROW  
at YELLOWKNIFE, N.W.T.

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the FIFTEENTH DAY  
of JANUARY, A.D. 1969

REASONS FOR JUDGMENT (ORAL)

The accused has been charged on four counts, two under Section 147 of the Criminal Code and two under Section 149 of the Criminal Code. The present case is one more example of the all too prevalent or frequent type which comes before the Court posing almost an insoluble problem of how the various principles that are recognized in our decisions should be applied in sentencing, that is, how do we satisfy the recognized principles justly and fairly and, I think I should say, humanely.

In this case, defence counsel, as we are prone to expect from him, has done a tremendous job of preparing his defence for his client; and, similarly, the Crown Counsel certainly has shown his usual fairness in cooperating with defence counsel,

<sup>which</sup> obviously, from the way the material has been presented, ~~with the defence counsel.~~ In the result, a tremendous amount of help has been given to the Court, but, notwithstanding that, I still have difficulty in approaching my conclusion and my sentence.

I do not propose reviewing the great mass of material that was presented to me, both by way of reports and by way of sworn evidence and statements through counsel. An excellent Probation Report from Mr. Elliott of Inuvik is made available. Mr. Suddaby, who is the Deputy Warden of the Yellowknife Correctional Institution, was helpful, as well as, of course, the medical reports and letters that were filed. Suffice to say, that it may be that a gaol term may turn out to be completely ineffective, or it may even make the situation worse with respect to this individual. My understanding of the penitentiary at Prince Albert, which is one of the alternatives open to me as the sentencing Court, would seem to indicate that I might even accentuate the condition of the accused if I were to send him there; My understanding is that a great number of inmates are serviced by a very small number of psychiatrists, and that really all we have there is examinations, rather than treatment.

This, then, leaves the alternative of whether this man should be sentenced to a term in the Correctional Institution with a direction that treatment be carried out there along the lines that have been indicated by Mr. Suddaby, and with the assistance of the Probation Officers here in Yellowknife, who, to my knowledge, are very conscientious and hard-working, or the question is, should we give and take a chance on what may happen,

and take a chance also on whether we can properly supervise this man, situated as the Court is and as the Police are, in the Northwest Territories and with the conditions that are to be found here.

The difficulty about a suspended sentence, in my opinion, is that the facilities open for proper supervision and control in this type of case are not satisfactory, and it is clear from the material before me that persons such as Dr. MacPherson quite honestly can not be sure of a cure, and certainly can not be sure that there may not be a repetition of these offences, no matter how well-intentioned the accused is and may continue to be, and I must pay some attention to this in arriving at what I consider to be the proper sentence. Placing the most favourable construction on this aspect, that is, the construction most favourable to the accused, (and I think it is my duty to do so) there is still the situation where several youths in the community, some very young, may have suffered emotional trauma, the final effect of which may never be known, certainly not for a long time. This is not in any way the type of case <sup>that</sup> ~~as~~ was considered by the Court of Appeal <sup>and by</sup> in the Supreme Court of Canada in the Klippert case, where the participants were consenting adults, and there was no danger of contaminating outsiders, or youths.

It seems to me that, <sup>having</sup> with full regard to my function as expressed so ably by Mr. Justice Mackay of the <sup>16 CR 138,</sup> ~~Appeal Court~~ of Ontario in Regina vs Willart, at page 141, where he says the Court is to aim at "a wise blending of the deterrent and the reformative, with retribution not entirely disregarded, and with constant appreciation that ~~the~~ not merely the Court and the offender

but also the public and society as a going concern,"

the present case, with the possible alternatives open to me, above, ~~it seems to me~~ I should impose a gaol term, rather than a suspended sentence. In passing, I mention that I would like to be able to sentence as the Court is able to do in British Columbia, where there is a possibility of determinate and indeterminate sentences, and I might mention that I have already asked the Minister of Justice to consider giving this Court the same powers, but I have not yet had a reply to my letter, and I do not know whether my request will ever be granted. Certainly, I have not the power now.

Accordingly, I sentence you to two years less one day, to be served in the Correctional Institution at Yellowknife, and subject to the following direction, namely, that full psychiatric examination be carried out as quickly as possible so that the Probation Officers here may be given instruction and help in providing treatment within the Institution. I also direct that this man be examined and receive what further treatment may be available on each occasion the psychiatrist attends at Yellowknife. I also direct that each and every one of the pamphlets and publications that are in the box and were filed as exhibits before the Magistrate shall be destroyed after the appropriate time for appeal has run out. I want to observe at this time that it seems to me, once again, that the most effective way of preventing this type of case, or helping to prevent it, would be if our preventive officers, the police, were more active in going after the sources of these books, and attempting to find out how they are able so readily available. I should <sup>also</sup> say that

all other exhibits would be returned to whoever filed them, if they request, after the time for appeal expires.

I could stop here, because my judgment is complete, but I choose to direct that if an application for parole is made, (and I would recommend that it be made as quickly as the Statute permits) that I, myself, would go on record, and I do go on record now, as being in favour of an early parole so long as this man is taken to British Columbia where he can be made readily accessible to both proper psychiatric treatment and readily accessible to the members of his family. It seems to me that is the best place for him.

Is there anything else?

*From counsel*  
Mr. Troy:

My Lord, I would like, in view of your direction in regard to the exhibits, after making some enquiries, *I would like* ~~if the request was made,~~ that the Order *to* be altered to have the exhibits forwarded to the appropriate authorities for examination and *if the request were made,* possible investigation.

The Court: I will amend it to that extent. If no action is contemplated, whenever that is ascertained, then they may be destroyed.

*From counsel*  
Mr. Troy:

Thank you.

The Court:

Mr. Purdy?

*Before counsel*  
Mr. Purdy:

The only thing I wanted to comment on is that the accused has been in custody about one month. I don't think I mentioned that.

The Court:

No, you didn't, but I don't think I can change it now, and ~~I am sure~~ in view of my recommendation, (and I will repeat it if I am asked to by the Parole Board, and I assume they will obtain a copy of my judgment

... out before long.

What I have just said with respect to Count  
Number One, I repeat with respect to each of the remain-  
ing three Counts, all <sup>sentences</sup> of them to be concurrent. Does  
that satisfy counsel?

*Defence counsel*  
Mr. Purdy:

Yes, <sup>my</sup> My Lord.

*Crown counsel*  
Mr. Troy:

Thank you, <sup>my</sup> My Lord.

~~Counsel:~~

O.J.T. Troy, Esq., for the Crown.

Ⓒ Brian Purdy, Esq., for the Defence  
*accused*