

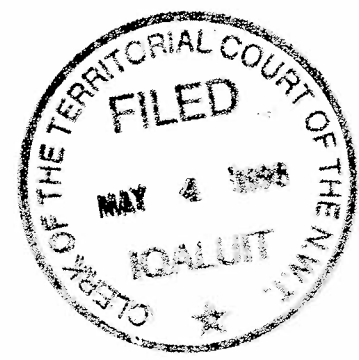
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN



- vs. -



SOLOMONIE KUKSIAK

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.

APPEARANCES:

Ms. D. Robinson: Counsel for the Crown

Ms. S. Cooper, acting as agent
on behalf of V. Foldats, Esq.: Counsel for the Accused

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

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

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

13 Pursuant to the provisions of the Criminal Code
14 amended as at January, 1996, there is a minimum
15 sentence of four years imprisonment provided for the
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 an
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 term
23 of four years."

24 Counsel for the accused have argued that the
25 minimum sentence prescribed in the legislation is
26 unconstitutional because it violates Section 12 of the
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
5 perfectly reflect the appropriate principles
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."

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

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

21 He has cooperated with the authorities at every
22 level in providing a statement to the police upon his
23 apprehension and in providing testimony against the
24 co-accused, without which the co-accused may not have
25 been implicated or convicted of the charge.
26 Particularly with regard to his testimony against
27 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

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

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Tracey Hoffman,
Court Reporter

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