IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Mason*, 2005 YKSC 42 Date: 20050720
Docket: S.C. No. 04-01538
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

EDWARD BRUCE MASON

Before: Mr. Justice R. Foisy

Appearances:
David A. McWhinnie For the Crown
Gordon R. Coffin For the Defence

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] FOISY J. (Oral): The accused Edward Bruce Mason, on the 20th of April of the year 2004, tragically shot and killed Germain Gaulin as set out in Count 1 of the Indictment. In doing so, he is accused of having used the firearm as that is set out in Count 2 of the Indictment. These facts and other documents and photographs were admitted into evidence as Exhibits 1, 2, and 3 in these proceedings.

[2] The central issue is whether or not the defence has been able to show, on a balance of probabilities, that at the time of the shooting the accused was suffering from a mental disorder, that is, a disease of the mind, which rendered him either incapable of

appreciating the nature and quality of his act, or alternatively, of knowing that it was wrong.

[3] I have had the opportunity of hearing evidence from two psychiatrists, Dr. Tomita, who completed an assessment at the instance of the court and whose report is part of the evidence before me, and Dr. Lohrasbe, who completed an assessment at the request of defence counsel and whose report is also in evidence. I wish to thank both psychiatrists for providing reports and giving *viva voce* evidence in a clear and concise manner.

[4] There is little significant divergence in the positions of each Doctor except for the conclusion arrived at by each one. Dr. Tomita has concluded that at the time of the offence, Mr. Mason suffered from "an extreme form of alcohol intoxication and that he was incapable of knowing that his acts were wrong." He added that since his state of mind was as a result of voluntary intoxication that a defence of not criminally responsible due to mental disorder was not available to Mr. Mason. Dr. Lohrasbe agreed that Mr. Mason was incapable of knowing that his act was wrong and while the accused was highly intoxicated at the time of the shooting he was also suffering at the time from alcohol induced psychotic disorder with hallucinations, a chronic and independent psychiatric disorder, which if correct and proven on a balance would, as properly conceded by the Crown, amount to a disease of the mind and would trigger the second part of the defence, namely, that the accused would not be capable of knowing that his act was wrong.

[5] There was also some suggestion by Dr. Lohrasbe that the first part of the defence, that the accused was incapable of appreciating the nature and quality of the act, might also be made out, however, he admitted that this part of the test proved to be more difficult and more open to question.

[6] There can be no doubt that the accused is an alcoholic and has abused alcohol for a long time. I conclude from the evidence that on the day in question at the time of the shooting he was highly intoxicated. I am also satisfied that just prior to the shooting he believed that he was being attacked by the deceased, who had a knife and who threatened to cut him up. As a result, he shot twice in rapid succession and killed Mr. Gaulin. The eye witness, Mr. Curtis, saw no knife, heard no threat, although he did hear some loud discussion and did see the shooting.

[7] Both psychiatrists were satisfied that the accused was being honest, open and genuinely tried to recall what had happened on April 20th, as well as earlier events in his life. There was no indication of malingering or attempt to mislead. I accept at the time of the shooting the accused believed what he said he saw and fired to protect himself, although, in fact he was not under attack and Mr. Gaulin had no knife.

[8] Mr. Mason immediately told Mr. Curtis about the threat that he perceived and shortly thereafter repeated the same story to the police. During a brief 911 call and some 18 minutes after the shooting the accused advised of the shooting and requested police protection. I conclude in this most important sequence that he was relating what he remembered and that he was not reconstructing or describing a mixture of both memory and reconstruction.

[9] I can only conclude from the evidence that Mr. Mason also cut off one of the earlobes of the deceased and placed it on the deceased's bare back and that he also, with a sharp object, made cutting marks to the back and about the head of the deceased.

[10] The timing of this bizarre action was more important to Dr. Tomita than to Dr. Lohrasbe. If this cutting was done closely enough in time to the shooting, Dr. Tomita testified that the cutting may well have been a psychotic episode and could also indicate that the accused suffered from the same episode when he shot the deceased. If timing is indeed important, I accept the evidence of Dr. Gray given at the preliminary inquiry and in evidence before me, that these cuts were made while Mr. Gaulin was dying and that death would have ensued within five minutes of the shooting.

[11] The remainder of the evidence as to timing, that is, Mr. Curtis' evidence and his involvement in the post shooting and the first two attempted 911 calls, are too uncertain in time to be of any particular help to me.

[12] In short, I am satisfied that the shots were fired when Mr. Mason was in a psychotic state and was indeed hallucinating. That Mr. Mason had hallucinations is well recorded. Dr. Tomita records three episodes of what he calls auditory hallucinations suffered by Mr. Mason. Dr. Lohrasbe, who was able to spend more time with the accused, reported that the accused had many, although could not exactly quantify hallucinations and that the more important ones occurred when Mr. Mason was sober and not in alcoholic withdrawal. Most of these were not critical but at times troublesome

and directive. It is quite likely that Mr. Mason also had other hallucinations when intoxicated and that he was not able to remember these.

[13] It is also important to note that Dr. Tomita testified that Dr. Lohrasbe had an advantage of spending more time with the accused and had the benefit of hearing of many hallucinations. Dr. Tomita agreed that with the additional information he might have concluded as did Dr. Lohrasbe.

[14] In short, I am satisfied that during a psychotic event, while hallucinating, induced by alcohol the accused believed he was threatened by Mr. Gaulin and shot and killed him. The reaction to the threat was abrupt, extreme, paranoid, and uncharacteristic.

[15] It is also interesting to note that in 1995 a very similar abrupt and extreme reaction was triggered when the accused knifed a person in the leg when he believed he was under the threat of a robbery and that the person he knifed had his hand in Mr. Mason's pocket at the time. Apparently Mr. Mason was then carrying a substantial amount of cash. The belief was not founded, but again, he dealt with a perceived hallucinatory threat which triggered an abrupt excessive response. He had also been drinking and was intoxicated. Dr. Lohrasbe refers to these two incidents, that is, 1995 and 2004 as "extremely suggestive of the possible onset of acute paranoid ideation possibly to the point of acute but transient delusions".

[16] It is also a consideration, but perhaps a more minor one, that Dr. Tomita, undoubtedly a bright young psychiatrist, has had five years in practice more or less. On the other hand, Dr. Lohrasbe has been practicing as a forensic psychiatrist for over 20

years, having assessed over 5000 patients and having given evidence at various levels of courts on more than 400 occasions.

[17] While Crown Counsel did a commendable job in cross-examination and Dr. Lohrasbe readily provided answers to a number of pertinent questions, Dr. Lohrasbe nonetheless re-affirmed his diagnosis that at the crucial time Mr. Mason suffered from alcohol induced psychiatric disorder with hallucinations, and in my view, correctly so.

[18] Crown Counsel has also properly conceded that this malady is a recognized disease of the mind. This is in accordance with the case law, as well as Dr. Lohrasbe's conclusion. I also conclude, that at the time of the shooting, Mr. Mason was not capable of knowing, and did not know, that his act was wrong. Accordingly, I find Mr. Mason not criminally responsible for the death of Mr. Gaulin on account of mental disorder.

[19] Since Count 2 is inextricably bound to Count 1 in that he is charged with using a firearm while committing the indictable offence of second degree murder, and since he has not been convicted of second degree murder or indeed any offence, that charge must be dismissed.

[20] Because of my conclusion on the s. 16 defence it is not necessary to deal with the question of intent.

[21] Gentleman what is your pleasure with respect to this position under s. 272 and the various other subsections?

[22] MR. COFFIN: My Lord, it seems to me that you may not wish to make a disposition. The only disposition that you would make that would not be reviewed by the Review Board within 90 days would be an absolute discharge and I do not suspect that that is in the cards at this particular time.

[23] THE COURT: You are correct in your suspicions.

[24] MR. COFFIN: So given that I would propose that the matter be referred to the Review Board and under s. 672.46 the release or detention order presently would continue until the Review Board holds their disposition hearing, I would ask that, unless the court is satisfied that some other order would be appropriate, I would ask that the matter be adjourned to perhaps sometime next week, if your schedule allows, to seek a bail supervision report primarily focused on the possible residency at the ARC. That's a location in Whitehorse that is kind of a halfway house, tightly supervised, it would eliminate the possibility of Mr. Mason drinking, it would have him controlled until such time as the Review Board has an opportunity to consider and make a disposition.

[25] THE COURT: Mr. McWhinnie.

[26] MR. MCWHINNIE: My friend has summarized the applicable provisions, My Lord. If you elect not to make a disposition at this point, then it does seem to the Crown that there are number of loose ends about what ought to be done with Mr. Mason and where he ought to live and under what circumstances. You could make very little more than an order which would amount to a bail order, in effect pending the review by the Review Board. The court electing not to make an order at this point,

referring it to the Review Board for the making of a disposition and then under s. 672.46(2) next week a bail application, a formal bail application would seem to be an appropriate approach to this particular matter.

[27] THE COURT: All right. You are both right, I certainly do not intend to make a disposition at this time and neither of you have asked for one, so, I am not bound to do so. I think the proper procedure has been adopted by both of you and submitted to me by way of a referral to the Review Board so that they may hold their hearing within the next 45 days. Of course they can apply for an extension as to the disposition of Mr. Mason.

[28] I am simply going to remand him. I am going to be here next Monday, but that is not for the whole week. The case that I was going to hear is not proceeding.

[29] MR. COFFIN: Yes, I would expect, My Lord, that the information necessary to be available by Monday.

[30] THE COURT: All right. I will be here Monday afternoon. I have got a matter in the morning but I am free in the afternoon.

[31] MR. COFFIN: Monday afternoon at two o'clock would by fine, My Lord.

[32] MR. MCWHINNIE: That would be July 25th, would it, Madam Clerk?

[33] THE CLERK: Yes, My Lord. Likelihood of two o'clock.

[34] MR. COFFIN: I would ask that Your Lordship make an order for a bail supervision report to be prepared for that time.

[35] THE COURT: So ordered.

[36] MR. MCWHINNIE: There are a couple of matters consequent upon the findings Your Lordship has made. As you will recall from the material before you, Mr. Mason was previously the subject of an order prohibiting him from possessing firearms, ammunition or explosives for a period of 10 years as a result of a previous conviction. This is his second matter before the courts where he has been found guilty of possessing, or not found guilty, but found to have had possession of firearms during the currency of that order. This is a situation where you have the discretion to impose and we ask you to impose a lifetime prohibition given your findings.

Secondly, this is a matter where the DNA provisions are engaged. You will recall, however, from the material before you that in connection with this particular matter a DNA sample was obtained. If my friend is content that the DNA sample previously obtained from Mr. Mason be identified in the bank as having come from him it would dispense with the need for a further sample at this particular time.

[37] THE COURT: The DNA order is mandatory, but I thought only on conviction.

[38] MR. MCWHINNIE: I think it is conviction or a discharge as I recall, My Lord.

[39] MR. COFFIN: Discharge under s. 730, which I wouldn't think is this.

[40] THE COURT: Yes. Why don't we put both of these matters over to Monday afternoon and we can discuss them then?

[41] MR. COFFIN: Yes, thank you.

[42] THE COURT: In the meantime, perhaps you might address your minds to that point and anything else that you wish to speak of with respect to the firearms prohibition, we will deal with it then.

[43] MR. MCWHINNIE: Thank you.

[44] THE COURT: Anything else?

[45] MR. MCWHINNIE: Not at this time.

[46] MR. COFFIN: No, My Lord, thank you.

[47] THE COURT: All right. I will again, thank you both and see you Monday.

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FOISY J.