

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

JAMES GEORGE THOMAS

Transcript of the Reasons for Sentence delivered by the Honourable Justice A.M. Mahar, sitting in Yellowknife, in the Northwest Territories, on the 15th day of December, 2021.

APPEARANCES:

D. Praught: Counsel for the Crown

S. Straub:

J. Hale: Counsel for the Defence

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.

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RULINGS, REASONS

Reasons for sentence

1

1 DECEMBER 15, 2021

2 THE COURT: This is the end of a long process. We
3 had a five-week trial in this matter. It is a very sad
4 case. If at all necessary, my reasons today should be
5 considered in conjunction with the reasons that I gave
6 at the conclusion of the trial in which I discuss the facts
7 in more detail. What I am going to do now is give a
8 very brief outline of the facts that I found and then go
9 on to the issue of sentence.

10 On Boxing Day in 2017, four young people all of
11 whom were intoxicated to some degree, concocted a
12 stupid and ugly plan to rob a small-time drug dealer of
13 some drugs and some money. He was known to them;
14 not particularly well, but this is a small community and
15 everybody basically knows who everybody else is even
16 though they were not close friends. One of the parties,
17 Sasha Cayen, set up the meet, and James Thomas
18 and Levi Cayen carried out the robbery.

19 James Thomas was not nearly as intoxicated as
20 Mr. Cayen. I do not want to suggest that he was not
21 intoxicated at all. Everybody had been drinking and I
22 believe that that drinking contributed to the terrible
23 judgment that they all exhibited that night.

24 Levi Cayen was significantly impaired, having
25 been drinking for days.

26 James and Levi showed up at the Portage
27 where Alex Norwegian was waiting for Sasha Cayen.

1 They were both armed. Mr. Thomas was also armed
2 with a rope. Mr. Thomas was planning on the possible
3 need for some violence, but he was not planning on the
4 extent of violence that actually occurred.

5 Mr. Cayen appears to have lost it to a certain
6 extent and broke all the windows in the vehicle and
7 then attacked Alex Norwegian with either a metal bar or
8 a bat. Mr. Norwegian was quite badly injured.

9 Although this would not have been obvious to Mr.
10 Thomas. At that point Mr. Norwegian was interrogated
11 as to the whereabouts of his drug stash. This involved
12 the use of a rope at some point. I am not exactly sure
13 how long that went on, but the ligature marks would
14 indicate that at some point at least his wrists and his
15 neck came into contact with the rope.

16 At the end of the assault or the robbery, he
17 either placed himself in his vehicle or was assisted into
18 his vehicle. He was able to put the vehicle into gear
19 with some difficulty and was able to commence driving.
20 He only made it across the road where the vehicle
21 came up against a snowbank and appears to have
22 stalled out.

23 Based on a series of pieces of evidence that I
24 referred to in my decision and I do not propose to go
25 through again, I found that Mr. Thomas would have
26 become aware at this point that Mr. Norwegian was in
27 some difficulty and that is essentially the case that I had

1 before me. I found James Thomas guilty on the
2 offence of second degree murder essentially because
3 of the decision to leave, and I will get into that in a bit
4 more detail shortly, and guilty as well of the robbery
5 which was not contested by defence.

6 The Crown is seeking a sentence of life
7 imprisonment on the second degree murder which is
8 mandatory, with a period of parole ineligibility of 15
9 years. He is also seeking six years on the robbery.
10 Defence agrees with the six years on the robbery but is
11 asking that I impose the mandatory minimum period of
12 parole ineligibility of ten years.

13 I have found as facts that James Thomas
14 neither intended to cause serious injury to Alex
15 Norwegian, nor was aware of the extent of those
16 injuries until shortly before deciding to leave the
17 location of the robbery. He was clearly aware that
18 some violence was likely to be necessary to carry out
19 the robbery, having armed himself with a club and rope
20 for this purpose, and is therefore responsible as a party
21 for the injuries that Alex Norwegian suffered.

22 Those injuries were not the cause of death.
23 What caused the death was the decision to leave Alex
24 Norwegian in an obviously vulnerable condition in
25 freezing temperatures. I did not find that James
26 Thomas intended that the vehicle have all its windows
27 smashed out. I also did not find that he took Alex

1 Norwegian's coat for the purpose of making him more
2 vulnerable to the elements. He was responsible as a
3 party out of principle for those circumstances, however.

4 The highly unusual aspect of this case is that
5 these circumstances that James Thomas took part in
6 creating imposed on him a positive duty to act. Once
7 he became aware that Alex Norwegian might not be
8 able to drive himself to safety, he had a responsibility to
9 make sure that he was not left exposed to the
10 elements. In this way, this case is fundamentally
11 different from the cases provided by the Crown in which
12 the victims were shot, bludgeoned, stabbed and
13 strangled.

14 The factors that the Crown asks me to take into
15 account in order to impose a greater period of
16 ineligibility (found in the *Ryan* decision), are the factors
17 that have led me to conclude that this duty rested on
18 James Thomas as a result of his behaviour during the
19 robbery.

20 It is in this context that the element of
21 recklessness as to whether or not death ensues comes
22 into play, which is actually quite unusual in findings of
23 fact on murder cases. I want to be clear that I found as
24 a fact that sending Levi Cayen out on the snowmobile
25 to phone the RCMP for help was an honest attempt to
26 assist Alex Norwegian, as I also found sending the
27 most intoxicated member of the group on this vital task

1 was reckless. Not driving out to the Portage to make
2 sure that help had arrived was reckless. Leaving Alex
3 there in the first place was reckless.

4 I have stated several times that this case falls
5 just over the line between manslaughter and second
6 degree murder. I respectfully disagree with the
7 suggestion by Crown counsel that it also falls close to
8 the line between second and first degree murder. It
9 does not. The finding of fact that Alex Norwegian was
10 at some point forcibly confined with a rope does not
11 connect causally or temporally with the murder. It
12 played no part in the injuries that made the victim more
13 vulnerable or in the decision to abandon him to the
14 elements.

15 It is a significantly aggravating factor on the
16 charge of robbery, however. As well, the factors listed
17 by the Crown, to the extent that they apply in this case,
18 are also aggravating on the robbery charge while also
19 playing a part in creating the duty to assist.

20 There is no specific burden on the Crown to
21 establish any particularly heinous conduct or character
22 in order for a court to impose a greater than minimum
23 period of parole ineligibility. This issue is one that must
24 be considered on a case-by-case basis and each case
25 is unique. A significant amount of judicial discretion
26 must be exercised.

27 The leading case on the issue of parole

1 ineligibility for second degree murder is *Shropshire*
2 which was considered by the Alberta Court of Appeal in
3 *Ryan*. At paragraphs 53 through 55 of that decision,
4 Justice Picard comments on the suggestion in
5 *Shropshire* that in the median number of cases, the
6 minimum is likely to be imposed.

7 I am going to now briefly read some of Justice
8 Picard's comments. I am to some extent editing out
9 parts that do not apply and are simply parts that deal
10 with her disagreement with a colleague writing a
11 dissenting decision.

12 I read *Shropshire* as recognizing that the 10
13 year minimum period of parole ineligibility is a
14 category by itself.... I read the reference to a
15 "median" as simply recognizing the practical
16 reality that the "ordinary" or "typical" period of
17 parole ineligibility for second-degree murder
18 may well be 10 years.

19 Quoting from *Shropshire*:

20 "To this end, an extension of the period of parole
21 ineligibility would not be "unusual", although it
22 may well be that, in the median number of
23 cases, a period of 10 years might still be
24 awarded."

25
26 What this observation in *Shropshire* recognizes
27 is that, in many cases and indeed maybe half or

1 perhaps even more than half of cases, counsel
2 and the court may well jointly agree that the 10
3 year ineligibility period is fit and proportional.
4 Even without full agreement, the Crown may
5 also refrain from seeking to appeal the
6 imposition of a 10 year parole ineligibility period.
7 In other words, 10 years may well be the result
8 in a disproportionately significant number of
9 cases of second-degree murder. Offenders are
10 often younger people. It should be no surprise if
11 clemency is considered proper in cases where
12 younger offenders have no prior records and
13 have otherwise reasonable prospects for
14 prosocial lives. The cases that reach the appeal
15 courts and the cases that are published in the
16 reporter services....cannot be taken as
17 determinative evidence of sentencing practice.
18 Those cases will likely involve issues of principle
19 worthy of comment and thus be cases with
20 ineligibility periods higher than 10 years. The
21 estimation in Shropshire that perhaps as many
22 cases are likely to involve the minimum period
23 as result in longer periods of ineligibility is quite
24 plausible. Indeed, it reflects common sense. It is
25 wrong, therefore, to characterize 10 years as
26 simply being the minimum available disposition.
27 I adopt this reasoning in this case.

1 James Thomas is an Indigenous offender. He
2 was 25 years old when he committed this offence and
3 he had a short and minor criminal record. He may be
4 on the edge of being considered a youthful first
5 offender, but he is certainly someone for whom a
6 characterization as a career criminal does not apply.
7 He was engaged in the drug trade, although it appears
8 at a low level. His history contained in the thorough
9 Presentence Report is one of hardship and tragic loss.
10 He has a very limited education, although he does
11 appear to be skilled in the trades. He was addicted to
12 methamphetamine and had a long-term issue with
13 alcohol. These are significant factors in a *Gladue*
14 analysis. He has supports in the community. He is
15 very young and he can have a positive future if he
16 wants it. He could have been more eloquent in
17 expressing remorse to the writer of the report, but I am
18 not willing to find that he has none. In fact, I found his
19 comments today sincere and I am quite happy that he
20 made them.

21 Under all the circumstances, I am not prepared
22 to exercise my discretion to raise the mandatory
23 minimum period of parole ineligibility in this case.

24 Mr. Thomas, please stand.

25 On the charge of murder, the sentence is
26 imprisonment for life with no possibility for parole for ten
27 years.

1 On the charge of robbery, the sentence is ten
2 years concurrent.

3 I have decided to -- you can have a seat. I have
4 decided to deviate from the suggestion by both the
5 Crown and the defence. I feel that the robbery in this
6 case was significantly aggravating and in fact led to the
7 series of circumstances or led to the circumstances that
8 ultimately led to the death. I believe that six years was
9 not sufficient to recognize that. Given the life sentence,
10 it has very little impact on Mr. Thomas but these things
11 are important from a proportionality point of view.

12 There will be a DNA order. There will be a
13 firearms order for 10 years under section 109. Given
14 that this awful event was the result of a violent robbery,
15 I am not going to allow a section 113 exemption. Is
16 there anything that I have forgotten, Mr. Praught?

17 D. PRAUGHT: I don't think so, Your Honour, no.

18 THE COURT: Mr. Hale, anything?

19 J. HALE: I don't know if we even need to address the
20 victim surcharge.

21 THE COURT: As Mr. Praught suggested, I do not know
22 that it is even available given when this occurred, but if
23 it is, I am waiving it for reasons of hardship. Mr.
24 Thomas, you have got a long road ahead of you and it
25 is just beginning. I hope that you are able to take
26 advantage of whatever educational opportunities and
27 counselling opportunities are available for you, and I

1 both hope and expect that we will never see you here
2 again.

3 And for the family of Alex Norwegian, I wish that
4 this was the end of things for you. I know you have
5 another proceeding to go through. I can only wish you
6 the best on that journey.

7
8

9
10 **(PROCEEDINGS CONCLUDED)**

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12

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 21st day of January, 2022.

23
24

25 

26 Kim Neeson
27 Principal