

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
sitting as YOUTH JUSTICE COURT
pursuant to s. 13 of the Youth Criminal Justice Act

HER MAJESTY THE QUEEN

- and -

K.M.
(A Young Person)

Transcript of the Decision on a Bail Hearing delivered by
The Honourable Justice L. A. Charbonneau, in Yellowknife,
in the Northwest Territories, on February 2, 2015.

INFORMATION CONTAINED HEREIN IS PROHIBITED FROM
PUBLICATION PURSUANT TO SECTIONS 110 AND 111
OF THE YOUTH CRIMINAL JUSTICE ACT
AND PURSUANT TO
SECTION 28 OF THE YOUTH CRIMINAL JUSTICE ACT
AND SECTION 517 OF THE CRIMINAL CODE

APPEARANCES:

Ms. J. Scott: Counsel on behalf of the Crown

Mr. T. Amound: Agent for Mr. C. Davison, Counsel on
behalf of the Young Person

Charge under s. 235(1) C.C.

1 R. v. K.M. (A Young Person)
2 February 2, 2015 - Yellowknife
3 Decision of Justice L. A. Charbonneau
4 (Bail Hearing)

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7 THE COURT: K.M. faces a charge of first
8 degree murder arising from the death of Charlotte
9 Lafferty on March 22nd, 2014. He was arrested on
10 March 22nd and he has been in custody since.

11 K.M.'s date of birth is April 18th, 1996.
12 He turned 18 a month after Ms. Lafferty's death.
13 As a result, this case is governed by the Youth
14 Criminal Justice Act.

15 K.M. has chosen to be tried by a judge and
16 jury. Because of that, this court is deemed to
17 be a Youth Justice Court under section 13(3) of
18 the Youth Criminal Justice Act, which I will
19 refer to as the YCJA from this point on.

20 K.M. had his preliminary hearing and he was
21 committed to stand trial on October 16th, 2014.
22 Since then, a pre-trial conference has been held
23 and dates have been set for hearings into certain
24 pre-trial issues as well as for the trial itself.
25 Pre-trial applications will proceed on May 5th
26 and the week of August 24th, 2015; and the jury
27 trial, which is scheduled to last three weeks, is

1 scheduled to start January 25th, 2016 — a year
2 from now essentially.

3 K.M. has filed an application seeking
4 release, and his parents C.K. and D.K. now live
5 in Yellowknife and are proposed to be his
6 sureties. The release plan contemplates K.M.
7 residing with them and being bound by very strict
8 conditions. He would essentially be on house
9 arrest and under the constant supervision of one
10 of his parents at all times. The Crown opposes
11 K.M.'s release and takes the position that
12 nothing short of actual detention can address the
13 concerns that arise in this case.

14 There have been issues in the case law about
15 whether this court's jurisdiction in youth
16 matters in situations like this one is limited to
17 the conduct of the trial or whether it extends to
18 bail as well. In one decision, *R. v. M.(T.R.)*,
19 2013 ABQB 571, the court concluded that the
20 Provincial Court retains exclusive jurisdiction
21 over bail, even on murder cases, where the young
22 person has chosen to be tried by a judge and
23 jury, and that the Superior Court's jurisdiction

24 is restricted to the trial itself. If this
25 reasoning is followed, it would mean that this
26 bail hearing should be held in what is otherwise
27 referred to as the Territorial Court sitting as

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1 the Youth Court.

2 Other decisions have come to the conclusion
3 that the Superior Court does have jurisdiction
4 over bail in situations where the young person
5 has elected trial in that court; for example, in
6 R. v. W.(E.), 2004 SKCA 114; R. v. B.(J.), 2012
7 ONSC 4957; R. v. H.(B.W.), 2005 Carswell Man 397.
8 There is not complete consensus as to what the
9 trigger is for that jurisdiction — the election
10 as to mode of trial or the committal to stand
11 trial — but all have concluded that the Superior
12 Court has jurisdiction.

13 Here, the Crown and defence are in agreement
14 to have the bail hearing in this court. This, to
15 me, means I do not really need to decide which of
16 the two interpretations I would favour. This is
17 because the YCJA creates its own stand alone bail
18 regime, but it also incorporates, by reference,
19 the bail provisions of the Criminal Code, unless

20 those provisions are inconsistent with or
21 excluded by the YCJA.

22 One of the bail provisions of the Code,
23 section 523, gives the trial court jurisdiction
24 over bail in certain circumstances: first, when
25 the trial is ongoing, because that provision
26 refers to "the court before which the accused is
27 being tried." In that situation, the

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1 jurisdiction does not depend on the consent of
2 the parties. The same provision goes on to state
3 that bail can be determined "by the court before
4 which the accused is to be tried" when the
5 parties consent. That provision contemplates a
6 situation where an order dealing with bail has
7 already been made and is sought to be changed on
8 cause being shown, but I think it also applies
9 when, as here, there simply has not been any bail
10 hearing and the matter is before the trial court.
11 It makes sense for this court, as the trial
12 court, to have jurisdiction over bail whether or
13 not there has been a bail hearing previously.
14 For that reason, it is clear, in my view, that
15 this court has jurisdiction over K.M.'s bail

16 hearing, and I leave to another day the
17 consideration of what would happen if, in a
18 situation like this one, the Crown and defence
19 were not in agreement to have the hearing in this
20 court. This court would then have to decide
21 which of the interpretations it will adopt.

22 I now turn to the evidence that was adduced
23 at the bail hearing two weeks ago. That evidence
24 includes the following: An affidavit sworn by
25 Alexandra Stewart, who is a paralegal at the
26 Crown's office, which sets out in detail the
27 evidence that the Crown intends to adduce at

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1 K.M.'s trial. The affidavit also sets out
2 information about an offence that K.M. committed
3 on November 28th, 2013, and for which he has now
4 been sentenced. It attaches, as exhibits, the
5 Agreed Statement of Facts pertaining to that
6 offence and a presentence report that was
7 prepared for that hearing. The report provides a
8 lot of information, a lot of positive information
9 in fact, about K.M.'s family support, as well as
10 information about some of his personal
11 circumstances.

12 Crown counsel provided some additional
13 information at the bail hearing about Ms.
14 Lafferty's age, the age of her children, the
15 population of Fort Good Hope, and the familial
16 connection between her and K.M.'s family.

17 The Crown also filed as an exhibit a
18 photograph which depicts Ms. Lafferty's body
19 shortly after she was found by the police officer
20 who first responded to the call on the morning of
21 March 22nd. This is the exhibit that is now the
22 subject of a sealing order. The photograph shows
23 the deceased's body and, in particular, the
24 extensive injuries to her face.

25 Defence filed an affidavit sworn by K.M.'s
26 father, C.K. One of the exhibits to that
27 affidavit is an excerpt of the same presentence

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1 report that is attached to Ms. Stewart's
2 affidavit. The other exhibit to C.K.'s affidavit
3 is an Acknowledgement of Surety Form signed by
4 K.M.'s mother, D.K.

5 Defence has also filed C.K.'s criminal
6 record, which is somewhat dated, as well as the
7 list of conditions that are being proposed as

8 part of K.M.'s release plan.

9 I have carefully reviewed the details of the
10 evidence set out in Ms. Stewart's affidavit. I
11 am not going to refer to each element and aspect
12 here, but I do want to refer to some of this
13 evidence in some detail to put my decision in
14 context.

15 At the time of her death Ms. Lafferty was 23
16 years old. Overall, the allegations are that on
17 the evening of March 21st, she and K.M. were
18 among a group of young people who spent time
19 together socializing and consuming alcohol in
20 Fort Good Hope. On the morning of March 22nd,
21 behind the elders' centre in Fort Good Hope,
22 Ms. Lafferty was killed. She died of blunt head
23 trauma as a result of a violent attack. She was
24 struck repeatedly during this attack. She was
25 kicked repeatedly on her body and in her head.
26 She was struck repeatedly with a piece of wood.
27 Her clothes were removed. She was kicked between

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1 her legs. Her attacker urinated on her. The
2 assault was reported while it was going on and
3 police attended the scene shortly thereafter.

4 Ms. Lafferty was pronounced dead by a nurse
5 shortly after she was discovered. The extent of
6 her facial injuries were such that she had to be
7 identified through dental records at the autopsy.

8 The Crown alleges that K.M. is the person
9 who attacked her. To prove this, the Crown
10 proposes to adduce various elements of
11 circumstantial evidence pointing to K.M. being
12 responsible for this.

13 First, there are allegations coming from
14 witnesses about contact between Ms. Lafferty and
15 K.M. shortly before her death.

16 Miranda McNeely is a witness who saw Ms.
17 Lafferty and K.M. that evening and the last
18 witness to have seen her alive. She saw them at
19 the house of Lee-Ana McNeely, and the three of
20 them left and decided to go to Miranda's house.
21 Miranda's house is located at the back of the
22 elders' residence in Fort Good Hope. Once at
23 Miranda's house, they continued drinking.
24 Miranda opened a mickey of Smirnoff vodka and
25 they drank a quarter of it. Miranda gave the
26 rest of the mickey to Ms. Lafferty before she
27 left. Miranda said Ms. Lafferty left with K.M.

1 A short time after, Miranda heard Ms. Lafferty's
2 voice yelling her name.

3 The second witness is Cora Rabisca. She was
4 at Miranda's house sleeping when the three others
5 arrived. They stayed in the living room,
6 drinking, while Cora went to another room to go
7 back to sleep. Miranda came to tell her they
8 were leaving, and Cora told Miranda she should
9 stay home.

10 These two witnesses are expected to put Ms.
11 Lafferty and K.M. together on the morning of
12 March 22nd in the vicinity of the elders' centre
13 shortly before the attack was reported to police.

14 Then there are allegations regarding the
15 evidence of people who witnessed the assault on
16 Ms. Lafferty. Two residents of the elders'
17 centre saw her being assaulted. Barthelemy
18 Kotchile awoke at about 7 a.m. to a noise coming
19 from the back of the building. He lives in the
20 elders' centre. He looked out and saw a young
21 man beating a woman who was laying on the ground
22 behind the building. The attacker was kicking
23 the victim in the head. He saw the man pull off
24 her pants and kick her between the legs, on the
25 head and on her body. He saw him urinating on
26 her. He saw the attacker hit her repeatedly with
27 a two-by-two wooden board on her head and on her

1 body. Mr. Kotchile called the RCMP as he was
2 watching this through the window. He made the
3 first call at 7:17 a.m. and made a second call at
4 7:24 a.m. Communication was difficult during the
5 calls because Mr. Kotchile is a Slavey speaker.
6 After the second call to the police, he called
7 his neighbour John Cotchilly. He then went to
8 the front of the building to wait for the police.
9 The attack was still ongoing when he left his
10 room and at that point the attacker was hitting
11 the victim with the wooden board. Mr. Kotchile
12 did not recognize the man but described him as a
13 young male between 15 and 20 years old, quite
14 tall but under six feet tall, medium build, clean
15 shaven and wearing a dark hood. He said the man
16 wore a down-filled jacket described as an army or
17 hunting jacket. He agreed with the suggestion
18 made by the police officer that it was a green
19 jacket and added that it had white spots. I
20 gather that in his preliminary hearing testimony,
21 he said the jacket was brown and grey with white
22 spots and that it was an army/hunter type jacket.
23 John Cotchilly, the neighbour, was awoken by
24 Mr. Kotchile at about 7:30. He went and looked

25 at the back of his unit and he saw someone
26 standing and someone lying on the ground. He did
27 not see anyone else behind the building. He

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1 called the RCMP at 7:33 to report that a man was
2 beating a young girl behind the elders' complex
3 and he thought the woman was already dead. A few
4 minutes later he saw a police officer arrive at
5 the back of the complex, so he went outside. The
6 police officer was trying to lift the young girl
7 and asked him to go get a blanket.

8 Then there are allegations regarding the
9 evidence of the police officer who first
10 responded to this call. He received a call from
11 RCMP dispatch at 7:19 a.m. The report he
12 received was that there was an assault behind the
13 elders' complex. He went there and arrived near
14 the building at 7:30. As he drove around the
15 building, he saw a male walking out of the
16 driveway at the back of the building. The person
17 was carrying a wooden board on his shoulder, two
18 to three feet long, and there was a red stain at
19 the top of the board. The officer saw a mickey
20 of Smirnoff vodka in the pocket of the person's

21 coat. The person was wearing a light brown
22 jacket and a black hat or black hood and was
23 clean shaven.
24 The officer approached the man and rolled
25 down the window of his truck. The man's eyes
26 widened. The officer could not immediately
27 remember the name of the person but he recognized

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1 the young man as K.M. He had had dealings with
2 K.M. in the past. Just as he was stopping the
3 vehicle, K.M. dropped the wooden board and
4 started running. The officer started to chase
5 him, telling him he was under arrest. He saw
6 K.M. reach for the pocket where he had seen the
7 mickey of vodka. He also saw K.M. turn around
8 and look at him as he was running away.

9 The officer stopped the chase to attend to
10 the victim. At the back of the elders' complex
11 he found blood splattered around and clothes. He
12 found Ms. Lafferty's naked body on the snow. She
13 was lying on her back, and her arms were locked
14 in clothing as if someone had tried to remove all
15 the top clothing at the same time but got stuck
16 at her arms. There was no movement or sign of

17 life from her. Her face was injured to the point
18 of being unrecognizable.

19 The officer at that point was not sure if
20 she was still alive. He called for backup. He
21 asked residents at the elders' complex to phone
22 the nursing station. He tried to lift Ms.
23 Lafferty's body to get her to his truck to get
24 medical attention. He was unable to do that so
25 he dragged her to his truck. The nurse arrived
26 at 7:44. By then the officer had been able to
27 put Ms. Lafferty into the vehicle, but the nurse

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1 pronounced her dead.

2 There are other allegations that relate to
3 utterances said to have been made by K.M.'s
4 mother. The Crown will seek to adduce these
5 utterances allegedly made to two people. The
6 admissibility of these utterances is in issue and
7 will be the subject of voir dices to determine
8 their admissibility.

9 The first utterance occurred on the morning
10 of March 22nd at around 8:30 a.m. Joseph Turo
11 was at the K.M. home. He overheard D.K. say,
12 "K.M., come here. How come you've got blood all

13 over your hands?"and "You're not supposed to be
14 drinking, you're under conditions."

15 The allegation regarding the second
16 utterance is that on that same morning of March
17 22nd, D.K. phoned Aurora McNeely and told her she
18 was worried that the person found behind the
19 elders' centre was L.T., K.M.'s girlfriend,
20 because he had come home with blood on him. D.K.
21 allegedly told Aurora McNeely that K.M. told her
22 he had blood on him because some people were
23 trying to fight with him.

24 It is alleged that when K.M. was arrested at
25 7:50 p.m. on March 22nd, he had fresh cuts on his
26 left finger and cuts to both palms of his hands.

27 It is also alleged there were empty

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1 containers of alcohol in his room that were in
2 plain sight.

3 The clothes that he was wearing — his belt
4 and his shoes — were seized and were among the
5 items that were sent out for forensic analysis.

6 The Crown plans to adduce the results of the
7 forensic testing done on several exhibits seized
8 in this investigation and the results are

9 outlined at paragraph 100 of Ms. Stewart's
10 affidavit, in particular:

11
The results of some of the DNA testing

12 that was done, for example, DNA found on the left
13 side of the left shoe seized from K.M. upon
14 arrest, matches the DNA of Ms. Lafferty;

15
The DNA profile of Ms. Lafferty was found

16 in areas of the wooden stick presumed to be the
17 murder weapon and K.M.'s DNA was also found on
18 that stick;

19
DNA found on the belt seized from K.M. is

20 from mixed origin originating both from Ms.
21 Lafferty and K.M.

22 There are other forensic results tying K.M.
23 with various things found and the overall
24 circumstances.

25 There are also allegations about things K.M.
26 said that morning. When Ms. Lafferty's mother,
27 Louisa Lafferty, realized her daughter had not

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1 come home on the morning of March 22nd, and once
2 she heard something had happened behind the

3 elders' complex, she made a number of phone calls
4 and spoke to some of the people who had seen her
5 daughter the night before. After speaking with
6 Miranda and learning that her daughter had left
7 Miranda's residence with K.M., she went to the
8 residence of his parents to speak to him to find
9 out where he had left her daughter. K.M.'s
10 mother told her he was sleeping and could not be
11 awoken but she would keep trying. Later that
12 morning K.M. called Louisa Lafferty. He told her
13 he had been getting too high the night before so
14 he had left Ms. Lafferty at Miranda McNeely's
15 place and had gone home to bed.

16 This is an overview of the main features of
17 the evidence that the Crown proposes to adduce at
18 this trial. I have not referred to every single
19 aspect of what is listed in Ms. Stewart's
20 affidavit, but these are some of the main
21 features.

22 The Crown also presented evidence about the
23 events that led to K.M.'s conviction for assault
24 causing bodily harm. The conviction and sentence
25 took place after Ms. Lafferty's death but relates
26 to events that had happened in November 2013.
27 K.M. was awaiting trial in relation to that

1 matter when he was charged with Ms. Lafferty's
2 murder.

3 K.M. was arrested and charged on November
4 28th, 2013, for aggravated assault, uttering
5 threats, and being unlawfully in a dwelling
6 house. He was released the same day on an
7 undertaking which included several conditions,
8 including no contact conditions with respect to
9 certain individuals, a condition that he abstain
10 absolutely from the consumption of alcohol, that
11 he abide by a curfew and be in his residence
12 between 10 p.m. and 7 a.m. His mother was given
13 a notice to parent in relation to that charge and
14 was advised of the conditions of his release.

15 K.M. had his trial on that matter on October
16 2nd and 3rd, 2014. Mid trial he entered a plea
17 of guilty to assault causing bodily harm on
18 Myrine Kakfwi.

19 The facts admitted at the sentencing hearing
20 included that K.M. had had a disagreement with
21 Mr. Kakfwi earlier in the evening and that there
22 had been an altercation between them. A short
23 time after this they met again and the
24 confrontation continued. At one point while Mr.
25 Kakfwi was lying on the landing area in front of
26 the door to the house, K.M. repeatedly kicked and
27 punched him in the upper body area. Mr. Kakfwi

1 had his arms and hands up around his head for
2 protection. Two other people who were there were
3 telling K.M. to stop. He picked up a bench that
4 was on the landing and threw it on Mr. Kakfwi and
5 then left in his truck.

6 Mr. Kakfwi suffered scratches and swelling
7 to his forehead, a swollen cheek, bruising to his
8 ears, and pain in his chest and on his hand as a
9 result of this assault.

10 For that offence, K.M. was sentenced to four
11 months' custody, deemed to have been served by
12 time already spent in custody.

13 I now turn to the release plan that was
14 presented. The proposed release plan is that
15 K.M. would live with his parents in Yellowknife
16 and would be under their constant supervision.
17 He would be on house arrest and only allowed to
18 leave his residence for limited purposes and in
19 the presence of one of his parents. The proposed
20 conditions are set out in Exhibit 4, a document
21 filed by defence, but K.M. has indicated through
22 counsel that he would be prepared to agree to
23 additional, and even more restrictive conditions

24 if this is what the court deems necessary to
25 address any concerns regarding his release.

26 Because the role of K.M.'s parents as
27 sureties is such an important component of this

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1 release plan, C.K.'s evidence is important. I
2 have his affidavit, but I also have the benefit
3 of his in-court testimony when he was
4 cross-examined on his affidavit and re-examined
5 by K.M.'s counsel. C.K. explained that he and
6 his wife have not found work in Yellowknife yet
7 but that they are seeking employment. He said
8 that if K.M. was released, one of them would not
9 work to ensure that someone was always around to
10 supervise him.

11 C.K. stopped drinking completely ten years
12 ago. He has a criminal record but the last entry
13 on that record is from 1997. He testified that
14 his wife was drinking alcohol until recently. He
15 said she cut back after K.M. was charged with
16 this offence and that she quit drinking
17 completely just before New Year's this year. He
18 said there is no alcohol in their home.

19 C.K. acknowledged that he was aware of his

20 son's no drinking conditions arising from the
21 November 2013 charges. He was asked whether he
22 did anything to enforce those conditions and he
23 answered that he just told his son every day that
24 he was not supposed to drink. He also said he
25 believed his son was obeying him. He did,
26 however, acknowledge that K.M. sometimes did
27 consume alcohol after he was put on those

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1 conditions and he would come home to "sleep it
2 off." C.K. said this did not happen regularly.
3 He said he was aware that there were empty
4 alcohol bottles in his son's room, as was
5 discovered when the police came to arrest him,
6 but C.K. said he did not think his son ever had
7 alcohol in his room. He said that K.M. had those
8 empty bottles in his room for recycling purposes.
9 He was asked if alcohol was a problem for his son
10 and he answered "not really". C.K. acknowledged
11 that he was aware, after the November 2013
12 charges were laid, that his son was on a no
13 contact order with respect to his girlfriend L.T.
14 He also acknowledged that on July 22nd he and his
15 wife went to the correctional centre to visit

16 their son, that L.T. was with them and that she
17 lied and said she was K.M.'s cousin. The lie was
18 discovered when the staff recognized her. New
19 conditions were put in place for visits. This
20 incident is also referred to in the presentence
21 report.

22 C.K. was also cross-examined about things he
23 said to police after his son was arrested for the
24 murder of Ms. Lafferty. He acknowledged he told
25 police that K.M. was home all night and so was
26 C.K., and he said that K.M. was in his room that
27 evening.

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1 At the bail hearing, C.K. was cross-examined
2 about having gone out for a skidoo ride that
3 night and he acknowledged that he may have left
4 the house at one point to go look for gas but he
5 was not out for very long. He acknowledged that
6 this was different from what he told the police
7 when he gave his statement.

8 I now turn to the analysis of this matter in
9 light of the relevant principles. First, it is
10 important to note that the YCJA has a standalone
11 bail regime that is set out at section 29 of the

12 Act.

13 Paragraph 29(1) provides that pre-trial
14 custody cannot be ordered for a young person as a
15 substitute for appropriate child protection,
16 mental health or other social measure. No one
17 here is suggesting that this provision is
18 engaged.

19 Paragraph 29(2) sets out several
20 requirements that must be met before a young
21 person can be detained. The Crown bears the onus
22 to satisfy the court on a balance of
23 probabilities that each of those requirements are
24 met.

25 The first requirement is that absent history
26 showing a pattern of outstanding charges or
27 findings of guilt, a young person can only be

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1 detained if charged with a serious offence.
2 "Serious offence" is a concept that is defined
3 and, not surprisingly, it includes first degree
4 murder.

5 The second requirement set out at paragraph
6 29(2)(b) is that the court be satisfied, on a
7 balance of probabilities, of one or more of these

8 three things:

9

10 i) that there is a substantial
11 likelihood that, before being dealt
12 with according to law, the young
13 person will not appear in court when
14 required by law to do so,

12

13 ii) that detention is necessary for
14 the protection or safety of the
15 public, including any victim of or
16 witness to the offence, having
17 regard to all the circumstances,
18 including a substantial likelihood
19 that the young person will, if
20 released from custody, commit a
21 serious offence, or

17

18 iii) in the case where the young
19 person has been charged with a
20 serious offence and detention is not
21 justified under subparagraph (i) or
22 (ii) that there are exceptional
23 circumstances that warrant detention
24 and that detention is necessary to
25 maintain confidence in the
26 administration of justice, having
27 regard to the principles set out in
section 3 and to all the
circumstances, including

24 (A) the apparent strength of
25 the prosecution's case,

25

26 (B) the gravity of the offence,

26

27 (C) the circumstances
surrounding the commission of the
offence, including whether a firearm

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1 was used, and

2 (D) the fact that the young
3 person is liable, on being found
guilty, for a potentially lengthy

custodial sentence.

4

5 This mirrors the three grounds of detention
6 provided for in the Criminal Code although there
7 are some important differences in wording. For
8 example, the public safety ground does not make
9 reference to risks that the young person will
10 interfere with the administration of justice.
11 The tertiary ground refers to the existence of
12 exceptional circumstances that warrant detention.
13 Those are differences when one compares the YCJA
14 provision with the provisions of section 515 of
15 the Criminal Code.

16 Another important difference in this bail
17 regime is that establishing that the grounds
18 exist for detention is not sufficient. If the
19 Crown establishes that detention is necessary on
20 one or more of these grounds, it must also
21 establish on a balance of probabilities that no
22 condition or combination of conditions of release
23 would address the concerns established under the
24 previous criteria. What has to be established at
25 that stage depends on the grounds for which
26 detention was found to be necessary. But,
27 depending on the case, the court has to be

1 satisfied that no condition or combination of
2 conditions will reduce, to a level below
3 substantial, the likelihood that the young person
4 would not appear in court; or that no condition
5 or combination of conditions will offer adequate
6 protection to the public from the risk that the
7 young person might otherwise present; or that no
8 condition or combination of conditions will
9 maintain confidence in the administration of
10 justice.

11 And finally, if, after going through this
12 exercise, the court comes to the conclusion that
13 the young person must be detained, the court must
14 go further and consider whether the young person
15 may, instead of being detained, be placed in the
16 care of a responsible person. That is under
17 section 31. To do so, the court must be
18 satisfied that the young person would otherwise
19 be ordered detained in custody, that the young
20 person is willing to be placed in the care of
21 that responsible person, and that the responsible
22 person is willing and able to take care of, and
23 exercise control over, the young person.

24 How, then, do these principles apply to this
25 case and the evidentiary record before me?

26 Any time bail is considered, certain
27 fundamental principles of our law are engaged.

1 The right to reasonable bail is protected by the
2 Canadian Charter of Rights and Freedoms. That
3 right is consistent with another fundamental
4 right also protected by the Charter, the
5 presumption of innocence.

6 K.M. is presumed innocent at this stage of
7 the proceedings. Pre-trial detention should not
8 be the norm. It should not be the norm that
9 people whose guilt has not been proven to the
10 requisite degree await trial in custody. That
11 consideration is even more pressing under the
12 YCJA. That Act represents a clear choice by
13 Parliament to have young persons dealt with
14 differently than adults in many respects. This
15 manifests itself in some of the differences that
16 I have already noted in the bail regime that
17 applies to youths but in many other respects as
18 well. On sentencing, the court's discretion, in
19 particular when it comes to imposing custodial
20 sentences, is far more curtailed under the YCJA
21 than under the Criminal Code.

22 Here, the Crown acknowledges that detention
23 should not be the norm and that it should be an

24 exceptional measure, particularly when dealing
25 with young persons. The Crown also concedes that
26 there is no offence for which bail cannot be
27 granted. Although first degree murder is as

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1 serious as an offence gets, the Crown
2 acknowledges that this does not in and of itself
3 mean that bail cannot be granted to a person
4 facing such a charge. But the Crown says K.M.'s
5 detention is required in this case based on the
6 secondary and tertiary grounds. The Crown says
7 that nothing short of detention can address the
8 public safety concerns that arise in this case,
9 and nothing short of detention can maintain
10 public confidence in the administration of
11 justice.

12 Dealing first with public safety. To
13 justify K.M.'s detention on this ground, the
14 Crown must establish on a balance of
15 probabilities that his detention is necessary for
16 the protection or safety of the public, including
17 witnesses, having regard to all the
18 circumstances, including a substantial likelihood
19 that he will, if released, commit a serious

20 offence.
21 The notion of "substantial likelihood" is
22 also present in the secondary ground as it is
23 defined in the Criminal Code and in that context
24 it has been interpreted in R. v. Link, [1990]
25 A.J. No. 169, to mean "substantial risk". I see
26 no reason to interpret that phrase differently in
27 the context of the YCJA. It is important to note

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1 that "substantial risk" means more than the "mere
2 possibility".

3 In examining public safety as a ground to
4 deny bail, the Supreme Court of Canada has made
5 it clear that the danger, possibility, or even
6 likelihood that a person might commit an offence
7 is not sufficient to justify their detention.

8 One of the cases where this was discussed is
9 Morales, [1992] 3 R.C.S. 711, which was referred
10 to by defence in submissions. I just want to
11 quote briefly from it at page 737:

12 Bail is not denied for all
13 individuals who pose a risk of
14 committing an offence or interfering
15 with the administration of justice
while on bail. Bail is denied only
for those who pose a "substantial
likelihood" of committing an offence

16 or interfering with the
17 administration of justice, and only
18 where this "substantial likelihood"
19 endangers "the protection or safety
20 of the public". Moreover, detention
21 is justified only when it is
22 "necessary" for public safety. It
23 is not justified where detention
24 would merely be convenient or
25 advantageous.

26 There are two main components or threads to
27 the Crown's argument on public safety. The first
28 stems from the fact that in March 2014, K.M. was
29 on process, facing a serious charge, an offence
30 for which he has now been sentenced. There
31 appears to be strong evidence from various

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1 sources that on the night of Ms. Lafferty's
2 death, K.M. was in breach of several conditions
3 of his undertaking: he was drinking alcohol; he
4 was not inside his residence, contrary to the
5 requirement of his curfew; and he had contact
6 with L.T., something he was also prohibited from
7 doing pursuant to that undertaking.

8 The second component of the Crown's argument
9 on the public safety issue is tied in with the
10 brutal and inexplicable nature of the attack on
11 Ms. Lafferty and the strong evidence that links

12 K.M. to that crime. The Crown says that this
13 type of prolonged and brutal assault raises
14 enormous public safety concerns. And the
15 evidence suggesting breaches of K.M.'s
16 undertaking goes to whether this court can have
17 confidence that he would actually comply with
18 terms imposed upon him if I were to release him.

19 When examining public safety, the strength
20 of the Crown's case is relevant, as it is on the
21 tertiary ground, so I will talk about it here.

22 There is considerable evidence suggesting
23 that Ms. Lafferty's death was the result of a
24 particularly violent and vicious attack. The
25 observations made by the two witnesses who saw
26 the attack in progress, the state of the
27 deceased's body when she was found, in particular

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1 her face, suggest that considerable force was
2 used. The autopsy results further confirm this.
3 The pathologist also noted injuries on her
4 genitalia, which is relevant to the
5 classification of this charge as first degree
6 murder.

7 It appears the central issue at this trial

8 will be identification. The evidence outlined at
9 the bail hearing suggests that the Crown appears
10 to have a strong circumstantial case on that
11 issue.

12 That case, of course, could be stronger.
13 There is no direct evidence because the two
14 witnesses who actually saw the assault did not
15 identify the attacker. There is also one element
16 of Mr. Kotchile's description of the assailant —
17 the description of the jacket worn by the
18 perpetrator — which does not correspond to the
19 observations made by the police officer when he
20 saw K.M. that morning.

21 But there are a number of other elements in
22 the evidence of identification that appear quite
23 strong. The first is that two witnesses place
24 K.M. and Ms. Lafferty together a short time
25 before the attack was reported. Miranda has them
26 leaving together in close proximity to the
27 elders' centre. The other element is that the

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1 mickey of Smirnoff vodka given by Miranda to Ms.
2 Lafferty is similar to what the police officer
3 saw in K.M.'s pocket at the scene and which was

4 ultimately dropped and recovered. The police
5 officer who responded to the call a short time
6 after it was made saw K.M. close to the scene
7 carrying a piece of wood. The officer knew K.M.
8 from past dealings so this is not a situation of
9 someone identifying a person he or she saw then
10 for the first time.

11 Another aspect is that the two witnesses at
12 the elders' centre only saw two people in the
13 area, a man and a woman. Apart from K.M., the
14 officer saw no one else in the area when he
15 responded to the call.

16 The presence of Ms. Lafferty's DNA and of
17 K.M.'s DNA on the piece of wood believed to be a
18 murder weapon or the weapon used in the attack is
19 another element. The fact that DNA matching Ms.
20 Lafferty's profile was found on K.M.'s shoe and
21 on his belt is another element.

22 Another element is that blood found at the
23 Bourassa-Kelly residence matches Ms. Lafferty's
24 DNA profile. I did not talk about this in my
25 summary of the allegations, but the potential
26 significance of the presence of Ms. Lafferty's
27 blood in that residence is that this is where

1 K.M. had gone earlier in the evening to see his
2 girlfriend L.T., and the Crown will argue that it
3 makes sense for K.M. to have gone back to that
4 residence after the attack.

5 There is other circumstantial evidence that
6 may be presented to the trier of fact. I say
7 "may" because the admissibility of some of that
8 evidence is in issue and has not yet been
9 decided. But the utterances reportedly made by
10 D.K. asking K.M. why he had blood all over him
11 when he came home that morning, and comments to
12 similar effect she is alleged to have made to
13 Aurora McNeely, if admitted into evidence, would
14 add to the circumstantial evidence available to
15 the Crown.

16 Some of K.M.'s conduct, like running away
17 from the police, or denying in his conversation
18 with Louisa Lafferty that he left with her
19 daughter that morning, may be argued to be
20 after-the-fact conduct suggestive of his guilt;
21 although, as always, with that type of evidence
22 the trier of fact would have to examine that
23 evidence very carefully and determine whether
24 there is another rational explanation for it
25 before using it as evidence of actual guilt. As
26 far as fleeing from the police, for example, the
27 fact that he was in breach of his undertaking

1 would be an alternative explanation for him not
2 wanting the officer to speak to him.

3 Another element of evidence the Crown points
4 to is that the injuries K.M. had on his hands,
5 more specifically his palms, at the time of his
6 arrest are, the Crown will argue, consistent with
7 him having held the wooden board to strike the
8 victim repeatedly.

9 A bail hearing is not the time to make
10 findings of facts or engage in weighing of
11 evidence. Because the rules of evidence are very
12 relaxed at this stage, there is always a need for
13 caution because a case may appear much stronger
14 when allegations are simply read or included as
15 hearsay in an affidavit than they actually will
16 be once the evidence is tested. Here, some of
17 this evidence has been tested through the
18 preliminary hearing. Some other evidence, such
19 as the time the emergency calls came in to the
20 police, the time when the first police officer
21 attended the scene, observations made during the
22 autopsy, is not subject to the same frailties
23 that other types of evidence might be.

24 When a bail hearing proceeds after a

25 preliminary hearing, it is sometimes pointed out
26 that frailties in the evidence that were not
27 apparent upon first review of the disclosure were

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1 unveiled by the preliminary hearing. In this
2 case, I did not hear any submissions along those
3 lines.

4 I take into account as well that this does
5 not appear to be a case where the Crown's case on
6 identification is dependent on only one source.
7 Many of the components of the circumstantial
8 evidence on identification that I have been
9 referring to in the last few minutes, are
10 independent from one another.

11 All that being said, the allegations must
12 still be treated as allegations, as opposed to
13 proven facts. But having regard to the specific
14 evidence that the Crown plans to present to
15 support these allegations, at this stage it does
16 appear the Crown's case is strong.

17 In fact at the bail hearing, defence
18 counsel, in his usual fair and realistic fashion,
19 acknowledged that there were live issues with
20 respect to public safety in this case. Defence's

21 position is that the proposed release plan,
22 however, addresses those concerns, particularly
23 because it would have K.M.'s parents effectively
24 act as his jail guards if the proposed conditions
25 are put in place. K.M. could not go anywhere
26 without them. He would be under their constant
27 supervision, which presumably would prevent him

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1 from being a threat to anyone. Defence counsel
2 noted that when K.M. was on conditions
3 previously, while he did live with his parents,
4 they were not named as sureties and as such did
5 not have any legal responsibility to monitor his
6 compliance with his conditions. Defence says
7 that this is an important difference because in
8 the proposed release plan here, they would take
9 on that legal role and that legal responsibility,
10 and they are prepared to sign a recognizance in
11 the amount of \$5,000, without deposit, to
12 guarantee that they will carry out those
13 responsibilities. This, defence counsel argues,
14 can address any public safety concerns that arise
15 because K.M.'s parents would be able to call the
16 police and report him immediately if he does

17 anything in breach of his conditions, including
18 consuming alcohol or not respecting his house
19 arrest condition.

20 In theory, of course, this type of plan may
21 address public safety concerns. But in practice,
22 in the circumstances of this case, I have grave
23 concerns about K.M.'s parents' ability to
24 exercise any real control over him, whether they
25 are named as sureties or not. I accept that they
26 are supportive of him. I take into account the
27 positive comments in the presentence report

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1 prepared in relation to the November 2013 matter
2 about the level of family support and other
3 things about K.M.'s background that are in his
4 favour. But there are many causes for concern in
5 this case in basing the release plan on the
6 premise that (a) his parents can truly control
7 him and (b) that they would contact the
8 authorities if K.M. starts to not comply with the
9 conditions.

10 The first concern is K.M.'s age. He was
11 under 18 when he was charged but he is now an
12 adult.

13 The second concern stems from what I would
14 characterize perhaps as a tendency by his parents
15 to minimize K.M.'s actions. I do not doubt that
16 the intention is to be supportive, but that type
17 of support does not necessarily bode well as far
18 as their proposed role as sureties and
19 supervisors of K.M.'s actions. This tendency to
20 minimize emerges from the presentence report. In
21 my view, it also came through in some ways in
22 C.K.'s evidence. He did not seem to think his
23 son has a problem with alcohol, this even though
24 he himself acknowledged that K.M., facing serious
25 charges after his arrest for the November 2013
26 offence, did not consistently comply with his no
27 drinking condition.

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1 Another example is C.K.'s evidence about the
2 empty liquor bottles in his son's room at a time
3 when he was on conditions not to drink. C.K.
4 said he thought K.M. had these empties because he
5 was recycling. That seems a bit farfetched and,
6 in my view, demonstrates an unwillingness to see
7 the obvious, or to admit that K.M. was in fact
8 breaching the terms of his release at that time.

9 There are also disturbing aspects of the
10 evidence as far as entrusting K.M.'s supervision
11 and enforcement of a release order to his
12 parents. I mean no disrespect to either of them,
13 as it is clear they are trying to help their son,
14 but there are aspects of what I heard that makes
15 me question to what extent they can be trusted to
16 be the court's eyes and ears as far as monitoring
17 their son's behaviour. For example, it is very
18 disturbing that C.K., knowing that K.M. was on
19 conditions not to have any contact with L.T.
20 last July, attended the jail with her with the
21 purpose of visiting his son. He was present when
22 she attempted to pass for K.M.'s cousin. C.K.
23 was at best complacent, and at worse complicit,
24 in conduct that would have the result of a court
25 order being breached. That is a concern.
26 C.K. also acknowledges that K.M. did breach
27 the no alcohol condition from the November 2013

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1 undertaking from time to time and just came home
2 to "sleep it off". Although C.K. testified he
3 told his son to obey the conditions, it does not
4 appear that he did anything meaningful to ensure

5 that K.M. did comply with his conditions or that
6 he took any actions when he knew K.M. was not
7 following these conditions.

8 Defence counsel properly noted that C.K.
9 was not a surety on the process that K.M. was
10 placed on in November 2013. It is true that he
11 did not have a surety's legal obligations to do
12 something if his son breached his conditions, but
13 his son was not an adult at the time, was facing
14 serious charges, and was living under his roof.

15 I have serious concerns about C.K.'s ability
16 to exercise any real control over his son.

17 As for D.K.'s ability to exercise such
18 control, I have really no evidence that would
19 suggest that she can.

20 Another area of concern is that, in
21 cross-examination, C.K. acknowledged that he told
22 the police when they were investigating this
23 matter that he, C.K., had been home all night and
24 that he knew that his son had also been home all
25 night and that he checked on him during the
26 night. C.K. acknowledged during his
27 cross-examination that he may have gone out at

1 some point of the night to get some gasoline, and
2 he also acknowledged that this is different from
3 what he told the police.

4 On the whole, I see two fundamental
5 weaknesses in this release plan. The first is
6 that, as is the case with all release plans, its
7 success in addressing public safety concerns
8 depends on K.M.'s compliance with terms and
9 conditions that this court would place on his
10 release. Based on his poor compliance with the
11 undertaking he signed in November 2013, I do not
12 have confidence that he would respect the very
13 restrictive conditions that are being suggested
14 here. I am not satisfied he would respect the
15 house arrest condition, and I am not satisfied he
16 would stay away from alcohol. And if he decided
17 to go out without one of his parents to go
18 drinking for example, I am not satisfied that
19 they could or would do anything to stop him.

20 The second weakness ties into the first.
21 For the reasons that I have already mentioned, I
22 am not confident that K.M.'s parents would be in
23 a position to control his behaviour.

24 I am also not confident that if he failed to
25 comply with their directions or with some of his
26 conditions that they would actually report this
27 to the authority, knowing that it would result in

1 their son being taken back into custody.

2 Considering the level of violence alleged
3 here, the circumstances of the offence K.M. was
4 convicted for in the past, considering his
5 failure to comply with earlier conditions placed
6 on him by the court, and considering the
7 weaknesses that I have identified in the release
8 plan, I conclude there are very, very serious
9 public safety concerns here. I am satisfied, on
10 a balance of probabilities, that K.M.'s detention
11 is necessary for the protection and safety of the
12 public, and I am also satisfied on a balance of
13 probabilities that no condition or combination of
14 conditions would offer adequate protection to the
15 public from the risk that K.M. presents.

16 There is another step in the analysis, which
17 is whether K.M. could be released into the care
18 of a responsible adult instead of being detained.

19 Before I deal with that I want to address the
20 tertiary ground.

21 It is not strictly necessary for me to deal
22 with the tertiary ground, given my conclusion
23 about the secondary ground, but I want to make it
24 clear that even if public safety concerns could

25 be addressed through a set of strict release
26 conditions, in my view this is one of the very
27 rare situations where K.M.'s detention would

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1 nonetheless be required on the tertiary ground.

2 In my view, there are exceptional circumstances
3 here that warrant detention, and detention is
4 necessary to maintain confidence in the
5 administration of justice.

6 The analysis of this ground requires taking
7 into consideration the overarching principles
8 that are set out at section 3 of the YCJA, as
9 well as four things: the strength of the
10 prosecution's case; the circumstances surrounding
11 the commission of the offence, including whether
12 a firearm was used; the gravity of the offence;
13 and the potential lengthy custodial sentence, if
14 convicted.

15 As counsel noted, whenever bail is sought in
16 a murder case, the accused person is always
17 subject to a lengthy custodial sentence if
18 convicted, and the offence is always a serious
19 one, so those two factors are always present.

20 The law is clear that bail is available for all

21 charges, including murder, so seriousness of the
22 alleged offence and the possibility of a lengthy
23 jail term cannot justify detention on their own.
24 There needs to be something more. Here, in my
25 view, there is something more. I have already
26 talked about the apparent strength of the Crown's
27 case so I will not repeat what I already said,

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1 but I think there is something more in the
2 circumstances of the alleged offence.

3 As I have said already, the YCJA uses in the
4 tertiary ground a word that does not appear in
5 the Criminal Code in describing that ground. The
6 word "exceptional" is there. During the hearing
7 I had a discussion with counsel about what that
8 might mean.

9 I agree with the general principles outlined
10 by the Ontario Court of Appeal in R. v. D.(R.),
11 2010 ONCA 899, as far as the guiding principles
12 that apply to tertiary ground matters in the
13 context of a young person. In my view, the use
14 of this word "exceptional" circumstances
15 reinforces the even more exceptional nature of
16 detention of a young person based on this ground

17 because, as we know, the tertiary ground, even
18 for adults, is not a ground that is to be used
19 frequently or easily or in routine cases to
20 justify detention, but that is even more the case
21 when we are dealing with youths and that is my
22 interpretation of why the words "exceptional
23 circumstances" appear in the provision.

24 The circumstances here, in my view, are
25 exceptional and are of a nature that would shake
26 the public's confidence in the justice system if
27 K.M. were to be released. Sadly, violence is

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1 prevalent in our communities, but the level of
2 violence alleged in this case is well outside the
3 norm of what we normally see. This was a
4 prolonged, apparently unprovoked and extremely
5 violent attack. The victim's face was beaten
6 beyond recognition. In addition to the sheer
7 violence of the attack, there is strong evidence
8 of a sexual component to the assault. There is
9 evidence through the eyewitnesses of highly
10 contemptuous behaviour, being the perpetrator
11 having urinated on Ms. Lafferty after her clothes
12 were removed. This would be a terrible event

13 anywhere, but the impact of such an event in our
14 small northern communities is immense. In a
15 community the size of Fort Good Hope, it is not
16 difficult to imagine the incredible impact an
17 event like this would have on the community.
18 This too must be taken into account in assessing
19 what can and cannot maintain the public's
20 confidence in the administration of justice.

21 When considering whether detention is
22 required to maintain confidence in the
23 administration of justice, courts are required to
24 attempt to gauge the perception of reasonable
25 members of the community, that is, people who do
26 understand the fundamental principles of the law
27 — things such as the presumption of innocence;

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1 the right to bail; the fact that people who do
2 not have a lot of money are more subject to being
3 detained before trial than people with means
4 because often they cannot put up money as
5 guarantees; the fact that people who are detained
6 pending their trial, especially on serious cases,
7 may be in custody for a long time. The
8 reasonable member of the community we try to

9 imagine is someone who is aware of those things.
10 In R. v. C.(B), 2011 ONSC 5241, at paragraph
11 13, Justice Ducharme offered a list of things
12 that the reasonable member of the community would
13 be aware of in assessing whether someone should
14 be released on bail and whether their confidence
15 would be shaken if a person were to be released.
16 I am not going to read the list here, but I find
17 those examples quite useful in attempting to
18 picture what this reasonable member of the
19 community would know and think. When I try to
20 imagine reasonable people in the community,
21 including people aware of all those various
22 things that Justice Ducharme talked about, and
23 aware of all the circumstances, I do not think
24 such a person would be able to still have
25 confidence in the administration of justice if
26 K.M. was released from custody pending his trial.
27 I say this having given careful consideration to

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1 the overarching principles set out at section 3
2 of the YCJA and reminded myself many times that
3 this ground for detention is to be resorted to
4 very sparingly when dealing with youths, as noted

5 by the Ontario Court of Appeal in R. v. D.(R.),
6 2010 ONCA 899. But in my view, this is one of
7 those cases where it is required.

8 For the same reasons I do not think the
9 conditions proposed under the release plan
10 adequately address the public safety concerns
11 that arise in this case, I am satisfied, on a
12 balance of probabilities, that no condition or
13 combination of conditions would suffice to
14 maintain the public's confidence in the
15 administration of justice given the overall
16 circumstances in this case. For that reason, I
17 conclude that detention is justified on the
18 tertiary ground as well.

19 Having so concluded, the last step in the
20 analysis I must engage in is to consider whether,
21 rather than ordering K.M.'s detention, I should
22 order that he be placed in the care of a
23 responsible adult, in this case his father,
24 pursuant to section 31 of the Act. This is a
25 potential outcome that is unique to the YCJA. It
26 applies to all the grounds of detention, as
27 confirmed in the R. v. D.(R.) case. I have

1 already referred to the criteria that must be met
2 in order for the court to be able to do this. In
3 this case, the key to me is whether the
4 responsible adult would be able to control the
5 young person. For the many reasons I have
6 already mentioned, I am not satisfied that C.K.
7 can control his son. I say this again because
8 K.M. is now an adult, because he was living with
9 his parents when he got into trouble before and
10 was living with his parents when he was on
11 conditions that he appears to have breached
12 frequently. I do not doubt that C.K. and his
13 wife sincerely want to help their son, but I am
14 not satisfied that placing him in their care,
15 pursuant to section 31 of the Act, is appropriate
16 or an outcome that is available under the
17 circumstances. In considering this matter, I
18 have taken into consideration the specific
19 principles that apply pursuant to the YCJA.

20 I have carefully reviewed the recent
21 decision of R. v. M.G., Youth Justice Court of
22 the Northwest Territories, September 18, 2013,
23 #Y-1-YO-2013-000129, where Judge Malakoe came to
24 the conclusion that a youth charged with second
25 degree murder could be released. I agree with
26 everything Judge Malakoe said in that decision
27 about the governing principles that apply in

1 these matters, more specifically at pages 53 to
2 55 of that decision, but, in my view, that case
3 must be distinguished from this one. It was a
4 serious case obviously, because someone died and
5 a weapon was used, but the allegations, as they
6 are reflected in the decision at least, do not
7 involve a prolonged beating or a level of
8 violence anywhere near to what is alleged in this
9 case. The young person in that case was not on
10 process at the time of the events that led to her
11 charge. The judge made specific mention that
12 there was no evidence that she had a record for
13 not following conditions or for violence. There
14 were indications that she had had issues with
15 alcohol. The evidence presented was that when on
16 occasion when those problems surfaced, her
17 parents did turn to the police, and that is
18 another thing that the judge noted. So I think
19 that there are very significant differences
20 between the two cases which, in my view, justify
21 a different outcome.

22 Having reviewed the cases that were provided
23 by the Crown, although clearly pre-trial
24 detention is consistently described as an
25 exception and not the norm especially when

26 dealing with young persons, it is also clear that
27 from time to time there are circumstances where

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1 even young persons must be detained before their
2 trial. This case, in my view, represents one of
3 those situations.

4 I want to make it clear that I have not
5 overlooked the fact that since the bail hearing
6 proceeded, the trial date has been set and it is
7 a long ways away. I realize that. But still,
8 having considered all the evidence before me, I
9 conclude that the Crown has met its onus and has
10 established that the continued detention of K.M.
11 is necessary.

12

13

14 Certified to be a true and
15 accurate transcript pursuant
16 to Rule 7 23 and 7 24 of the
Supreme Court Rules of Court.

16

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18 _____
Annette Wright, CSR(A)
19 Court Reporter

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