Citation: *R.* v. *Elias,* 2010 YKTC 139

Date: 20101130
Docket: 10-00377
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

VICTORIA ANNE ELIAS

Appearances:
Terri Nguyen — Counsel for the Crown
Nils Clarke — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral) Victoria Elias has been charged with having committed the following offences: on August 20, 2010; Count 1, break and enter a dwelling house and utter threats, contrary to s. 348(1)(b); Count 2, uttering a threat to cause death contrary to s. 264.1(1)(a); Count 3, uttering a threat to cause damage to property, contrary to s. 264.1(1)(b); Count 4, breaching an abstain condition of a recognizance, contrary to s. 145(3); and Count 5, breaching a keep the peace and be of good behaviour condition of a recognizance, contrary to s. 145(3), all sections of the *Criminal Code of Canada*.

[2] Ms. Elias has also been charged with having breached an abstention term of a probation order she was bound by. The date of this alleged offence is July 19, 2010.

[3] Pursuant to a court order dated September 27, 2010, Ms. Elias underwent a psychiatric assessment to assist in determining whether she was criminally responsible at the time she is alleged to have committed these offences. I note at this time that, pursuant to discussions I had with counsel during submissions, a finding of not criminally responsible by reason of mental disorder is not being pursued with respect to the July 19th incident and Count 4 of the five-count Information. Crown counsel indicated that in the event a not criminally responsible by reason of mental disorder finding is made with respect to the other charges the Crown would likely stay or withdraw these charges. I will refer to this briefly at the conclusion of these reasons.

[4] It is the position of defence counsel that Ms. Elias was not criminally responsible for the remaining offences. Crown counsel, while not necessarily being opposed to such a finding being made, has nonetheless highlighted some concerns in this case which may challenge the appropriateness of such a finding. Crown counsel submits that this case is on the cusp of a s. 16(1) finding of not criminally responsible by reason of mental disorder.

Circumstances of the Offence and the Offender

[5] On July 19, 2010, Ms. Elias was located intoxicated. She was on a probation order at the time that required her to abstain from the possession and consumption of alcohol. The circumstances of the August 20th incident, briefly put, are that Ms. Elias, while intoxicated by alcohol, broke into the home of her ex-boyfriend and his partner

and, while inside the residence, threatened to injure and kill the partner and to destroy property within the residence. Ms. Elias was on a recognizance at the time that required her to abstain from the possession and consumption of alcohol, and to keep the peace and be of good behaviour.

[6] Ms. Elias's recollection of the events of August 20, 2010, as set out in the psychiatric report prepared by Dr. Lohrasbe pursuant to the September 27, 2010 order, differs considerably from the information in the police report. In particular, Ms. Elias denies breaking into the residence and making any threats to the partner.

[7] Ms. Elias is 30 years old and possesses a significant criminal record. There are 11 youth entries, including three convictions for assaulting a peace officer. She has a further, approximately 43 entries as an adult. These include one uttering threats, six common assaults, one assault peace officer and, most significantly, two assault with a weapon offences for which she was sentenced in May 2009 and February 2010. On the first s. 267(a) she received a sentence of four months custody in addition to 11 months time served and, on the second, seven months custody in addition to four months time served.

Psychiatric Report

[8] As noted, Dr. Lohrasbe prepared a psychiatric assessment report pursuant to the court order of September 27, 2010. Dr. Lohrasbe concludes the following at page 13 of his report:

> Hence, while fully acknowledging the limited information available regarding Ms. Elias's mental state at the time of the incident of 20 August 2010, my assessment would provide

> support to a legal consideration for finding Ms. Elias not criminally responsible by reason of mental disorder. This opinion is not a confident one because of several factors: Limited background information, the fact that her deficits and disorders are not the typical ones associated with a Section 16 defense, and the very limited information available about her thoughts, feelings, and actions at the time of the incident.

[9] In preparing this report, Dr. Lohrasbe reviewed two prior psychological reports as follows: Psychological Assessment dated February 28, 2010, prepared by Norman Brodie, a registered psychologist at The Triune Group (the "Brodie Report"), and Psychological Assessment Report dated April 3, 2010, prepared by Monty Nelson, registered psychologist (the "Nelson Report"). Dr. Lohrasbe also reviewed the Medical Summary Report dated March 10, 2010, prepared by Dr. Dekker of the Lakeland Centre for Fetal Alcohol Spectrum Disorder (the "Dekker Report").

[10] The summary and comments in the Brodie report include that:

> On the current assessment Victoria displays significant impairment on multiple aspects of the neuropsychological battery, primarily on tests of verbal processing and higher level abstract reasoning/executive functioning. This suggests a long-standing or chronic/static form of mild brain damage, quite likely from prenatal damage or adverse developmental influences.
>
> Intellectual testing indicated a mild mental deficiency level Full Scale I.Q. of 63 on the WAIS-IV, with nearly equivalent impairment of both her verbal and nonverbal intellectual aptitudes, but with somewhat stronger functioning on simple attention span and decision making speed tasks.
>
> Emotional testing indicates a severe of depressive affect and symptoms (BDI-II) as well as multiple areas of significant emotional distress and concern on both the EPS and SCL-90-R, consistent with her reported history of long-standing problems with both depression and anxiety symptoms.

> Given the observed deficits it is concluded that Victoria is very likely to have suffered some prenatal onset brain damage and while she was able to focus on some short term attention span tasks, the pattern of stronger delayed memory than immediate learning and her reported personal history also suggests some degree of ADHD related impairment of attention and impulse control. Intellectual functioning is generally compromised, but much more so for verbal learning aptitude and her academic achievement levels are relatively consistent with this reduced intellectual potential. Severe emotional disturbance is also indicated, with mixed depressive and anxiety features. Further psychiatric consultation and medical treatment of her depression, anxiety and ADHD symptoms may be critical to help stabilize her condition, in conjunction with vocational rehabilitation programming with a focus on assisting to secure "hands on" training in positions that do not require functional literacy skills.

[11] The diagnosis and recommendations in the Nelson report includes the following at page 4:

> Amidst the above test results, and the background history obtained by members of the Whitehorse Correctional Centre, LCFASD, and the Fetal Alcohol Spectrum Society of the Yukon (FASSY), numerous diagnoses were provided for her, including an Alcohol Related Neurodevelopment Disorder (ARND), an addition to alcohol and drugs, psychosis with anxiety and depression, mental retardation, illiteracy, a neurocognitive disorder (including poor decision making, impaired memory, and no impulse control), a language disorder, hepatitis c, and non compliance with medications.

[12] Ms. Elias is diagnosed in the Dekker report as having:

1. Alcohol Related Neurodevelopment Disorder;
2. Alcohol and Substance Abuse Dependency;
3. Psychosis (NOS) with anxious and depressive features;
4. Mental Retardation;
5. Functional Illiteracy;
6. Severe Neurocognitive Disorder including poor decision making, severe impaired memory, and no impulse control;
7. Impaired Language comprehensive and expression;

8. Hepatitis C presumably in the carrier state;
9. Non compliance with medications.

[13] Dr. Lohrasbe indicated that:

> It is readily apparent that Ms. Elias is cognitively impaired. … [W]hile undoubtedly having areas of strength within her range of cognitive functioning…, [she] can reasonably be said to have compromised brain functioning such that her capacities to perceive events accurately and respond appropriately are generally impaired. …
>
> [O]n concrete and limited intellectual tasks, Ms. Elias can function reasonably well. She was fully oriented as to time, place, person, and situation. … [S]he appeared to have a limited grasp of the seriousness of her actions, her life situation and her addiction.

Dr. Lohrasbe notes that while intoxication is undoubtedly a factor in some circumstances, that even when not intoxicated, Ms. Elias' “impaired brain functioning has a significant role in her memory impairment.”

[14] Ms. Elias reported to Dr. Lohrasbe that her recollection of her longest period of abstinence from alcohol and drugs within the community is four to five days. Dr. Lohrasbe identifies the presence of some psychotic symptoms in Ms. Elias on at least an intermittent basis. Ms. Elias's sister advised Dr. Lohrasbe that Ms. Elias requires treatment for her explosive anger as she “carries so much anger in her all the time.”

[15] Dr. Lohrasbe identifies three areas of concern regarding his assessment of Ms. Elias. These are Ms. Elias's diagnosis of Alcohol Related Neurodevelopment Disorder (ARND), her diagnosis of alcohol and drug dependency in relation to her addiction to alcohol and drugs, and the issue of psychosis. Dr. Lohrasbe considers Ms. Elias to be

"somewhere in the transition from psychosis associated with intoxication to psychosis alone." He states that it is his view that:

> ...Ms. Elias is a woman who suffers from chronic, intermittent, low intensity psychotic symptoms when sober, and those psychotic symptoms are likely to become overt and expressed when she is intoxicated with alcohol or drugs.

[16] In attempting to apply his assessment of Ms. Elias to the requirements of a s. 16(1) not criminally responsible by reason of mental disorder analysis, Dr. Lohrasbe utilizes a four-step process. Firstly, he identifies Ms. Elias as meeting the threshold question of having the presence of a mental disorder. While it is not a classic mental disorder such as schizophrenia, in that Ms. Elias suffers from a structural mental disorder as contrasted to functional, it nonetheless results in "similar disruptions in cognition, affect and interpersonal behaviours."

[17] Secondly, he considers it likely that Ms. Elias was possessed of the symptoms of a major mental disorder at the time of the August 20th incident. This conclusion is:

> ...not based on direct information but is based on the assumption that, since she has symptoms of mental disorder even when she is sober, intoxication with alcohol at the time of the offense is likely to have exacerbated the preexisting psychotic symptoms.

[18] Thirdly, in analyzing the information to determine whether the symptoms of Ms. Elias's mental disorder were the most important or prominent mental elements in the offences, Dr. Lohrasbe concludes that, "On balance, my view is that mental disorder had at least some role in her actions during that incident [August 20th]." Dr. Lohrasbe concedes that this determination was problematic as there was little information which

linked symptoms of a mental disorder to Ms. Elias' actions at the time. In this regard, he states that:

> [I]t is difficult to exclude the potential role of paranoia, distorted perceptions and impaired thought processes in her actions. Even when sober, her mental functioning is disordered and influences her emotional reaction to events. She can misinterpret words and events, and see threat where none exist [sic]. When intoxicated, it is likely that her mental functioning, broadly speaking, was grossly disordered.

[19] Finally, in assessing the direct link between the psychiatric finding and the legal criteria under s. 16(1), Dr. Lohrasbe states that:

> ...Ms. Elias' capacity to appreciate the nature and quality of her actions is, at best, very limited. In a real-life situation that involves significant intoxication, it is unlikely that Ms. Elias' cognitive capacities are anywhere near what could reasonably be considered ‘normal’. She does not experience events, when sober, in the same way that those without her manifold deficits do. When those limited capacities are further distorted by heightened emotions or by intoxication, they are likely to quickly become grossly impaired. Similarly, Ms. Elias' capacity to know the wrongfulness of her actions is limited, even when sober and emotionally calm. When emotionally aroused or when intoxicated, her ability to apply her limited capacities would likely be grossly impaired.

[20] Dr. Lohrasbe testified as to the contents of his report. He conceded that his conclusions were based, to some extent, upon the application of general principles, stressing that how these general principles applied to Ms. Elias was a matter of degree, taking into account a number of factors. He agreed that Ms. Elias can, at times, and in certain contexts, think more clearly and can, in a general sense, understand that if she assaults people she will go to jail, and that more assaultive behaviour will result in more

jail. Dr. Lohrasbe further agreed that assessing Ms. Elias was problematic due to the lack of reliable information regarding the incident of August 20th and the contradiction between Ms. Elias' recollection and the police reports. He agreed that not everyone with brain damage is not criminally responsible by reason of mental disorder, and neither is everyone who experiences psychotic symptoms. There must be a contemporaneous connection between the psychotic symptomology and the event or incident in question to support a conclusion of not criminally responsible by reason of mental disorder.

[21] Dr. Lohrasbe agreed with the suggestion by Crown counsel that his conclusion that Ms. Elias was suffering from a mental disorder at the time of the August 20th incident was, besides the application of general principles, largely based upon Ms. Elias's history and some resultant speculation as to how she would have been processing information at the time of the events. Dr. Lohrasbe testified that Ms. Elias' history of intermittent psychotic symptoms that increased when she was drinking led him to his conclusion and that there was no direct evidence that psychotic symptoms were present on August 20th. He agreed that it is possible that Ms. Elias was not suffering from a psychotic episode at the time.

[22] In examination by defence counsel Dr. Lohrasbe compared Ms. Elias' mental functioning to a child who, while possibly knowing the difference between right and wrong still lacks the capacity to appreciate the broader consequences of actions, particularly over time. Similar to a child, there is a lack of depth and breadth to Ms. Elias' knowledge of the difference between right and wrong. Even when Ms. Elias is sober, she is unable to appreciate the consequences of her actions or to hold and apply

her knowledge of the fact that it is wrong to assault someone, to the same degree as a non-mentally impaired individual. This inability is greatly heightened when she is intoxicated.

[23] Crown counsel quite correctly identifies the difficulty with Dr. Lohrasbe's assessment and conclusion being that he lacked sufficient information to associate the incident of August 20th with the presence of any observed psychotic symptoms in Ms. Elias. Dr. Lohrasbe's conclusion is quite candidly based upon his bridging the gap between Ms. Elias' cognitive impairment and history and the events of August 20th, with his assumption that Ms. Elias' intoxication made it likely that she was suffering from a mental disorder at the time of the offences. There is clearly a degree of speculation in Dr. Lohrasbe's conclusion.

[24] Section 16(1) reads:

> No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Crown counsel concurs that the structural mental disorder Ms. Elias suffers from should not, for these purposes be distinguished from the functional mental disorders which have more traditionally been considered in the s. 16(1) analysis. Dr. Lohrasbe testified that it is his opinion, from a practical perspective, that the effects of the structural and functional mental disorders are similar. He stated that there has been a broad shift in his profession from a traditional, more restrictive approach, to a broader and more inclusive approach, although this has not garnered universal acceptance.

[25] I favour the approach advocated by Dr. Lohrasbe. It is the effect of the mental disorder on the individual's thought process at the time that matters, not the cause of the mental disorder, whether functional or structural. Differences in the treatment options available are irrelevant considerations when determining whether an individual is not criminally responsible by reason of mental disorder at the time of the commission of an offence.

[26] In *R.* v. *Luedecke,* (2008) ONCA 716, in para. 7, Doherty J.A. stated that:

> ... The criminal law uses the concept of mental disorder very differently than the medical profession. The concept of a mental disorder in the criminal law is used to describe those [accused] who have committed criminal acts but because of some abnormal mental state are unable to conform their behaviour to the dictates of the criminal law. A determination that an accused suffers from a mental disorder is more a reflection of the need for a further inquiry into the dangerousness of that accused than it is an assessment of his or her medical condition.

[27] It is against this backdrop that I consider the circumstances of the present case. Of particular concern for me is the role that self-induced intoxication plays in the conclusion that Ms. Elias was likely suffering from a mental disorder at the time of the events of August 20th, such that she should be considered to be not criminally responsible by reason of mental disorder. The evidence before me is not sufficient to allow for a finding that Ms. Elias is, when sober, not responsible for her actions, nor are there any submissions to this effect. The evidence is that, when sober, she suffers from a structural mental disorder and intermittent psychosis. When she "chooses" to drink, the likelihood is that her underlying structural deficiencies are exacerbated and the

degree to which she is able to appreciate the nature and quality of her actions is further diminished.

[28] Section 33.1 of the *Code* was enacted in response to situations where self-induced intoxication is raised as a defence to general intent offences, and limits the availability of the defence. In the present case, there is a somewhat analogical similarity in that Ms. Elias, by reason of her self-induced intoxication, given her underlying mental disorder, now claims to be not criminally responsible by reason of mental disorder for the events of August 20, 2010. I appreciate the difficulties that could arise when individuals who, knowing they have a propensity to commit criminal acts when intoxicated due to an underlying structural or functional mental disorder, choose to consume alcohol nonetheless and then wish to argue that they are not criminally responsible by reason of mental disorder. I will not embark upon an analysis of this larger issue and will confine myself to the circumstances of the case before me.

[29] Ms. Elias' underlying difficulties present a somewhat circular situation. Due to her cognitive limitations, her ability to choose alcohol or not is likely significantly affected in the first place. She does not make a choice with the same ability to foresee the consequences of her actions as those not suffering from her cognitive limitations. In the circumstances, I do not see that Ms. Elias' decision to consume alcohol in the first place as being a limitation on her ability to argue that she was not criminally responsible by reason of mental disorder at the time of the events of August 20th.

[30] As to the lack of evidence about the actual presence of psychotic symptoms at the time of the events of August 20th and the effect that intoxication had on Ms. Elias on

that occasion, given her structural limitations, I recognize that the material provided to Dr. Lohrasbe only goes so far, and speculation and assumptions must bridge the gap or a finding of not criminally responsible by reason of mental disorder is not possible. In these circumstances, I find that the history of Ms. Elias allows for this gap to be bridged. This is not the clearest of cases by any means, but I am satisfied that it has been made out on the requisite balance of probabilities. I find that the comments of Doherty J.A. are applicable to Ms. Elias' case. I am concerned about the escalation and the degree of Ms. Elias' assaultive behaviour, given Dr. Lohrasbe's comments that Ms. Elias is in transition from "psychosis associated with intoxication to psychosis alone." A further inquiry into the danger Ms. Elias poses to society needs to be made.

[31] As such, I find with respect to Counts 1, 2, 3 and 5 of the five-count Information, that Ms. Elias is not criminally responsible by reason of mental disorder in accordance with s. 16(1) of the *Code*.

[32] Returning to Count 4 of this Information and the single count Information from July 19, 2010, as the breaches would be made out once a sober Ms. Elias initially chose to possess and consuming alcohol, and as the evidence before me relies to a large degree on Ms. Elias being intoxicated on August 20, I am not prepared to make a finding of not criminally responsible by reason of mental disorder. I appreciate that Count 5, the failure to keep the peace and be of good behaviour, could also be similarly treated, were I to consider the breach to have been made out by the possession and consumption of alcohol. I choose, however, in the circumstances, to consider this breach to be more related to the more serious and substantive offences alleged.

[33] After making this decision, I decline to make a disposition and refer the matter to the Yukon Review Board.

_____

COZENS T.C.J.