*R v Thomas*, 2022 NWTSC 4 S-1-CR-2019-000020

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**JAMES GEORGE THOMAS**

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**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.**

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**APPEARANCES:**

D. Praught: Counsel for the Crown

S. Straub:

J. Hale: Counsel for the Defence

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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.**

**I N D E X**

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**RULINGS, REASONS**

Reasons for sentence 1

DECEMBER 15, 2021

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

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

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

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

James and Levi showed up at the Portage where Alex Norwegian was waiting for Sasha Cayen. They were both armed. Mr. Thomas was also armed with a rope. Mr. Thomas was planning on the possible need for some violence, but he was not planning on the extent of violence that actually occurred.

Mr. Cayen appears to have lost it to a certain extent and broke all the windows in the vehicle and then attacked Alex Norwegian with either a metal bar or a bat. Mr. Norwegian was quite badly injured. Although this would not have been obvious to Mr. Thomas. At that point Mr. Norwegian was interrogated as to the whereabouts of his drug stash. This involved the use of a rope at some point. I am not exactly sure how long that went on, but the ligature marks would indicate that at some point at least his wrists and his neck came into contact with the rope.

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

Based on a series of pieces of evidence that I referred to in my decision and I do not propose to go through again, I found that Mr. Thomas would have become aware at this point that Mr. Norwegian was in some difficulty and that is essentially the case that I had before me. I found James Thomas guilty on the offence of second degree murder essentially because of the decision to leave, and I will get into that in a bit more detail shortly, and guilty as well of the robbery which was not contested by defence.

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

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

Those injuries were not the cause of death. What caused the death was the decision to leave Alex Norwegian in an obviously vulnerable condition in freezing temperatures. I did not find that James Thomas intended that the vehicle have all its windows smashed out. I also did not find that he took Alex Norwegian's coat for the purpose of making him more vulnerable to the elements. He was responsible as a party out of principle for those circumstances, however.

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

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

It is in this context that the element of recklessness as to whether or not death ensues comes into play, which is actually quite unusual in findings of fact on murder cases. I want to be clear that I found as a fact that sending Levi Cayen out on the snowmobile to phone the RCMP for help was an honest attempt to assist Alex Norwegian, as I also found sending the most intoxicated member of the group on this vital task was reckless. Not driving out to the Portage to make sure that help had arrived was reckless. Leaving Alex there in the first place was reckless.

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

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

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

The leading case on the issue of parole ineligibility for second degree murder is *Shropshire* which was considered by the Alberta Court of Appeal in *Ryan*. At paragraphs 53 through 55 of that decision, Justice Picard comments on the suggestion in *Shropshire* that in the median number of cases, the minimum is likely to be imposed.

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

I read Shropshire as recognizing that the 10 year minimum period of parole ineligibility is a category by itself.... I read the reference to a “median” as simply recognizing the practical reality that the “ordinary” or “typical” period of parole ineligibility for second-degree murder may well be 10 years.

Quoting from *Shropshire*:

“To this end, an extension of the period of parole ineligibility would not be “unusual”, although it may well be that, in the median number of cases, a period of 10 years might still be awarded.”

What this observation in Shropshire recognizes is that, in many cases and indeed maybe half or perhaps even more than half of cases, counsel and the court may well jointly agree that the 10 year ineligibility period is fit and proportional. Even without full agreement, the Crown may also refrain from seeking to appeal the imposition of a 10 year parole ineligibility period. In other words, 10 years may well be the result in a disproportionately significant number of cases of second-degree murder. Offenders are often younger people. It should be no surprise if clemency is considered proper in cases where younger offenders have no prior records and have otherwise reasonable prospects for prosocial lives. The cases that reach the appeal courts and the cases that are published in the reporter services....cannot be taken as determinative evidence of sentencing practice. Those cases will likely involve issues of principle worthy of comment and thus be cases with ineligibility periods higher than 10 years. The estimation in Shropshire that perhaps as many cases are likely to involve the minimum period as result in longer periods of ineligibility is quite plausible. Indeed, it reflects common sense. It is wrong, therefore, to characterize 10 years as simply being the minimum available disposition.

I adopt this reasoning in this case.

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

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

Mr. Thomas, please stand.

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

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

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

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

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

THE COURT: Mr. Hale, anything?

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

THE COURT: As Mr. Praught suggested, I do not know that it is even available given when this occurred, but if it is, I am waiving it for reasons of hardship. Mr. Thomas, you have got a long road ahead of you and it is just beginning. I hope that you are able to take advantage of whatever educational opportunities and counselling opportunities are available for you, and I both hope and expect that we will never see you here again.

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

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

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

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

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Kim Neeson

Principal