

Citation: *R. v. Sam*, 2010 YKTC 92

Date: 20100901
Docket: 09-00746
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

ROBIN CHARLIE SAM

Appearances:
Bonnie Macdonald
David Christie
Karen Wenckebach

Counsel for the Crown
Counsel for the Defence

REASONS FOR DECISION

[1] On July 23, 2010, Robin Sam entered a plea of guilty to a single count of wounding Dwayne Sam thereby committing an aggravated assault. On August 18, 2010, I found Mr. Sam to be not criminally responsible by reason of a mental disorder, with written reasons to follow. These are my reasons.

Facts of the Offence:

[2] There was little in Dwayne Sam's relationship with his nephew, Robin Sam, to prepare him for the events which would unfold in the early morning hours of December 30, 2009. By all accounts, the two had no history of conflict or animosity.

[3] The evening began simply enough, with Dwayne Sam sharing two 26 ounce bottles of liquor with his nephews, Robin and Chris. Robin left the home between 7:00 and 8:00 p.m. followed by Chris at 11:30 p.m., leaving Dwayne Sam alone in his Carmacks residence. He went to bed, but did not lock the door, as is not uncommon in a small community.

[4] Dwayne Sam was awakened sometime later to the sound of Robin Sam entering his home. Without preamble or apparent motive, Robin Sam proceeded to kick Dwayne Sam in the head and face area at least three or four times, before passing out on the couch. Dwayne Sam was able to crawl back to his bedroom, but was unable to call for help, as he does not have a telephone.

[5] It was not until sometime between 9:00 and 11:00 a.m. the following morning that Chris Sam returned to Dwayne Sam's residence to find Robin Sam still passed out on the couch and Dwayne Sam in need of medical attention. With the assistance of Cathy Sam, Dwayne's mother, Dwayne was transported to the Carmacks Health Centre and then to Whitehorse for treatment of his injuries, which included:

- Multiple contusions and abrasions to the face;
- Perforation of the left tympanic; and
- Fracture of the right orbital socket, including blow-out fractures of the superomedial, medial and inferior wall.

[6] Shortly after 11:00 a.m. on December 30th, the police located Robin Sam passed out on Dwayne Sam's couch, still wearing his jacket and boots. He was arrested without incident. Mr. Sam has no recollection of the events giving rise to the offence.

Background of Mr. Sam:

[7] Robin Sam, a twenty-nine year old member of the Selkirk First Nation, comes before the court with an extensive history of involvement with the mental health system and, to a lesser extent, the criminal justice system.

[8] Considerable work has been done by counsel, in this case, to compile various psychiatric and psychological assessments along with other medical reports and records to provide a relatively clear picture of Mr. Sam's circumstances. In addition, Dr. Shabehram Lohrasbe, the author of two court-ordered psychiatric assessments with respect to Mr. Sam, and Psychologist Bill Stewart, who has provided some counseling and support services to Mr. Sam, both attended to provide *viva voce* testimony regarding Mr. Sam's mental state at and around the time of the offence.

[9] All of the information before me confirms that Mr. Sam suffers from significant cognitive limitations, likely resulting from a number of causes. Although there is no FASD diagnosis regarding Mr. Sam, community reports suggest a likelihood of pre-natal exposure to alcohol.

[10] Mr. Sam's subsequent childhood can only be described as traumatic, characterized by exposure to domestic violence, emotional, physical and sexual abuse.

At age two or three, he nearly drowned when left unattended in a bathtub. At the age of five, the family home burnt down. Dr. Lohrasbe's report dated April 20, 2010, indicates that the fire, which caused the death of Mr. Sam's maternal grandmother, was a result of Mr. Sam playing with matches.

[11] I am also advised that there has been an ongoing history of Mr. Sam being bullied in his home community. In particular, at the age of sixteen, Mr. Sam suffered a significant beating when attacked by a group of five individuals. This incident and resulting head injury is seen as the cause of Mr. Sam's epilepsy and seizure disorder.

[12] Mr. Sam became involved in the criminal justice system in 2001, amassing a relatively limited criminal record which includes convictions for three separate assaults, two of which resulted in bodily harm to his victims.

[13] In 2008, Mr. Sam lost his home in a second fire.

[14] Against this backdrop, Dr. Lohrasbe testified that it would be reasonable to hypothesize that the beating Mr. Sam suffered at age sixteen caused brain damage which caused seizures, which, in turn, caused and continues to cause further brain damage, with the increasing onset of psychotic symptoms. With respect to the offence before me, Dr. Lohrasbe concluded in his April 20th report that "[t]here is indirect information supporting the hypothesis of paranoia precipitated by alcohol in a man with epilepsy" (page 13).

Issues:

[15] There is little doubt that Mr. Sam is a man whose mental functioning is severely compromised. The question to be decided, from a legal perspective, is what, if any, impact Mr. Sam's cognitive limitations have on his fitness to stand trial and his criminal responsibility.

Fitness:

[16] While the primary focus of the hearing was on the issue of criminal responsibility, fitness was, nonetheless, a peripheral issue raised through concerns expressed by defence counsel, who noted ongoing difficulties with advising and receiving instructions from Mr. Sam.

[17] Section 2 of the *Criminal Code* defines "unfit to stand trial" as meaning:

[U]nable on account of mental disorder to conduct a defense at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.

[18] In his preliminary report dated April 20th, Dr. Lohrasbe addressed the issue of fitness as follows:

When interviewed on 13 April 2010, Mr. Sam's responses to fitness related questions were sufficiently accurate and coherent to conclude that, from a psychiatric perspective, he is fit, but marginally so. (page 11)

He went on to note:

It is certainly conceivable that he can become temporarily unfit due to transient confusion especially if he were to become non-compliant with medications. He could also become unfit if he were to develop any suspiciousness or outright paranoia regarding his lawyer. (page 11)

[19] Concerns raised by defence counsel led to Dr. Lohrasbe's follow up report dated June 25, 2010, in which he expanded on his earlier opinion by addressing the criteria set out in section 2 of the *Criminal Code* in greater detail and ended by confirming that his opinion as to Mr. Sam's fitness to stand trial was unchanged. In fact, he went on to note:

Overall however, Mr. Sam is functioning at a capacity higher than many individuals I have assessed (and observed while on the B.C. Review Board) who have subsequently been found fit for trial. The fluctuations in his mental state are not extreme compared to many other brain-damaged individuals. What is more of an issue with him than many others is his difficulty articulating his thoughts, and the time required to elicit his responses. He will require patient handling by counsel.

[20] At the hearing, Dr. Lohrasbe again reiterated his opinion that Mr. Sam meets the fitness criteria.

[21] I found the evidence of Dr. Lohrasbe, both written and oral, on the issue of fitness to be compelling and persuasive. His considered opinion clearly and comprehensively addressed each of the considerations enumerated in section 2, and I have no hesitation in concluding, based on his evidence, that Mr. Sam is fit to stand trial, notwithstanding the clear limitations which have made this an understandably difficult case for his counsel.

Criminal Responsibility:

[22] In addition to raising fitness, counsel for Mr. Sam asserted that Mr. Sam was sufficiently mentally disordered at the time of the offence as to be exempted from criminal responsibility.

[23] Section 16 of the *Criminal Code* 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.

[24] There seems little dispute that Mr. Sam suffers from a mental disorder. Dr. Lohrasbe testified that, while not a traditional disorder, the cognitive deterioration suffered by Mr. Sam as a result of likely neo-natal exposure to alcohol, traumatic childhood experiences, brain injury and epilepsy amounts to a mental disorder. In his April 20th report, Dr. Lohrasbe noted:

[I]t is still my opinion that he does have a mental disorder. He is severely limited in a range of his cognitive capacities including his executive functioning, that collectively impair his experience of reality. Functionally, Mr. Sam is as disordered, mentally, as a patient who has severe degree of a more typical mental illness such as schizophrenia. (p. 11-12)

[25] The larger and more difficult question is the impact the mental disorder had on Mr. Sam's ability to appreciate the nature and consequences of his actions on December 30, 2009.

[26] Again, in his April 20th report, Dr. Lohrasbe opined:

In my view, Mr. Sam's cognitive limitations are such that even at his best his capacities are well below 'normal'. In the context of his 'S. 16 capacities', he could reasonably be seen as 'marginally capable', akin to his fitness. His perceptions, interpretations, insight, and judgment are all barely capable of effective functioning in the real world, when he is at his best.

At a time when he was intoxicated, there is the likelihood emotional arousal (alcohol is known to disinhibit control over emotions) which would likely have further compromised his capacities. Alcohol in an epileptic and cognitively impaired man would have a high likelihood of precipitating paranoia. Under such circumstances, I have serious questions about his capacity to 'appreciate' his actions at the time of his offence and to 'know' their wrongfulness at that time.

To reiterate, a man with a functional IQ of 53 is, at best, marginal in his capacities to appreciate his actions and to know their wrongfulness. Such a man, if acutely intoxicated, is likely to be even more impaired in these capacities. If he was acutely intoxicated and paranoid, his capacities would be further undermined. Insofar as the legal tests under section 16 require meaningful, rational thought, Mr. Sam would likely fail to meet that threshold. (p. 14)

[27] What makes the application of the test difficult in this case is the necessarily tentative nature of Dr. Lohrasbe's opinion regarding Mr. Sam's mental state at the time of the offence. Dr. Lohrasbe identified several limitations on his opinion that Mr. Sam was in a paranoid state at the time of the attack, including

1. Mr. Sam's lack of recall regarding the attack and the lack of objective evidence to fill in the blanks;
2. The fact there is little reliable information about Mr. Sam's background prior to his injury at age 16, including no knowledge of the extent of cognitive functioning before the injury, or of the impact of sexual abuse or of his mother's use of alcohol; and
3. Mr. Sam's reluctance to provide information, coupled with his inability to do so.

[28] It is the combined impact of these limitations which renders Dr. Lohrasbe's opinion tentative and raises the very real question as to whether his opinion is sufficient, on a balance of probabilities, to support the finding that Mr. Sam was not criminally responsible by reason of a mental disorder at the time he committed the offence.

[29] It is at this point that the extensive documentation provided by counsel and, most particularly, the evidence of Bill Stewart provide assistance in determining with, somewhat greater certainty, Mr. Sam's mental state at the time of the offence.

[30] In direct examination, Dr. Lohrasbe was referred to a Medical Memorandum filed under Tab 5 of Exhibit 5, dated July 28th, 2010, which indicates that Mr. Sam was seen by a doctor as he was exhibiting symptoms of paranoia, particularly regarding whether kitchen staff were tampering with his food. Dr. Lohrasbe indicated that the fact Mr. Sam was displaying signs of paranoia while closely supervised in custody and, therefore, not likely to be under the influence of alcohol, strengthened his opinion with respect to Mr. Sam's state of mind at the time of the offence.

[31] Psychologist Bill Stewart testified that he was contacted by the head nurse at the local Health Centre in the first week of December 2009, regarding concerns about Mr. Sam's mental state. When he visited Mr. Sam, Mr. Stewart found him to be extremely agitated and disoriented. He was expressing concerns about community members and was exhibiting compulsive cleaning behaviour, appearing to be angered by the lint he found on the carpet. His thinking was disorganized and his thoughts were not contextually related to the conversation.

[32] Attempts to have Mr. Sam committed to the Whitehorse General Hospital were unsuccessful due to his angry and aggressive behaviour.

[33] Mr. Stewart observed the same behaviour from Mr. Sam the following week and again recommended that he be taken to hospital, and, again, due to aggressive behaviour, the attempt was unsuccessful and Mr. Sam was lodged in cells.

[34] Mr. Stewart indicated that in his dealings with Mr. Sam, the most disordered behaviour he observed was in December 2009. He has not seen Mr. Sam in that agitated a state before or since.

[35] A General Occurrence Report filed at Tab 10 of Exhibit 6 refers to an incident on December 12, 2009, in which the RCMP were advised by Mr. Stewart of information suggesting Mr. Sam may attempt to kill himself. In responding to the call, Constable Waldner noted a distinct difference in Mr. Sam's behaviour from what he had observed a few days previously, noting that he repeatedly looked up in the sky with a blank look on his face with his eyes moving very rapidly back and forth. The officer concluded "something was definitely bothering Robin as he was fretting constantly and was not acting in his usual way".

[36] Dr. Lohrasbe indicated that the evidence of Mr. Stewart bolstered his opinion, noting that the compulsive behaviour and tangential speech observed by Mr. Stewart suggest deterioration in Mr. Sam's mental state throughout December leading up to the

offence. Accordingly, he felt even more confident in his opinion that Mr. Sam had been actively paranoid at the time of the offence.

[37] While this is not the clearest of cases, when I consider all of the evidence put before me, I am satisfied that there is a sufficient evidentiary basis to establish, at least on a balance of probabilities, that Mr. Sam was, at the time of the offence, incapable, by reason of his mental disorder, of appreciating the nature and quality of his actions or of recognizing that they were wrong.

RUDDY C.T.C.J.