

SUPREME COURT OF YUKON

Citation: *R. v. Lange*, 2012 YKSC 07

Date: 20120215
S.C. No. 05-01508A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DEAN ERNEST BOUCHER (A.K.A. JOHNS)

AND

MARK LEWIS LANGE

Before: Mr. Justice R.S. Veale

Appearances:

John W. Phelps
Karen Wenckebach and Melissa Atkinson

Counsel for the Crown
Counsel for Mark Lewis Lange

REASONS FOR SENTENCING OF MARK LANGE

INTRODUCTION

[1] In the early hours of December 24, 2004, Dean Boucher, assisted by Mark Lange, beat Robert Olson so severely that he was rendered unconscious and died from his injuries. Mr. Boucher and Mr. Lange were convicted of second degree murder on June 9, 2006. On August 31, 2006, Mr. Lange was sentenced to imprisonment for life with no possibility of parole until he had served 10 years.

[2] On May 17, 2011, the Court of Appeal granted Mr. Boucher and Mr. Lange a new trial. Since that time, Mr. Lange has remained incarcerated in the Whitehorse Correctional Centre.

[3] Pursuant to a sentencing agreement with the Crown, Mr. Lange pled guilty to manslaughter on November 4, 2011. As part of that sentencing agreement, this Court ordered a remand for the assessment of Mr. Lange pursuant to s. 752.1 of the *Criminal Code* to determine whether he may become the subject of a long-term offender application.

[4] On January 15, 2012, Dr. Lohrasbe completed his assessment. He concluded that in December 2004, Mr. Lange was strongly established in a culture of social deviance and steeped in substance abuse. However, he has since taken advantage of treatment programs and no longer presents with overt features of anti-social personality disorder. He has been alcohol- and drug-free for seven years and is motivated to lead a lawful lifestyle. Dr. Lohrasbe says that there is no longer a high risk of Mr. Lange reoffending and is of the opinion that he can be monitored and supervised in the community.

THE OFFENCE

[5] Mr. Lange and his co-accused, Mr. Boucher, both had their sentencing hearings on the same date. Although they were conducted as separate hearings, they both proceeded on the same set of agreed facts. Those facts are reproduced in my decision in *R. v. Boucher*, 2012 YKSC 06, and I am not going to include them again here. On the facts agreed to in both cases, Mr. Lange was a lesser participant in the assault that led to Mr. Olson's death.

THE JOINT SENTENCING SUBMISSION

[6] The Crown and defence have filed a Joint Submission on Sentencing. The submission was based upon Mr. Lange's guilty plea to manslaughter in exchange for a sentence of 10 years, less credit for time served. Dr. Lohrasbe has concluded that Mr. Lange does not present a high risk for violence in the foreseeable future based upon his current presentation and the counselling he has received in federal custody since 2006. Accordingly, the Crown is not applying for a long-term offender designation against Mr. Lange.

[7] As with Mr. Boucher, it is proposed that Mr. Lange receive enhanced 2-to-1 credit for the twenty months of remand custody he served before his first sentencing on August 31, 2006, and enhanced 1.5-to-1 credit for the eight months he was on remand between the Court of Appeal decision and this disposition. This amounts to 52 months of credit for remand time. This is to be added to the time Mr. Lange served in the federal penitentiary; a period of approximately four years and nine months. The result is credit for nine years and one month. Under the agreement in place at the time of his guilty plea, Mr. Lange would have had 11 months remaining on his 10 year custodial sentence. However, in an attempt to provide controls and supports to Mr. Lange in the community, Crown and defence are now presenting a slightly different joint position of a sentence of nine years and four months. Under this joint submission, Mr. Lange would spend three additional months in the Whitehorse Correctional Centre and then be released subject to a probation term of 15 months. This proposal also seeks a lifetime firearm prohibition under s. 109 of the *Criminal Code* and a DNA order pursuant to s. 487.051 of the *Criminal Code*.

ROBERT OLSON

[8] Mr. Olson was a long-time resident of Carcross, Yukon, and the proprietor of the Caribou Hotel. As noted in the companion decision of *R. v. Boucher*, little information was provided to the Court about his circumstances, although a heartfelt victim impact statement was presented by his sister, Lorraine Olson. It is clear that he knew and presumably trusted both accused before his life ended tragically and brutally at their hands. Ms. Olson's statement is reproduced in full in *R. v. Boucher* and it makes poignant observations about the value of human life and the price for taking it.

MARK LANGE

[9] Mr. Lange is 36 years old. His unenviable criminal record starts in 1990, when, as a 14-year-old, he was convicted of assault with a weapon. Fortunately, the weapon was only a BB gun. In the same year, he had three break and enter convictions. He then had a string of possession of stolen property offences, as well as a single conviction for theft under \$1000, and convictions for uttering threats and possession of a prohibited weapon. All of these offences occurred while he was still a youth. His first entries as an adult were convictions in 1995 for impaired driving and failing to comply with probation. In 1997, he broke into an apartment, and, in 1998, he was convicted of possession of a stolen credit card. Also in 1998, he was convicted of a serious assault causing bodily harm, committed while he was not under the influence of alcohol or drugs and, in that same year, he was as well convicted of assaulting his girlfriend. In 2000, he registers convictions for possessing a prohibited firearm with ammunition, failing to comply with an undertaking and failing to attend court. The weapons offence was with respect to a homemade zip gun. In 2002, Mr. Lange was convicted of

trafficking in cocaine and possession of property obtained by crime. In 2003 and 2004, just prior to the homicide of Mr. Olson, he was convicted of further theft offences.

[10] Mr. Lange's biological mother is from Na-Cho Nyak Dun First Nation. He was in foster care in an early age and ultimately adopted by a family that he has maintained a connection with to this day. He was hyperactive as a child and, unfortunately, he was sent away for treatment, which kept him away from his adoptive family. At this time he was struggling with the fact that he was an aboriginal person and his adoptive family was not. When he returned to the Yukon, his adoptive parents had separated and he opted to stay in the Yukon with his adoptive father. However, it was a difficult relationship and Mr. Lange kept running away and getting into trouble. He describes his adoptive parents as good people and very strict. But he was rebellious, antisocial and did a lot of fighting to prove himself.

[11] It was not until 1999, while Mr. Lange was in jail in Whitehorse that he learned who his First Nations family was. He returned to Mayo to meet his biological family. While he has formed some positive relationships with this family, his relationship with his biological mother has not worked out.

[12] As reported in a pre-sentence report filed on August 7, 2006 for his sentencing after trial, Mr. Lange indicated that he did not feel responsible for the murder of Mr. Olson but he acknowledged that he failed to act and that he felt badly for Mr. Olson's death. In contrast to Mr. Boucher, Mr. Lange was already at that time prepared to take advantage of the programming offered in the penitentiary. He was able to acknowledge then that alcohol and drugs had negatively affected his life, with result that he had been living on the street and involved in criminal activity.

[13] Mr. Lange has had one significant relationship. His daughter was born in June 2000 and it appears that her mother has always been the primary caregiver. Although she apparently testified against Mr. Lange at his trial, the relationship appears to have improved somewhat, and she attended the sentencing hearing before me.

DR. LOHRASBE'S REPORT

[14] Dr. Lohrasbe describes Mr. Lange as a person that is able to describe his struggle to find a coherent identity with thoughtfulness and insight. He had a lot of identity problems specifically related to being an aboriginal person raised by Caucasian parents. He acknowledged that there were incidents of violence directed at his parents, including an incident with a knife. However, despite the numerous challenges, his relationship with his adoptive father has remained strong. Nevertheless, as a teenager Mr. Lange was rebellious and anti-social, and he acknowledges that he did a lot of stupid things often related to drugs and fighting. Mr. Lange did attend a short treatment program in Alberta in 2002, but it did not enable him to quit drug and alcohol abuse. In 2003, when he returned to the Yukon, he made the following comment about his daughter:

I saw a fair bit of my daughter but I was struggling with alcohol and [the mother] didn't want me around when I was drinking or hung over. [The mother] had quit alcohol and drugs, she was being a really good mom.

[15] Dr. Lohrasbe reports that Mr. Lange has made a great deal of progress during his incarceration in federal penitentiary. He made immediate contact with the aboriginal officer and Elder. He was in Kent Institution for less than a year and was then placed in Mission Institution for approximately five years, before returning to the Whitehorse Correctional Centre after his appeal. He had some institutional offences while in Mission

Institution, but none of them involved violence. He obtained his high school equivalency (GED), he took the aboriginal basic healing program, the In Search of Your Warrior Program and a native substance abuse program.

[16] In answer to Dr. Lohrasbe's question about the difference between the Mark Lange of 2004 and the Mark Lange of 2011, he said:

I'm not as selfish a prick as I used to be. I've moved from being a boy to a man. I'm tired of doing time. I've changed, and it's not just what I think. A lot of people have noticed changes too, and have told me.

[17] He recalls that an Elder at Mission Institution had a great impact on him and when he looks back at the changes he has made, he stated:

I don't feel sorry for myself anymore. I used to feel that the world owed me something, but the world owes me nothing. In the past I let my own bullshit get in the way. I'm tired of drinking and I'm tired of doing time. [I] know that people have no reasons to trust me yet, I haven't proved myself out there. But I am self-aware and I make mental notes. I am very aware that I can never drink again. I know I can't control my drinking once I start. If I drink again I may as well be dead.

[18] Mr. Lange's only contact with a psychiatrist or psychologist was in 1990 and, at that time, there was great concern noted about his anti-social attitudes being firmly entrenched. Dr. Lohrasbe takes the 2006 Actuarial Assessment that indicates Mr. Lange was a high risk as a baseline. Dr. Lohrasbe describes the offence of 2004 as being the result of an explosive mix of alcohol, cocaine and an anti-social mindset and lifestyle, all of which contributed to the use of excessive amounts of violence. Dr. Lohrasbe considers that Mr. Lange participated in some substantial way to the assault that led to the death of Mr. Olson.

[19] However, there are two aspects to Mr. Lange's future risk. One is his diagnosis of anti-social personality disorder, and the other is his abuse of alcohol and drugs.

Dr. Lohrasbe indicates that Mr. Lange is prepared to work at changing and reducing the influence of social deviancy and substance abuse in his life. He states that Mr. Lange has embraced absolute abstinence from alcohol and drugs and presents a fair degree of awareness about what he will lose if he returns to substance abuse, crime and violence.

[20] Dr. Lohrasbe concludes that Mr. Lange's risk level has been lowered substantially. Mr. Lange can no longer be seen as a high risk for acts of violence in the foreseeable future. Instead, Dr. Lohrasbe assesses his risk in the low to moderate category, but notes that he has not been tested in the freedom of the community.

MR. LANGE'S APOLOGY IN COURT

[21] Mr. Lange acknowledged that he was in court because of the loss of a life. He said that he realizes that taking a life has an impact on a lot of people. He apologized to Mr. Olson's sister and said that he takes full responsibility for his actions and for Mr. Olson's death. He indicated that he has been woken up with the mental, spiritual and emotional understanding that he received from the Elders. He said that he is very proud of the carving that he does and that he wishes to continue carving and pursuing mining work in the future. He said that he kept the victim impact statement of Mr. Olson's sister on his wall to remind himself of the damage he inflicted, particularly when he was feeling sorry for himself or angry.

MANSLAUGHTER SENTENCING LAW

[22] I discussed the decision of the British Columbia Court of Appeal in *R. v. Aburto*, 2009 BCCA 446, in the sentencing of Mr. Boucher. That decision also has relevance for the determination of a just sentence for Mr. Lange, as there is no upper limit on the sentence available for manslaughter, and each case has to be decided on the

circumstances of the offence, the principles of sentencing, and the relevant aggravating and mitigating factors (para. 19 of *Aburto*).

[23] The case of *R. v. A.B.*, [2004] O.J. No. 2684 (S.C.), is factually similar to Mr. Lange's. B.H., a co-accused, was a 24-year old aboriginal male who, with another individual, had beaten someone to death. B.H. had a troubled upbringing and was perpetually before the courts from the time he was a youth. His childhood was marked by abuse and exposure to family violence, and both he and his mother were physically abused by his father. The trial judge included that 10 years in jail would be a fit and proper sentence for the brutal crime that he had committed.

AGGRAVATING FACTORS

[24] The aggravating factors in Mr. Lange's manslaughter offence are similar to those I set out in *R. v. Boucher*. They are as follows:

1. The fact that the beating occurred in Mr. Olson's residence;
2. The fact that Mr. Lange participated in the deadly beating, although to a lesser extent than Mr. Boucher;
3. The fact that Mr. Lange was a partner in the stealing of Mr. Olson's truck as well as the art work from his hotel;
4. Mr. Lange was a partner in placing Mr. Olson in the box of his truck while he was injured and unconscious in December temperatures;
5. Mr. Lange participated in the disposal of Mr. Olson's body in a ditch to avoid detection.

[25] A mitigating factor for Mr. Lange is that he was not the primary actor in starting the argument with Mr. Olson and he did not inflict the majority of blows that led to Mr. Olson's loss of consciousness and subsequent death. Mr. Lange has also shown

remorse and determined that he would use his incarceration to get the rehabilitation programming to change his life. In both respects, he was much quicker off the mark than Mr. Boucher, who took a considerably longer time to start working to get his life back on track.

[26] Nevertheless, there is no doubt that Mr. Lange participated in a substantial way in the assault that led to the death of Mr. Olson. I am therefore in agreement with the joint sentence submission that nine years and four months is a fit and proper sentence. I am in agreement with the sentencing credit proposed and set out above, resulting in Mr. Lange having three months remaining in this sentence, and I am also in agreement with the Crown and defence submission about probation. I am therefore sentencing Mr. Lange to a period of incarceration of nine years and four months, less nine years and one month of credit, for a remaining period of three months in custody. This will be followed by a period of probation of 15 months.

[27] The conditions of probation for the 15 months are as follows:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court.
3. Notify his probation officer, in advance of any change of name or address, and promptly notify his probation officer of any change of employment or occupation.
4. Remain within the Yukon Territory unless he obtains written permission from his probation officer or the court.
5. Report to a probation officer immediately upon his release from custody, and thereafter, when and in the manner directed by the probation officer.

6. Reside as approved by his probation officer, abide by the rules of the residence and not change that residence without the prior written permission of his probation officer.
7. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to him by a qualified medical practitioner.
8. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.
9. Take such alcohol and drug assessment, counselling or programming as directed by his probation officer.
10. Take such other assessment, counselling and programming as directed by his probation officer.
11. Make reasonable efforts to find and maintain suitable employment and provide his probation officer with all necessary details concerning his efforts.
12. Provide his probation officer with consents to release of information with regard to his participation in any programming, counselling, employment or education activities that he has been directed to do pursuant to this probation order.

[28] I also order pursuant to s. 109 of the *Criminal Code* that Mr. Lange is prohibited from the possession of any firearm, crossbow, prohibited weapon, restricted weapon, prohibited devices, ammunition, prohibited ammunition and explosive substance for a period of life. I have considered Mr. Lange's application for an exception to the weapons' prohibition order under s. 113 of the *Criminal Code*. Section 113(1)(a) requires that Mr. Lange establish to the satisfaction of the Court that "the person needs

a firearm or a restricted weapon to hunt or trap in order to sustain the person or the person's family". I am not satisfied that a blanket lifting of the prohibition order is appropriate, as the need has not been demonstrated for Mr. Lange or his family. However, I am prepared to make an order authorizing a Chief Firearms Officer to issue a restricted authority that allows Mr. Lange to use the licence of Don Lange only while he is on the trap line of Don Lange. The Chief Firearms Officer may have further terms and conditions that are not inconsistent with the general intent of this order.

[29] There will also be a DNA order pursuant to s. 487.051 of the *Criminal Code* authorizing the taking of any number of samples of one or more bodily substances for the purpose of forensic DNA analysis.

VEALE J.