Citation: *R.* v. *Stewart*, 2005 YKTC 74 Date: 20051115
Docket: T.C. 04-10045A
Registry: Whitehorse

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

REGINA

v.
MICHAEL STEWART

Appearances:
David McWhinnie Counsel for Crown
Nils Clarke and Counsel for Defence
Malcolm Campbell

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): Michael Stewart is a 47-year-old man and a member of the Liard First Nation, whose traditional territory is at and near Watson Lake, Yukon Territory. He has entered a plea of guilty to a charge of manslaughter contrary to s. 236(b) of the *Criminal Code*, namely, that on November 11, 2004, he did unlawfully kill John Lucas.

The Facts

[2] The facts, as they could be ascertained after the fact, are relatively straightforward. Michael Stewart and the deceased were drinking buddies. On

November 10th, after work, they had both been drinking and were observed by community members to be intoxicated. John Lucas was observed in Mr. Stewart's residence around 7:00 p.m., apparently passed out. Mr. Stewart was observed a little later, in a vehicle driven by Phillip Donnessy in an erratic manner. A member of the community took the keys to the vehicle away from Mr. Donnessy and drove Mr. Stewart home. Mr. Stewart told him that John Lucas was at his home and that he was drunk.

[3] The Court was given little information about what happened next. Late in the evening of November 10 or early in the morning of November 11, 2004, Michael Stewart was in an altercation with John Lucas. Mr. Stewart then either passed out or fell asleep. When he awoke, he found John Lucas on the floor. Stewart attempted CPR, but without success. He called his brother Leo, at approximately 2:30 a.m., seeking assistance. When Leo arrived at Michael Stewart's home, he found Michael performing CPR on John Lucas. Finding no pulse, Leo Stewart also attempted to perform CPR on Lucas, but also without success. So at approximately 2:40 a.m., Leo Stewart called the hospital for assistance.

[4] The ambulance attendants arrived between 2:45 and 3:00 a.m. They noticed that blood on the floor and on John Lucas was dry and cracked in places. While his body was still warm to the touch, it had a bluish color. They estimated that John Lucas had been dead for an hour.

[5] Numerous bloody footprints, consistent with the boots worn by Michael Stewart, were observed throughout the house. Blood was observed on numerous items throughout the house, including kitchen cupboards, beer cans and items on the kitchen

table, a vodka bottle found in the back door/porch area, on the refrigerator and in the bathroom. I have inferred that Mr. Lucas's blood was tracked around the house by Mr. Stewart after he assaulted him. The blood on the beer cans and vodka bottle suggests that Mr. Stewart made have drunk more after the altercation. He then fell asleep or passed out, and when he awoke, he discovered John Lucas's body on the floor.

[6] An autopsy conducted in November 2004 made the following observation, as reported in the joint statement of facts that counsel filed with me:

> Mr. Lucas was noted to have sustained multiple bruises to the face and scalp, with lacerations on his face. He had a fractured nose, and had inhaled as well as swallowed blood. He had bruising on his torso and extremities, as well as swelling and bruising to his brain.
>
> The pathologist noted that certain of the head injuries showed a textured pattern typical of scuffing or stomping with patterned footwear.
>
> The deceased had numerous broken ribs, more on the left side. The left lung had was torn and collapsed. There was a tear in the liver.
>
> His blood alcohol was determined to be 430 mg. %. That is, John Lucas's blood alcohol level was determined to be 430 mg. %.
>
> All the injuries appeared to be fresh.
>
> In a report dated September 28, 2005, Dr. Gray, a forensic pathologist, determined that the principal cause of John Lucas's cause of death was due to a beating assault to the head and torso, with a contributory factor of acute alcohol intoxication.
>
> Dr. Gray concluded the more severe injuries were typical of a combination of "punches, kicks, and stomps."
>
> In her view, John Lucas's level of intoxication would have made him less able to withstand his head injuries.

[7] Mr. Stewart was initially charged with murdering John Lucas. Upon receipt of the forensic analysis from Vancouver in October 2005, the Crown laid a new charge of manslaughter, to which Michael Stewart entered a plea of guilty in a timely matter and also waived his right to a preliminary hearing.

[8] A very comprehensive and helpful pre-sentence report was prepared by Ms. Rushant, the probation officer.

Criminal Record of Mr. Stewart

[9] Almost 48 years old, Michael Stewart has 51 convictions recorded since 1974, beginning when he was 16 years old. These include seven drinking and driving convictions; numerous process offences for failing to obey court orders, and 13 prior convictions for violent offences. His own mother and father were the victims of assault causing bodily harm convictions in 1981; his mother was a victim of an assault in 2002. Mr. Stewart has spent a considerable amount of time in jail and also has been on probation a number of times, but he has not done well on community supervision.

Family History

[10] Michael Stewart's parents are now both deceased. They were heavy drinkers and also fought a lot, exposing Michael and his siblings to their violent behaviour. They were known in the community to be extremely violent, and incurred charges for assaulting each other. Mr. Stewart, along with five male siblings, grew up in this extremely dysfunctional setting. Two of his brothers are deceased as a result of alcohol abuse. Mr. Stewart himself was drinking heavily by age 14. He got as far as grade

seven or eight in school, when he quit and started working. Effectively illiterate, he taught himself to read and write later in life.

[11] At age 15, he went to live with his grandfather. He has worked steadily since that time, in a number of labouring jobs, with good reports from his employers. Being a good worker, however, was a double-edged sword for Mr. Stewart. It provided him with the necessary funds to purchase and consume alcohol to excess, and during the last four or five years he drank continuously. In addition, he used and probably abused a variety of prescription drugs.

[12] Mr. Stewart is not currently in a domestic relationship, although he has been seeing a woman for the past two or three years, someone he describes as a "drinking buddy." Prior to that he was in a common-law relationship for over 15 years. He has a son from that relationship who has an extensive involvement with the justice system and is currently in the Whitehorse Correctional Centre serving a sentence.

Other Circumstances

[13] Mr. Stewart reports that he has no real friends, just drinking buddies. Other than drinking, he has no leisure activities. He has no significant debts and lives in the house he inherited from his mother. He has made some attempts at alcohol treatment in the past. He reports that he was denied admission into the Alcohol and Drug Services residential treatment program in 2002 because he was taking prescription medicines prescribed by his doctor.

Risk Assessments

[14] Mr. Stewart was evaluated to be in the high risk range to re-offend violently. He has a number of risk factors, including alcohol and drug problems. He states that he will probably never drink again and does not need to go to treatment. He is both naive and wrong on this point. Mr. Stewart desperately needs treatment and programming to address his lifetime exposure to violence, substance abuse and family dysfunction.

Custody Status Report

[15] Mr. Stewart has been in custody on this offence since November 12, 2004, a few days over a year. During this time, he has been a model prisoner from a management point of view: quiet, cooperative and requiring minimal supervision. For an entire year he was ignored by the Correctional authorities. There were a number of relevant programs at the jail during this time, but he was never informed about them and he never asked. He incorrectly believed that as he was on remand, he could not attend programming. In effect, he did a year of "dead time."

Purpose And Principles Of Sentencing

[16] The *Criminal Code* sets out a number of purposes and principles of sentencing in s. 718, s. 718.1 and s. 718.2. The purpose and objectives of sentencing are denunciation, general and specific deterrence, separation of the offender from society, rehabilitation, making reparations, and promotion of a sense of responsibility in the offender. Section 718 clearly states that only one or more of these objectives need be

met. It is not the judge's role to accommodate all of these objectives at one time, as some may be contraindicated on the facts.

[17] A fundamental principle is that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Proportionality requires that the sentence should be within the range of those recently imposed for similar offences. That is why counsel, in this case, provided the Court with books of cases, and spent a good deal of time in court reviewing their facts and comparing them to the facts of the case at bar. Proportionality and sentencing conveys both fairness and equality. Proportionality also requires that the enormity of the tragic consequences of an offence should not be allowed to unduly distort the appropriate penalty.

[18] I have also considered the sentencing principles set out in s. 718.2 of the *Code*. Subsections (b), (c), (d) and (e) send a message of restraint, particularly for aboriginal offenders. But in the case of serious, violent offenders, it is less likely that sentences between aboriginal and non-aboriginal offenders will differ: see *R.* v. *Wells*, [2000] 1 S.C.R. 207.

[19] It is important to underscore that the charge before the Court is one of manslaughter, not murder. For murder, the sentence is life imprisonment. Sentences for manslaughter range from a suspended sentence and probation to life imprisonment, depending on the circumstances and moral culpability of the offender.

[20] In the case of Michael Stewart, the charge is manslaughter. The Crown has submitted a range sentence of five to seven years in the penitentiary. I understood the defence to suggest something less, in the range of four to six years.

Case Law

[21] I have reviewed all of the cases submitted by counsel, but will only refer to those I found to be most relevant.

[22] *R.* v. *Asp*, [2005] YKSC 58, is a very recent Yukon case where an intoxicated wife stabbed her partner once in the course of an argument. There was history of mutual violence. She immediately regretted her act and tried to save him but to no avail. The effective sentence in that case was five years incarceration.

[23] *R.* v. *Charlie*, [1987] Y.J No.35, is a case very similar to the case at bar. The accused and the victim were friends and they had been drinking. For no apparent reason, Mr. Charlie stabbed his friend. He received a sentence of five years. I note that this case is also somewhat dated.

[24] Similarly, *R.* v. *Lavoie*, [1987] Y.J No.28, is similarly dated but also similar on the facts. The accused, who had been drinking, shot a recent acquaintance which whom he shared accommodation, for no apparent reason. The accused received an effective sentence of five years incarceration.

[25] The sentences imposed in the other manslaughter cases placed before me ranged from three to twelve years. A significant proportion of these, sadly, were spousal in nature.

Victim Impact Statements

[26] Several victim impact statements were read into the record, and today I also heard verbally from Mr. Lucas's mother. The victim impact statements that were filed with the Court came from his mother, his sisters and a brother. They express their grief, loss and hurt. John's mother also expressed concern that someone else might be hurt:

> I do not want anyone to go through the pain that I am going through. Losing a child has broken my heart.

[27] John Lucas's family was in the courtroom throughout the sentencing hearing. I know they are expecting me, as the sentencing judge, to impose a sentence today that will somehow recognize the enormity of their loss.

[28] The truth is that there is nothing I can do or say today that will compensate them for the loss of a son and the loss of a brother. It is impossible to place a value on a family relationship that is terminated in such a violent and senseless manner. The sentence I impose today is not intended to be a measure of the worth of a human life. That life is priceless and John cannot be brought back. I think, though, based on what the family members have told me about John, that he would want his family to stop grieving and to get on with the rest of their lives.

Mitigating Circumstances

[29] The facts of the case suggest the following mitigating circumstances for Michael Stewart.

1. He grew up in a very violent and alcoholic home and did not receive the benefit of proper structure and role modeling. The intergenerational effects of being raised in a dysfunctional home setting have been clearly visited on Mr. Stewart.

2. Mr. Stewart has demonstrated remorse for his actions. He has entered a timely guilty plea and waived his right to a preliminary hearing. The victim, Mr. Lucas, was a drinking buddy. When he woke up and discovered Mr. Lucas unconscious on the floor, he attempted to provide CPR, and when he got no response, called his brother, who then called the police and ambulance. He expressed his remorse in court and addressed the Lucas family directly and asked for their forgiveness.

3. Mr. Stewart sees the connection between his substance abuse and the death of Mr. Lucas. He says he will probably never drink again. As I mentioned earlier, he is being exceedingly naive in believing he can achieve that end without counselling, treatment and programming. He is aware of treatment opportunities in the federal penitentiary system and, through his counsel, expressed his interest in engaging in relevant programming.

4. Michael Stewart has sought out counselling in the past, most recently in 2002. He was denied admission to the ADS residential treatment program because he was taking medically prescribed medications. He recognized

he had a problem, at that time, but unfortunately the program could not accommodate him.

5. After Stewart was arrested and taken to the police detachment, the officer noticed some bruising and swelling under his eye. Stewart responded in a way that suggests Lucas may have struck him first. Although only a possibility, it is information on which I place a modest amount of weight.

6. No weapon was used to effect the unlawful act.

7. Mr. Stewart recalls attending the Mission School for one year and recalls being abused and punished for no apparent reason. He subsequently refused to go back.

Aggravating Factors

1. Mr. Stewart has a long criminal history, consisting of 51 previous convictions going back to 1974 when he was 16 years old. He has 13 convictions for violent offences.

2. By his own admission, alcohol was a contributing factor in all of his offending behaviour. The significance of his alcohol dependency is underscored by his seven drinking and driving convictions. He was clearly aware of the role alcohol and substance abuse played in his life. He did not take sufficient steps to address his addictions, although he knew he was hurting people as a violent drunk. As noted by Kerans J. in *R.* v. *Charlie,* [1987] Y.J. No. 35 (YTSC), a case whose facts were similar to the

case at bar, "continued failure to deal with his alcoholism is an aggravating circumstance." I find in these circumstances, that his intoxication at the time of current offence is an aggravating factor.

3. Mr. Lucas sustained numerous injuries to his head and body, including multiple bruises to the face and scalp, lacerations to his face, fractured nose, bruised torso, swelling and bruising to his brain, numerous broken ribs, torn and collapsed left lung, and a tear in his liver. Death, according to Dr. Gray, the forensic pathologist, was due to a beating to the head and torso, with a contributory factor of acute alcohol intoxication. The injuries were consistent with a combination of "punches, kicks, and stomps." They obviously took place over a period time, and are to be contrasted with one impulsive blow.

4. The victim was extremely intoxicated. John Lucas's blood alcohol level was 430 milligrams per 100 millilitres of blood. He also had smoked marijuana that evening. I am satisfied that Mr. Lucas's intoxicated condition prevented him from defending himself from the vicious attack by Mr. Stewart. Mr. Stewart obviously applied an extended beating on Mr. Lucas, who was not able to fight back.

[30] In my opinion, these aggravating factors place this offence and this offender on the more serious side of the mid range for manslaughter sentences.

Pre-Sentence Custody

[31] Mr. Stewart has spent 12 months in pre-trial custody. Section 719(3) enables the Court to take any pre-trial custody into account at the time of sentencing. Although this section is permissive and confers a discretion on the Court, various Courts of Appeal have held that failure to give credit for pre-trial custody without good reason is an error in principle: see *R.* v. *Mills* (1999), 133 C.C.C. (3d) 451 (B.C.C.A.).

[32] While there is no mechanical formula for crediting pre-trial custody, the starting point in this jurisdiction is to give credit by a factor of 1.5. This recognizes that most offenders receive early release after serving two-thirds of their sentence. Although the rules governing eligibility for early release are different in the federal system, I will nevertheless use the same starting point.

[33] In some jurisdictions, additional credit is given where there is some harshness in the pre-sentence custody. Absence of programming or doing "dead time" is considered a factor justifying an increase in the credit given for pre-trial custody.

[34] In this case, it appears that Mr. Stewart spent 12 months doing "dead time." The circumstances are somewhat unusual and although I referred to them earlier, I will set them out again in the hope that corrective action will be taken to avoid a similar occurrence in the future.

[35] In the pre-sentence report, the correctional facility "describes Mr. Stewart as the quietest, most cooperative inmate who required the least supervision." He was so quiet

and so cooperative that the jail apparently forgot about him, and, in particular, did not offer him either of the two substance abuse management programs that were available during the year when he was there. The following paragraph is taken from page 9 of the pre-sentence report:

> Since his incarceration at Whitehorse Correctional Centre on November 12, 2004, Mr. Stewart has not attended any programming. There have been two Substance Abuse Management Programs in that time and there is a substance abuse counsellor who attends at the jail to see inmates. Mr. Stewart has never asked to see anyone for substance abuse counselling or to attend programs. His case manager, Spencer Elofson, says that if it had been suggested to Mr. Stewart that he take such programming, he probably would have done so. Mr. Elofson admits that because Mr. Stewart is quiet and presents no problem to the staff, he gets overlooked and no one has ever suggested to him or to the program coordinator that he might be a candidate for the SAM program. Mr. Stewart says he has not asked about programming because he is on remand waiting for court so does not think he could have attended.

[36] I will only say that society has missed an opportunity to begin Mr. Stewart's rehabilitation. I regret that he has wasted a year of his life. The justice system expects more, considerably more from a "correctional institution" than what was provided for Mr. Stewart. I trust that my concerns will be forwarded to the appropriate people. In any event, in these circumstances, I consider that a credit of two to one for pre-trial custody is appropriate.

Sentence

[37] Mr. Stewart, please stand. Considering all of the circumstances, an appropriate sentence for the manslaughter of John Lucas is six years imprisonment. However,

taking into account your pre-trial custody, I sentence you to a further four years in jail, to be served in the penitentiary. Pursuant to s. 743.6, I order that you serve one half of your sentence before you may be released on full parole.

[38] Pursuant to s. 110, you are prohibited from having in your possession any firearm, cross-bow, restricted weapon, ammunition or explosive substance for life.

[39] Counsel, I understand this is a primary designated offence; is there any issue with respect to the DNA?

[40] MR. MCWHINNIE: No.

[41] THE COURT: Is there a sample on file in the DNA data bank, to your knowledge?

[42] MR. MCWHINNIE: Not that I am aware of.

[43] THE COURT: Madam Clerk, the order will go. This is a primary designated offence and if you provide me with the appropriate form, I will execute it as soon as practicable. Is there anything further from counsel that I can address at this time?

[44] MR. MCWHINNIE: Nothing, Your Honour. There is another charge outstanding but I suspect that it has found its way to the Supreme Court, perhaps in error, so I will have to track it down and --

[45] THE COURT: The original murder charge?

[46] MR. MCWHINNIE: Yes.

[47] THE COURT: Yes, the intention is that that will be stayed. Anything, Mr. Clarke, before we --

[48] MR. CLARKE: Just for the completeness of the record, I am certainly -- I do not have any strong submissions but with respect to the one-half parole eligibility, whether Your Honour has to give reasons on the record, but I suppose it would be fairly self evident from the reasons --

[49] THE COURT: The reasons are self evident. Mr. Stewart has done well at the Whitehorse Correctional Centre. If he serves half his sentence as minimum, he will have at least a decent opportunity to form a basis for further rehabilitation when he returns to the community. I am not sure in the circumstances that it really makes a difference because of the seriousness of the offence. It was certainly a message that I wanted to send, that he should take advantage of all the programs that are available in the federal system.

[50] There are some good programs there and I know that you will probably return to Watson Lake and it is very important that when you do return, Sir, that you commit yourself to a sober lifestyle.

[51] MR. CLARKE: A minor matter, the victim fine surcharge?

[52] THE COURT: Waived.

[53] MR. CLARKE: Thank you.

[54] THE COURT: Thank you, counsel.

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LILLES T.C.J.