

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

JAMES GEORGE THOMAS

**Transcript of the Trial Decision delivered by the Honourable
Justice A.M. Mahar, sitting in Yellowknife, in the Northwest
Territories, on the 16th day of November, 2021.**

APPEARANCES:

D. Praught: Counsel for the Crown (in person)

S. Straub:

J. Hale: Counsel for the Defence
(via videoconference)

Charges under s. 235(1) and s. 344 of the *Criminal Code*

**There is a ban on publication, broadcast, or transmission in any way of the evidence,
submissions of counsel, exhibits, and reasons heard or filed at the Respondent's
trial, beginning 120 days prior to the commencement of Levi Cayen's trial in the**

Supreme Court, and ending after the jury retires to consider its verdict.

INDEX

PAGE

RULINGS, REASONS

Reasons for Judgment

1

1 NOVEMBER 16, 2021

2 THE COURT: On the morning of December 28th, 2017,
3 a snowplough was clearing the Wilderness Lodge Road
4 on the K'at'l'odeeche First Nation. The road is a private
5 access road to the lodge with a gate at the entrance.
6 When the snowplough driver reached the gate, he
7 found it closed with a chain wrapped around the end
8 but the lock undone. The driver opened the gate and
9 commenced clearing the road. Approximately one
10 kilometre in, he came upon a damaged Mazda sedan
11 face in against the snowbank. All the windows were
12 basically smashed. Inside he found the frozen body of
13 Alexander Norwegian. Alexander was 25 years old at
14 this time. The basic outline of what happened in this
15 case is clear and unchallenged by the defence.

16 Alex Norwegian had returned to Hay River near
17 the end of December 2017. He had been living in
18 Edmonton where he was involved in the crack cocaine
19 trade both as a user and as a low level dealer. He
20 drove up in an older Mazda sedan that had been
21 purchased by his father, Roy. His plan was to spend
22 Christmas with his family and to make some money
23 dealing drugs. He used an area on Lagoon Road to
24 stash his drugs and used a location known as the
25 Portage on Wilderness Lodge Road to conduct drug
26 transactions from the Mazda. This location is quite
27 isolated, being on a private gated road.

1 On December 26th he came into contact with
2 Sasha Cayen, Tyler Cayen and the accused, James
3 Thomas. On the first occasion, James Thomas drove
4 Sasha to the Portage where Alex sold her a gram of
5 crack cocaine.

6 Later that evening, Alex Norwegian got his car
7 stuck in a snowbank. He called Sasha Cayen. She
8 and Tyler drove with James Thomas in his pickup truck
9 to assist him. The three of them had been socializing
10 at James Thomas' residence. They pulled Alex's car
11 out of the snowbank and he gave Sasha a small piece
12 of crack and a few dollars.

13 The three of them returned to the Thomas
14 residence where they were joined by an intoxicated
15 Levi Cayen. A plan was made to rob Alexander
16 Norwegian out at the Portage. Sasha Cayen would set
17 up a buy at that location where Levi Cayen and James
18 Thomas would rob him. They decided to travel by
19 snowmobile because Alex would recognize James
20 Thomas' truck from earlier in the evening. Tyler Cayen
21 decided not to join in the plan because Alex was his
22 cousin.

23 Levi Cayen and James Thomas changed into
24 old clothes in a further effort to avoid being recognized.
25 They left on James Thomas' snowmobile.

26 They arrived at the Portage and found Alex
27 Norwegian in the Mazda. James Thomas had a small

1 wooden bat and Levi Cayen had something more
2 substantial, either a metal bar or a bat. Levi hit all the
3 windows in the vehicle and smashed most of them. He
4 also assaulted Alex with the weapon causing serious
5 injuries to his head and neck. James Thomas
6 searched the inside of the vehicle. I will deal with the
7 rest of what occurred at the Portage when I discuss my
8 findings of fact which are more controversial.

9 They left the Portage across the ice and
10 returned to James Thomas' house. James Thomas
11 told Sasha Cayen and Tyler Cayen that Levi had gone
12 too far and told Levi to go to the Rooster, a local
13 convenience store, to tell the police that they had seen
14 a drunk driver at the location of the robbery. Levi did
15 this, but his call was unclear and the police did not
16 follow up. A number of items, including clothing, were
17 burned in the woodstove.

18 A short time later, James Thomas took Tyler
19 Cayen in his truck to the Lagoon Road to look for Alex
20 Norwegian's stash of drugs.

21 I move on now to findings of fact. I make these
22 further findings of fact; where they are pivotal or
23 significantly aggravating, I find that they have been
24 proven beyond a reasonable doubt. Where I refer to
25 evidence in reaching these conclusions, I have
26 accepted that evidence.

27 **James Thomas was actively involved in planning the**

1 **robbery**

2 While I suspect that Sasha Cayen played a
3 larger role than she admitted to in her evidence, it is
4 clear from all the evidence that James Thomas was not
5 an indifferent or reluctant participant. Both Sasha and
6 Tyler gave this evidence. It was either his suggestion
7 or he was one of the main instigators. He looked for
8 old clothes so they could disguise themselves. He
9 brought a rope. He decided what weapons to use and
10 drove the skidoo they used to get there. After the
11 robbery, he took Tyler to the Lagoon Road to search for
12 the stash of drugs.

13 One of the odder aspects of this case is that the
14 two actual robbers were not crack cocaine users. Levi
15 Cayen was a hard drinker going through a difficult time
16 with his girlfriend, and James Thomas used meth. Why
17 the accused decided to do this, we'll never know.
18 Maybe he wanted money. Perhaps he hoped to get
19 some drugs for his girlfriend who was a cocaine user;
20 but decide to do it, he did.

21 **They dummy-locked the gate on the way to the meeting at**
22 **the Portage**

23 The reason this was done was not clear. I find
24 for these purposes that it was done to avoid being
25 disturbed in the act of robbing the victim and not to stop
26 the victim from leaving the area or stop anyone from
27 finding him after. I accept that leaving it in this state

1 was not done with malice.

2 **Levi Cayen was significantly more intoxicated than James**
3 **Thomas. The accused had been consuming alcohol but**
4 **there is nothing in the evidence of either Tyler or Sasha**
5 **Cayen to suggest that he was anything more than slightly**
6 **impaired. Levi Cayen, on the other hand, had been**
7 **drinking for days.**

8 **Levi Cayen caused most of the injuries suffered by Alex**
9 **Norwegian.**

10 I have made limited use of the statement of Levi
11 Cayen. His testimony during the trial that he was the
12 lone assailant was completely incredible and ridiculous,
13 as acknowledged by the defence. His statement to the
14 police that he gave shortly after his arrest was largely
15 self-serving and I have given very limited weight to his
16 attempts to minimize his involvement to the detriment of
17 the accused. He did, however, provide some details
18 which are either neutral or helpful to the defence which
19 I have taken into account, as well as some other pieces
20 of information which I have accepted because they
21 align with the rest of the evidence.

22 James Thomas was armed with a small wooden
23 fish knocker that broke when it struck the vehicle. It
24 was found in the vehicle. The only forensic evidence
25 on it were drops of blood which made sense given the
26 location where it was found. There was no evidence to
27 suggest that it had been used to assault the victim.

1 Levi Cayen was armed with either a metal bar
2 which was never found or the aluminum bat found later
3 in the residence of the accused, whichever one it was
4 makes no difference. There was a suspicious drop of
5 blood on the bat, perhaps the bat had been cleaned.
6 The bat did not match paint samples that were taken
7 from the vehicle. But it is also quite surprising that the
8 bat would have been referred to earlier in evidence as
9 having been taken as a weapon.

10 Whatever weapon Levi Cayen used, it was
11 significantly more substantial than the weapon wielded
12 by Mr. Thomas, and Levi used this weapon to smash
13 virtually all the windows in the car as well as to inflict
14 the serious injuries to the victim's head and neck. He
15 acknowledged this in his statement more or less and
16 the rest of the evidence points in this direction as well.

17 **James Thomas knew that Levi was beating the victim and**
18 **expected violence to take place during the robbery. He**
19 **did not expect Levi to go as far as he did.**

20 Some violence was clearly intended by the
21 accused. Why else would he have taken weapons and
22 rope to the meeting? As I said, I am willing to accept
23 that Levi Cayen was the primary assailant and that he
24 caused more injuries than James Thomas expected. I
25 do not accept that James Thomas was unaware of
26 what was going on because he was too busy searching
27 the car.

1 There is no credible evidence to suggest this. It
2 is purely speculative. It also doesn't make sense. Alex
3 Norwegian was beaten and interrogated. James
4 Thomas was part of that. Legally speaking, James
5 Thomas was a party to the violence inflicted on the
6 victim.

7 **There is no evidence of an actual intention to kill on the**
8 **part of either of the assailants.**

9 The victim was badly injured by the beating. He
10 suffered significant blows to the head and his condition,
11 left untreated, was life threatening.

12 I do not find that death was likely or that the
13 extent of his injuries, such as they were, was
14 intentional. When I say "likely", I mean in a legal sense.
15 The evidence suggests that the intention of both parties
16 and specifically James Thomas was to attack the
17 victim, steal whatever drugs and money he had on him,
18 force him to reveal the location of his stash and then let
19 him go.

20 **The victim's coat was taken during the robbery and later**
21 **burned.**

22 I accept Sasha Cayen's evidence that one of the
23 items James Thomas burned in the woodstove was the
24 victim's Carhartt coat. The coat was taken from the
25 victim during the robbery. I do not believe this was
26 done to harm the victim. This does not connect
27 logically to allowing him to remain in his vehicle with

1 presumably the heater on. I suspect that it was taken
2 in order to search it more thoroughly for drugs and
3 cash. Whatever the reason, the effect was to make the
4 victim substantially more vulnerable to the cold and is
5 something the accused would have been clearly aware
6 of when he left the scene.

7 **The rope was used to confine Alex Norwegian.**

8 The autopsy showed clear indications of ligature
9 use on both the neck and wrist. The pathologist was of
10 the opinion that a rope was used. He conceded on
11 cross-examination that it was possible that the marks
12 could have been caused by friction from the tugging of
13 clothing.

14 We know James Thomas took a rope with him
15 to the robbery. What appears to be the burned
16 remnants of a rope was found in the woodstove. The
17 search of the Lagoon Road location is evidence that
18 Alex Norwegian must have provided this information to
19 James Thomas and Levi Cayen which he would not
20 have done willingly. I find that the rope was used
21 during an interrogation and that for a time at least Alex
22 Norwegian was forcibly confined.

23 **Alex Norwegian was allowed to leave the location of the**
24 **robbery. He either got back into the car by himself or was**
25 **assisted back into the vehicle.**

26 When the vehicle was found, the keys were in
27 the ignition and the car was in gear. The battery was

1 dead, there was gas in the tank and the blower was on.
2 The tire tracks indicated that the car had left the
3 Portage, crossed the road at an angle and come to a
4 stop against the snowbank on the far side of the road.
5 There was no indication that it had backed up or
6 otherwise moved after coming to a stop.

7 On this issue, Levi Cayen's statement is helpful.
8 The assertion in his statement that the victim had been
9 allowed to leave in his vehicle and did so under his own
10 volition is in keeping with the rest of the evidence. That
11 he had to try to get the car in gear twice before he was
12 able to leave also makes sense given the nature of the
13 injuries he had suffered.

14 The only reasonable conclusion is that the victim
15 lost consciousness while driving and came to a stop
16 against the snowbank while the car was in gear. This
17 caused the car to stall, as all manual shift cars would
18 do in a situation like that, and the battery was quickly
19 drained by the blower and the lights afterward.

20 **The skidoo used in the robbery belonged to the accused.**
21 **Other than Levi using it for a quick trip to his house**
22 **before the robbery and for the drive to the Rooster to call**
23 **the RCMP, the accused was the operator of the vehicle.**

24 There is no evidence otherwise, nor does it
25 make any sense that the accused would have let the
26 intoxicated Levi do most of the driving. He drove the
27 skidoo.

1 **The accused knew the victim was incapacitated when he**
2 **left the scene on the skidoo.**

3 I have come to this conclusion based on several
4 pieces of evidence including the statement of Levi
5 Cayen. I do not accept that Levi was concerned about
6 the victim's welfare and James Thomas was not. I am
7 not saying this was not the case, but I am not
8 convinced by self-serving aspects of the statement that
9 are not corroborated by other evidence. I do, however,
10 find that the accused knew that the victim was unable
11 to drive his vehicle by the time the accused and Levi
12 left the scene.

13 There are a number of reasons why I find this.
14 Along with the statement, the following lead me to this
15 conclusion: When they returned to the residence, the
16 accused told Sasha and Tyler that Levi "had gone too
17 far." He told Levi to go to the Rooster to call the RCMP
18 so they would find the victim. He decided to burn the
19 evidence which he would not have been in a hurry to
20 do if he had believed that the victim was on his way
21 home. He decided to search the location on Lagoon
22 Road which I conclude was provided by the victim. He
23 would not have done this if he had believed that the
24 victim was in any shape to retrieve the drugs himself.
25 He certainly would not have waited until after burning
26 the clothes.

27 I find that James Thomas knew the vehicle was

1 stopped against the snowbank when he decided to
2 leave the scene. He knew that Alex Norwegian was
3 too injured to be able to drive his car. He knew all the
4 windows were smashed and that the victim was
5 missing his jacket on a night when the temperature was
6 in the minus twenties. I am not able to conclude that
7 he knew that the vehicle had stalled. The workings of
8 manual shift automobiles are no longer common
9 knowledge and the lights, while likely dimmed, would
10 have remained on.

11 I am also willing to accept for the purpose of this
12 analysis that the accused simply forgot about the gate
13 to the road being closed and did not leave it in that
14 state to make the discovery of the victim more difficult
15 for anybody who might have gone looking for him.

16 I move on now to my analysis of these findings
17 of fact. If I could please have a copy of the indictment,
18 Madam Clerk?

19 THE CLERK: Yes, Your Honour.

20 THE COURT: Thank you. James George Thomas is
21 charged as follows: On count 1, that between the 26th
22 day of December in the year 2017 and the 27th day of
23 December in the year 2017 at the K'atl'odeeche First
24 Nation Reserve, Northwest Territories, did commit first
25 degree murder on the person of Alexander Norwegian
26 contrary to section 235(1) of the *Criminal Code*; and
27 count 2 that between the 26th day of December in the

1 year 2017 and the 27th day of December in the year
2 2017 at the K'atl'odeeche First Nation Reserve,
3 Northwest Territories, did rob Alexander Norwegian
4 contrary to section 344 of the *Criminal Code*.

5 Robbery is a theft with violence. The defence
6 concedes that the robbery charge is made out. It
7 makes no difference in this case that the robbers did
8 not find either what they were looking for or as much of
9 it as they were looking for. It is enough that the victim's
10 coat was taken. In any event, an attempt is as serious
11 as a completed offence in a case like this. I find the
12 accused, James Thomas, guilty of the offence of
13 robbery.

14 Moving on to the other charge, first degree
15 murder can be made out in one of two ways. The
16 Crown must prove that either the killing was planned
17 and deliberate or they must prove that a second degree
18 murder took place in the course of committing another
19 offence which falls on a list of specified offences.
20 These offences include, for example, the killing of a
21 police officer, a correctional officer or a killing during a
22 sexual assault. That list also includes the offence of
23 forcible confinement which is the offence that the
24 Crown is relying on in this case.

25 In order to obtain a conviction of first degree
26 murder against James Thomas, the Crown must prove
27 beyond a reasonable doubt that the death of Alexander

1 Norwegian constitutes a second degree murder and
2 that this murder took place in the course of the
3 commission of the offence of forcible confinement.

4 Second degree murder requires either an actual
5 intention to kill or the intention to cause bodily harm that
6 the accused knows is likely to cause death and the
7 accused is reckless as to whether or not death ensues.

8 As I already said, I do not find that there was any
9 actual intention to kill in this case. The bodily harm
10 inflicted during the robbery in which the accused
11 participated was very serious but not sufficient to allow
12 me to draw the legal conclusion that the accused would
13 have known it was likely to cause death.

14 What this case comes down to is the decision to
15 leave Alex Norwegian at the Portage and its
16 consequences, the consequences that flow from that
17 decision. I suspect, and I am prepared to give the
18 accused the benefit of this suspicion, that he fully
19 intended that Alex Norwegian would be able to leave
20 the Portage and drive home. This was not a
21 reasonable expectation and when this did not happen,
22 James Thomas made the decision to leave him there
23 incapacitated, not dressed for the weather, in a car with
24 no windows on a deserted road in the middle of the
25 night in minus 20 temperatures.

26 At that point in this situation entirely caused by
27 the actions of James Thomas and Levi Cayen, this

1 decision was the one which likely caused the death of
2 Alex Norwegian. He was likely to die under those
3 circumstances. I also find that James Thomas had to
4 be aware of this. The robbery, the injuries, the decision
5 to leave, form a continuous string of actions all of which
6 James Thomas is responsible for, especially so the
7 fatal decision to leave.

8 The mental element or guilty mind in this case
9 falls very close to the line between manslaughter and
10 murder. If Alex Norwegian had been able to drive away
11 and lost consciousness further down the road out of
12 sight, this would have been an extremely serious
13 manslaughter with robbery, but that is not what
14 happened here. I find that the first stage of the
15 requirements for second degree murder is made out,
16 that the accused caused bodily harm to the victim,
17 knowing that this was likely to result in his death. That
18 knowledge was not complete until the decision to leave
19 the Portage, but upon that decision being made, the
20 knowledge was complete. I now move on to consider
21 the issue of recklessness.

22 The requirement that the accused be reckless
23 as to whether or not death ensues is very seldom an
24 issue in murder trials. Typically, the inflicting of the
25 injury and the recklessness are one and the same.
26 This case is somewhat different. It took a long time for
27 the victim to die of exposure to the cold. If the accused

1 had simply left and taken no further steps, then
2 recklessness would be obvious in this case. Here, the
3 accused told Levi Cayen to take his snowmobile and
4 drive to a convenience store to report a drunk driver in
5 the hope that the victim would be found and saved.

6 The accused did not go himself. He entrusted
7 this potentially lifesaving task to the very drunk Levi
8 Cayen who predictably made a mess of it when he
9 made the call. After burning the clothes, he took Tyler
10 Cayen on a search of Lagoon Road looking for the
11 victim's stash of drugs. It would have been a simple
12 thing to drive to the Portage to check on the victim but
13 he did not. If James Thomas had made that call to the
14 RCMP, if he had gone to check on the victim, I may
15 have been willing to find that he was not reckless about
16 the death that ensued, but he was reckless and the
17 essential elements for second degree murder are made
18 out.

19 I now have to consider the forcible confinement
20 and the possibility of first degree murder. In order to
21 find the accused guilty of first degree murder, I would
22 first have to find that this death took place in the course
23 of the forcible confinement. This requirement is not
24 absolutely strict in terms of timing and causation but
25 there does need to be a causal connection or nexus
26 between the second degree murder and the
27 confinement.

1 While I have found that at some point the victim
2 was forcibly confined, I do not find beyond a reasonable
3 doubt that the forcible confinement was
4 contemporaneous with the serious injuries inflicted on
5 the victim which appear to have taken place before he
6 was questioned. I also have found that he was fully
7 released and operating under his own volition when he
8 drove into the snowbank. He wasn't in good shape, he
9 was badly injured, but he was released. On this issue,
10 the statement of Levi Cayen is very helpful to the
11 accused in that the release of the victim is clear. I
12 accept the statement on this issue. In any event, on
13 the totality of the evidence, I do not find that the Crown
14 has proven that the forcible confinement was
15 sufficiently linked to the death of Alex Norwegian to
16 raise this case to first degree murder. I therefore find
17 the accused guilty of second degree murder.

18 Counsel, I want to make it clear that this case
19 does fall just over the line between manslaughter and
20 murder. The aggravating circumstances of the robbery,
21 the assault on the victim, are circumstances that I
22 would have taken into account in imposing a very
23 severe sentence for either manslaughter or robbery.
24 But the intention in this case that drives the conviction
25 for murder is the decision to leave, and I say that in
26 terms of the sentences that are possible or the various
27 things that I can do upon a conviction for second

1 degree murder and in terms of the steps that we next
2 take.

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7 **(PROCEEDINGS ADJOURNED TO 10:00 AM, NOVEMBER**
8 **22, 2021, AT YELLOWKNIFE)**

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13 **CERTIFICATE OF TRANSCRIPT**

14 Neesons, the undersigned, hereby certify that the foregoing
15 pages are a complete and accurate transcript of the
16 proceedings transcribed from the audio recording to the best
17 of our skill and ability. Judicial amendments have been
18 applied to this transcript.

19

20

21 Dated at the City of Toronto, in the Province of Ontario, this
22 20th day of January, 2022.

23

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25



26

Kim Neeson

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Principal