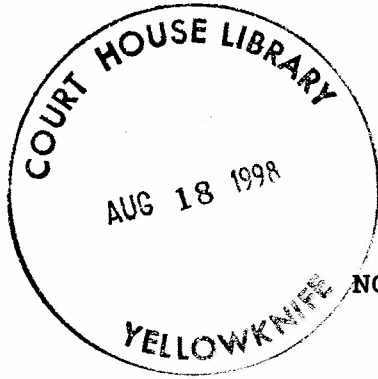


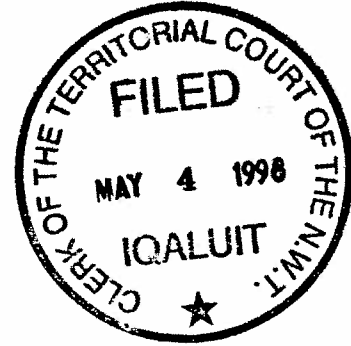
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN



- vs. -



NOAH KOPALIE

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Transcript of the Oral Reasons for Judgment and Sentence by  
The Honourable Judge B.A. Browne, at Iqaluit in the  
Northwest Territories, on Friday, May 1, A.D., 1998.

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APPEARANCES:

Ms. D. Robinson: Counsel for the Crown

Ms. S. Cooper: Counsel for the Accused

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Charge under s. 343(d) of the Criminal Code of Canada

1 THE COURT:

I apologize, first of all, for  
2 delay in my being ready to give this judgment. I  
3 rewritten my judgment many times and have struggle  
4 many hours with the issues that have been raised w  
5 regard to this sentencing hearing.

6 Solomonie Kuksiak and Noah Kopalie have both  
7 guilty to charges of armed robbery. My job today  
8 impose an appropriate sentence. Counsel for the t  
9 accused have argued that the minimum penalty provi  
10 for this offence in the Criminal Code is  
11 unconstitutional having regard to various argument  
12 that have been made.

13 Pursuant to the provisions of the Criminal Co  
14 amended as at January, 1996, there is a minimum  
15 sentence of four years imprisonment provided for  
16 offence of armed robbery under Section 344 of the  
17 Criminal Code, and that section reads:

18 "Everyone who commits robbery is guilty of a  
19 indictable offence and liable, where a  
20 firearm is used in the commission of the  
21 offence, to imprisonment for life and to a  
22 minimum punishment of imprisonment for a ter  
23 of four years."

24 Counsel for the accused have argued that the  
25 minimum sentence prescribed in the legislation is  
26 unconstitutional because is violates Section 12 c  
27 Charter of Rights, which provides that:

"Everyone has the right not to be subjected  
to any cruel and unusual treatment or  
punishment."

1           I am grateful to counsel for their well-researched  
2           and well-presented arguments, both written and oral.  
3           They have been helpful to me in grappling with this  
4           difficult issue.

5           In considering the arguments that have been put  
6           forward by counsel, it is appropriate to discuss the  
7           circumstances of the crime, the personal circumstances  
8           of each of the accused, and the factors that are  
9           relevant to the sentences of the two accused before the  
10          Court to put the arguments on the constitutional issues  
11          into the proper context.

12          Both Mr. Kopalie and Mr. Kuksiak have pled guilty  
13          to a charge of armed robbery. On the evening of the  
14          31st of January, 1996, the two accused had been  
15          drinking alcohol. They obtained and loaded a gun and  
16          went by skidoo to a 24-hour convenience store in  
17          Iqaluit. Kuksiak, who was masked, went into the store  
18          with the loaded gun. He asked the clerk for money, and  
19          pointed the gun at the clerk. When the money was not  
20          forthcoming, he fired a shot into the ceiling of the  
21          store. The clerk grabbed the gun, and in the ensuing  
22          struggle, took the gun away from Mr. Kuksiak. Kuksiak  
23          then left the store, and he and Kopalie left the scene  
24          by foot as the skidoo they had come on would not  
25          start. The motive for robbing the store was to obtain  
26          money for drugs and/or alcohol.

27          Mr. Kuksiak is 32 years of age. He has lived

1 common-law with a woman for 13 years, and they are  
2 caring for five children. The pre-sentence report  
3 indicates that the accused has struggled with a  
4 sniffing problem throughout his teenage and adult  
5 life. Since the incident in January, 1996, Mr. Kuksiak  
6 has not been involved in further difficulties and has  
7 taken some steps to identify and address the problems  
8 in his life.

9 The pre-sentence report indicates that Mr. Kuksiak  
10 is very involved in the care and upbringing of his  
11 children. Any sentence imposed will, therefore, affect  
12 many people, including family members and others in the  
13 community that he comes from.

14 The report also indicates that Mr. Kuksiak  
15 completed a painting and decorating course through  
16 Arctic College in Broughton Island and may have future  
17 employment with the Broughton Island Housing Authority  
18 even after he's completed the sentence imposed as a  
19 result of this incident. The report indicates that  
20 that course was completed during the time that he was  
21 released on these charges.

22 Mr. Kuksiak has, during the two years since the  
23 incident, been able to obey the restrictive terms of  
24 his undertaking. He cooperated with the police from  
25 the time of his arrest, he provided a statement to the  
26 police at the time of his arrest, and I believe that  
27 included a re-enactment. He has testified against the

1 co-accused and has pled guilty to the charge without  
2 putting the Crown to any proof of the allegations  
3 against him. He also cooperated in the preparation of  
4 the pre-sentence report, which obviously is to his  
5 benefit.

6 The pre-sentence report also indicates that  
7 Mr. Kuksiak is remorseful or sorry for his actions, he  
8 accepts responsibility for what he did and is aware  
9 that a lengthy jail sentence will follow. Also in the  
10 report, there are indications that Mr. Kuksiak  
11 recognizes the fear and harm that he caused to the  
12 victim.

13 After the incident and his apprehension, he has  
14 taken some steps to deal with the problems that may  
15 have led to the commission of the offence. His guilty  
16 plea has also saved the Court significant time and  
17 money, which should be recognized in the sentence  
18 imposed.

19 Mr. Kuksiak does have a criminal record covering  
20 the period 1988 to 1993. He was sentenced to jail on  
21 one occasion on a break-and-enter charge in 1990 and  
22 served one year. There is also a ten-day sentence  
23 imposed on an assault charge in 1988. All of the other  
24 sentences imposed on Mr. Kuksiak do not involve periods  
25 of time in jail, but rather, probation or fines.

26 It is obvious from the record that many efforts  
27 have been made to help Mr. Kuksiak in the past in

1 various forms from jail to probation, and  
2 unfortunately, those efforts have not been successful  
3 and have culminated in the very serious charge before  
4 the Court today.

5 It is important to note, as well, that Mr. Kuksiak  
6 is an aboriginal offender from a small community in the  
7 soon-to-be territory of Nunavut. There are no federal  
8 jails within this territory nor within the Northwest  
9 Territories. A federal jail sentence will likely  
10 result in Mr. Kuksiak's transfer to a southern  
11 penitentiary, far from his culture, language, family,  
12 friends, and country food. It is likely if he is  
13 sentenced to a federal jail that he will not have  
14 access to traditional counselling as he would in the  
15 North; he would not have access to Elders and other  
16 ways of dealing with difficulties in a traditional  
17 Inuit way.

18 Mr. Kopalie is 34 years of age. He is a carver by  
19 trade. He is married and has three children.  
20 Mr. Kopalie obviously cares very much for his family,  
21 but is struggling, and has been, with those  
22 responsibilities and other responsibilities.

23 Mr. Kopalie has a significant criminal record  
24 dating from 1979 to 1996. The record includes  
25 convictions relating to property crimes and crimes of  
26 violence. I can only reiterate that many efforts have  
27 been made to assist Mr. Kopalie over the years, and

1 none of those efforts have been successful in bringing  
2 his difficulties with the law to an end. Mr. Kopalie  
3 has served time in jail on a number of occasions, and  
4 has also been on probation a number of times as well.

5 While released and waiting for this charge to be  
6 dealt with, Mr. Kopalie was convicted of an assault  
7 that arose subsequent to the robbery charge and was  
8 sentenced to a period of jail on that charge.

9 Mr. Kopalie's guilty plea is worth some credit.  
10 His guilty plea was entered after a lengthy preliminary  
11 inquiry, but the guilty plea is worth some credit.

12 Mr. Kopalie has, as well, been detained in  
13 custody, and I believe it is approximately six months  
14 as a result of the reserve that I took to write this  
15 judgment on the charge, as a result of his undertaking  
16 being revoked when the intervening charge occurred. He  
17 was initially released on an undertaking, but as a  
18 result of the other charge, did spend, now, about six  
19 months in custody waiting for this charge to be finally  
20 concluded.

21 Mr. Kopalie is also an aboriginal offender from  
22 the community of Iqaluit. He will encounter similar  
23 difficulties if sent to a southern penitentiary; that  
24 is, he will be far away from family, traditional  
25 methods of counselling, he will probably not have  
26 access to visits, country food, culture, and the  
27 language that he no doubt speaks in the home.

1           It is clear from Mr. Kopalie's record that he has  
2 struggled with an alcohol problem for many years in his  
3 life, and no doubt, alcohol was a contributing factor  
4 to many of the convictions that are recorded on his  
5 criminal record.

6           It is difficult to make any significant  
7 distinction between the involvement of the two accused  
8 with regard to the robbery. Although it was  
9 Mr. Kuksiak who went into the store and fired the gun,  
10 Mr. Kopalie provided the material necessary to carry  
11 out the robbery; that is, the gun, the ammunition, and  
12 the skidoo. Both accused were involved in the planning  
13 and carrying out of the robbery, and I make no  
14 distinction between the involvement of the two for the  
15 purposes of sentencing.

16           Counsel on behalf of Mr. Kuksiak and Mr. Kopalie  
17 have argued that the Court should find that the  
18 mandatory minimum sentence required on a charge of  
19 armed robbery is unconstitutional, as the punishment  
20 constitutes cruel and unusual punishment. The analysis  
21 required to address this argument is set forth in the  
22 cases of Smith and Goltz, both decisions of the Supreme  
23 Court of Canada.

24           The first consideration is, is the legislature  
25 pursuing a valid purpose in imposing that minimum  
26 punishment? It is conceded by both defence counsel  
27 that the restriction on firearms and the strict



1 sentencing regime regarding the use of firearms in a  
2 criminal offence is a valid legislative purpose.

3 The second consideration is, is the punishment  
4 grossly disproportionate to the appropriate penalty,  
5 having regard to the usual factors that would be taken  
6 into account in any sentencing hearing? This  
7 requirement has been divided into two parts for  
8 consideration. First, is the minimum mandatory  
9 punishment unconstitutional; that is, cruel and unusual  
10 on the facts before the Court? Secondly, is the  
11 minimum mandatory punishment unconstitutional based on  
12 reasonable hypotheticals, which is the basis for the  
13 decision in the Supreme Court of Canada decision,  
14 Smith.

15 I will discuss the second test first. I am unable  
16 to accede to the arguments put forward by the defence  
17 that the hypotheticals they have proposed would  
18 necessarily result in a charge of armed robbery being  
19 laid and a sentence less than the prescribed minimum  
20 being imposed.

21 A charge of armed robbery presumes the intended  
22 use of a firearm to harm or intimidate another person  
23 to gain some advantage. The circumstances that support  
24 a charge of armed robbery are not as far-ranging as  
25 those that could support a charge of importing, as in  
26 Smith. That minimum sentence was held to be  
27 unconstitutional.

1           In the recent case of Bill from the B.C. Supreme  
2 Court, the manslaughter minimum sentence was held to be  
3 unconstitutional based on actual sentences that were  
4 imposed for manslaughter charges, and Piscione, which  
5 dealt with failure to file income tax returns.

6           The charge of armed robbery is a very serious  
7 crime and would certainly demand a significant  
8 sentence. Sentences in the past have usually ranged  
9 between two and six years. The minimum mandatory  
10 sentence has not changed significantly the kind of  
11 sentences that were regularly imposed on offenders for  
12 these kinds of offences.

13           I am not prepared to make a finding that Section  
14 344 of the Criminal Code is unconstitutional based on  
15 the hypotheticals proposed.

16           Returning to the first part of the test, is the  
17 minimum mandatory unconstitutional on the facts before  
18 the Court? This test involves a consideration of  
19 whether the sentence required by law is so grossly  
20 disproportionate to the sentence that might otherwise  
21 being imposed as to constitute cruel and unusual  
22 punishment.

23           I am summarizing in this paragraph a number of the  
24 phrases that have been taken out of the various cases  
25 that have dealt with this issue:

26           Is the required minimum punishment so  
27 excessive as to outrage the standards of  
decency?

1 To invoke the unconstitutionality of the  
2 minimum penalties section, the penalty must  
be more than merely excessive.

3 Where minimum sentences are required by law,  
4 the imposition of those sentences may not  
perfectly reflect the appropriate principles  
5 of sentencing, but the greater goal of the  
protection of society.

6 The imposition of severe penalties in certain  
7 cases is paramount, and in the case of a  
crime involving the use of a firearm,  
8 understandable.

9 The Charter exemption should not be used as a tool  
10 that allows legislation to be tinkered with, but must  
11 only be used to interfere with legislation in clear and  
12 unequivocal terms.

13 In reviewing the principles that other Courts have  
14 applied to the discussions of cruel and unusual  
15 punishment and whether appropriate sentences are  
16 grossly disproportionate to the minimum required  
17 sentence, it is also important to point out a couple of  
18 other sections of the Criminal Code. Section 718.2(e),  
19 is a legislative factor that must be taken into account  
20 in imposing a sentence. A Court that imposes the  
21 sentence shall take into consideration the following  
22 principles, and I refer, for the purposes of this  
23 judgment, to paragraph (e):

24 "All available sanctions other than  
25 imprisonment that are reasonable in the  
26 circumstances should be considered for all  
offenders, with particular attention to the  
circumstances of aboriginal offenders."

27 That section clearly points out that the

1 circumstances of aboriginal offenders must be  
2 considered carefully, and presumably, that's because of  
3 the very high incarceration rate involving aboriginal  
4 offenders.

5 The other section that is referred to in the Wust  
6 case, particularly, is Section 719(3) of the Criminal  
7 Code, which is also a legislated factor to consider in  
8 imposing a sentence. That section reads:

9 "In determining the sentence to be imposed on  
10 a person convicted of an offence, a court may  
11 take into account any time spent in custody  
12 by the person as a result of the offence."

13 All of those legislative factors to consider in  
14 imposing a sentence are important in the considerations  
15 with regard to these two matters.

16 In assessing the appropriate sentence for  
17 Mr. Kuksiak, I have struggled with the credit that  
18 should be given to him for his guilty plea. He  
19 indicated that a guilty plea would be entered shortly  
20 after his apprehension, and he must be given  
21 appropriate credit for that.

22 He has cooperated with the authorities at every  
23 level in providing a statement to the police upon his  
24 apprehension and in providing testimony against the  
25 co-accused, without which the co-accused may not have  
26 been implicated or convicted of the charge.

27 Particularly with regard to his testimony against  
Mr. Kopalie, that is significant because that may well

1           affect the way his sentence is served because of the  
2           concerns for his safety.

3           It is imperative that any accused receive  
4           significant credit on sentence for that kind of  
5           cooperation. Society would agree that solving crimes,  
6           apprehending those involved in crimes, and the entry of  
7           prompt guilty pleas are all legitimate factors that  
8           should be recognized in imposing a proper sentence.  
9           Without proper credit being given for those actions,  
10          there is little incentive for guilty pleas or  
11          cooperation with the authorities, and particularly,  
12          testimony in court.

13          With regard to Mr. Kopalie, it is significant in  
14          recognizing that he has spent some time in custody  
15          awaiting these charges to be dealt with. The case of  
16          Wust that I mentioned, the decision of the British  
17          Columbia Supreme Court, is instructive. In that case,  
18          the Judge held that under all of the circumstances, a  
19          sentence of four-and-a-half years was appropriate on a  
20          charge of armed robbery, but having regard to the time  
21          that the accused had spent in jail, the sentence was  
22          reduced to three-and-a-half years. I am not aware if  
23          that decision has been appealed.

24          Perhaps I should note at this time, as well, that  
25          that case, from all of the cases that I have had the  
26          opportunity to review, was the only case of armed  
27          robbery that actually imposed something less than the

1 required minimum sentence.

2 With regard to the sentence involving Mr. Kuksiak,  
3 the minimum sentence of four years presumes a robbery  
4 and presumes the use of a firearm in the planning that  
5 would go into the commission of that crime.

6 The aggravating factors that must be considered  
7 are that a shot was fired, that a mask was worn, and  
8 that Kuksiak has a criminal record, as I have noted  
9 above.

10 In the case of Mr. Kuksiak, there are significant  
11 mitigating factors, and I will just summarize them as  
12 they have been discussed in detail already. The early  
13 guilty plea is an important factor that must be taken  
14 into account on the sentence, his cooperation with the  
15 police, his testimony against the co-accused, and the  
16 difficulties that that may cause him while he is  
17 serving his sentence. It is also important to note  
18 that aboriginal offenders should be carefully  
19 considered when sentences are imposed, and that the  
20 jails that are available to serve federal terms are  
21 very far from here.

22 Having regard to all of the factors noted above, I  
23 am satisfied that a proper sentence for Mr. Kuksiak is  
24 three years in the penitentiary. I am satisfied that  
25 having regard to all of the factors that I have  
26 mentioned above, a statutory exemption from the  
27 statutory minimum sentence provided in Section 344 is

1 appropriate, as the imposition of a four-year sentence  
2 would not properly address all of the principles of  
3 sentencing in this case, particularly, his significant  
4 cooperation with the authorities.

5 I am satisfied that society would clearly  
6 recognize that the need to cooperate with authorities  
7 is essential to the proper administration of justice,  
8 and that in all of the circumstances of Mr. Kuksiak,  
9 the imposition of the statutory minimum sentence would  
10 be grossly disproportionate to the appropriate sentence  
11 having regard to all the facts that I have mentioned.

12 With regard to Mr. Kopalie, I would reiterate that  
13 the minimum sentence of four years presumes a robbery  
14 and it presumes the use of a firearm and the planning  
15 that would go into the commission of that crime.

16 With regard to Mr. Kopalie, the aggravating  
17 factors are that he has a significantly more serious  
18 criminal record than Mr. Kuksiak, and he was involved  
19 in further offences during the time that he was  
20 awaiting disposition on this charge. The other  
21 factors, as well, that were mentioned in relation to  
22 Mr. Kuksiak, that there was planning for a mask to be  
23 worn and that a shot was fired, are also aggravating  
24 factors in dealing with Mr. Kopalie's sentence.

25 The mitigating factors in dealing with  
26 Mr. Kopalie's sentence are that there was, as I say, a  
27 late guilty plea. Mr. Kopalie's guilty plea is worth

1 something, although as I have indicated, it was after a  
2 lengthy preliminary inquiry. Mr. Kopalie has spent  
3 about six months in custody awaiting disposition of his  
4 charge. He is, as well, an aboriginal offender, and  
5 all of the factors that should be taken into account,  
6 including the location of the jails where someone would  
7 serve a federal penitentiary sentence, must be taken  
8 into account as mitigating factors with regard to his  
9 sentence.

10 Having considered all of those factors and  
11 balancing them, the proper sentence with regard to  
12 Mr. Kopalie is four years in a federal penitentiary.

13 Having regard to that decision, there is no need  
14 to discuss whether or not he may be entitled to a  
15 constitutional exemption.

16 Mr. Kopalie and Mr. Kuksiak, please stand up.

17 Mr. Kopalie, Mr. Kuksiak, I have had to deal with  
18 some, I think, complicated legal issues in dealing with  
19 the arguments that your lawyers have made in front of  
20 me.

21 Mr. Kuksiak, with regard to your charge, the  
22 sentence is three years to be served in a federal  
23 penitentiary.

24 Mr. Kopalie, the sentence with regard to your  
25 charge is four years to be served in a federal  
26 penitentiary.

27 Having regard to the sentences imposed on the



1 substantive charges, with regard to each of you, from  
2 the date of your release from custody, neither of you  
3 shall have possession of firearms or ammunition within  
4 any community in the Northwest Territories for a period  
5 of ten years.

6 I make that order to prohibit these two  
7 individuals from having guns within a community.  
8 However, having regard to both of them being aboriginal  
9 people from this region and having regard to the  
10 significant sentences I have imposed on the armed  
11 robbery charges, I am prepared to allow them to  
12 continue hunting once they have served their  
13 sentences.

14 Mr. Kopalie and Mr. Kuksiak, I hope that while you  
15 serve your sentences, you have learned that firearms  
16 must be treated with respect and that they cannot be  
17 abused, and I hope that when you return to your  
18 communities, you will treat firearms with proper  
19 respect.

20 Just in closing, I have spent many, many hours  
21 struggling with these issues and the sentences that are  
22 appropriate for these individuals. I hope that the  
23 sentences that I have imposed today will, as Parliament  
24 hopes, send a message to all the people of the  
25 communities in this region and other northern regions  
26 where guns are a part of everyday life and are readily  
27 available to individuals; that is, if guns are used in

1 the commission of crime, the penalties are severe, and  
2 hopefully, those sentences will discourage others from  
3 being involved in similar activities.

4 I believe that concludes these matters.

5 (AT WHICH TIME THE PROCEEDINGS CONCLUDED)

6 .....


7

8 Certified correct to the best of  
9 my skill and ability,

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\_\_\_\_\_  
Tracey Hoffman,  
Court Reporter

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