Date Amended Corrigendum Filed: 2017 05 29
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Docket: S-1-YO-2014-000005

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

K.M.
(A Young Person)

Publication Ban: Information contained herein is prohibited from publication pursuant to **ss. 110 and 111** of the *Youth Criminal Justice Act* and pursuant to **s. 28** of the *Youth Criminal Justice Act*.

Corrected judgment: A corrigendum was issued on April 28, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT
APPLICATION FOR TESTIMONIAL AIDS AND FOR THE EXCLUSION OF THE PUBLIC

I) INTRODUCTION

[1] In January and February 2016, K. M. was tried before a jury for the murder of Charlotte Lafferty. The events giving rise to this charge occurred on March 22, 2014, in Fort Good Hope, but the trial proceeded in Yellowknife.

[2] During the trial, I granted a number of applications for use of testimonial aids, as well as an application to exclude the public from the courtroom during the testimony of two witnesses. These are my Reasons for having granted those applications.

[3] The applications brought by the Crown were for the following:

> a) the presence of a support person during the testimonies of Louisa Lafferty and M.M.;
> b) the use of a screen during the testimonies of Lyla Tobac and Samantha Kelly; and
> c) an order excluding the public from the courtroom during the testimonies of Lyla Tobac and Samantha Kelly.

[4] The evidence adduced in support of these applications consisted of affidavits sworn by Crown Witness Coordinators who had met the witnesses in the preparation for the trial and discussed the possibility of applying for the use of testimonial aids. K.M.'s counsel did not seek to cross-examine any of the affiants and did not raise any issue about the fact that the witnesses' views and concerns were conveyed through the evidence of the Crown Witness Coordinators.

[5] In addition, K.M.'s mother D.K. applied to be permitted to testify through a closed-circuit television system. The status of D.K. as a Crown witness was unusual: she was to be called by the Crown but had been declared an adverse witness. The Crown anticipated its position at trial to be that D.K.'s testimony to the jury may not be truthful, as she was expected to deny having made utterances to other witnesses about having seen blood on her son the morning of Charlotte Lafferty's death. The specifics of this evidence and of the situation are explained in my ruling as to the admissibility of D.K.'s utterances. *R v K.M.*, 2016 NWTSC 14.

[6] Because of that unusual context, the Crown did not consider it could advance the application for the testimonial aid on D.K.'s behalf. It advised the Court of D.K.'s wish to make the request. I called D.K. to testify about the reasons why she wished to testify using a closed-circuit television system. Her testimony was brief. She said she was very shy, rarely went out in public and was scared of speaking in public. D.K. was not cross-examined by Crown or by Defence. The Crown did not take a position on the application. K.M. consented to it.

[7] K.M. did not adduce any evidence on any of the applications. He did not oppose the applications for support persons and for use of the screen. He opposed

the applications to exclude the public for the testimonies of Lyla Tobac and Samantha Kelly.

2. Support persons

[8] Applications for support persons are governed by Section 486.1 of the *Criminal Code*. The applicable test depends on the age of the witness. For a witness who is under 18 years old, the Court is required to make the order unless it is of the opinion that the order would interfere with the proper administration of justice. If the witness is an adult, the Court may make the order if it is of the opinion that the order would facilitate the giving of a full and candid account by the witness or would otherwise be in the interest of the proper administration of justice.

[9] The factors to be considered in deciding an application for a support person are set out at section 486.1(3) and include: the age of the witness; the witness' mental or physical disabilities, if any; the nature of the offence; the nature of the relationship between the accused and the witness; whether the witness needs the order for their security or to protect them from intimidation or retaliation; society's interest in encouraging the reporting of offenses and the participation of victims and witnesses in the criminal justice process; and any other factor that the Court considers relevant.

[10] The test that governs these applications was altered in 2015 by amendments to the *Criminal Code*. Under the previous wording of section 486.1, the court had to be satisfied that the order was *necessary* to obtain a full and candid account of the events complained of. The requirement now is that the court be satisfied that the order would facilitate the giving of a full and candid account of events.

[11] The plain meaning of the word "facilitate", according to the Oxford dictionary, is "to make (an action or process) easy or easier". This is consistent with the French version, which uses the phrase "rendre plus facile". Clearly, that is a standard that is less stringent than establishing "necessity". While the test that governs applications for testimonial aids remains different, depending on whether the witness is a youth or an adult, Parliament has altered the legal framework to make testimonial aids more easily accessible to adult witnesses.

[12] M.M. was 17 years old at the time of the trial. She is the cousin of both K.M. and of Charlotte Lafferty. She told the Crown Witness Coordinator that she was nervous about testifying and that she did not want K.M. to look at her. She also had experience testifying before a jury with her mother present as a support person present and felt more comfortable with her mother there.

[13] Given Ms. M.'s age, as noted above, I was required to make the order unless I was of the opinion that it would interfere with the administration of justice. There was no evidence or suggestion that this would be the case. In light of this, the applicable factors, and K.M.'s position, the application was granted.

[14] Louisa Lafferty is the mother of the deceased, Charlotte Lafferty. The affidavit of the Crown Witness Coordinator indicated that Ms. Lafferty has struggled significantly since the death of her daughter, to the point that at the time of the trial, almost two years after Ms. Lafferty's death, she had not been able to go back to work. She told the Crown Witness Coordinator she wanted to be strong and testify at the trial but felt it would be easier for her to do so with a support person with her during her testimony.

[15] It is probably not possible to imagine what having to testify at this trial would be like for Ms. Lafferty. She would have to testify about what was probably the worst day of her life. I had no difficulty concluding that allowing her to testify with a support person would facilitate her testimony.

3. Use of screens

[16] Applications to use a screen during the testimony of a witness are governed by section 486.2 of the *Criminal Code*. The applicable tests mirror those set out in section 486.1. The factors to be considered are the same as those listed in section 486.1, except for one additional factor that has no relevance in this case (the protection of the identity of a witness who has responsibilities related to national security or intelligence).

[17] Lyla Tobac and Samantha Kelly were both over 18 years of age at the time of the trial. The applicable test, therefore, was whether the order would facilitate each of them giving of a full and candid account of events.

[18] Lyla Tobac was 19 years old at the time of the trial. She was K.M.'s girlfriend from June 2013 to April 2015. She told the Crown Witness Coordinator that K.M.'s family put pressure on her to visit him while he was in custody; D.K. has asked her to speak with K.M. over the phone on more than one occasion, the last time having been in December 2015; K.M. tried to get in touch with her in January 2016 through a Facebook message from one of his friends. Ms. Tobac told the Crown Witness Coordinator that she was scared of K.M. and did not want to see him.

[19] Samantha Kelly was 27 years old at the time of trial and is Lyla Tobac's sister. She told the Crown Witness Coordinator that she was very nervous about testifying; she did not want to see K.M. during her testimony and was concerned about testifying in the presence of his family. She told the Crown Witness Coordinator that she has had physical run-ins with one of K.M.'s aunts since he has been charged.

[20] This was a first degree murder trial. The civilian witnesses were all connected to the deceased and to K.M. in one way or another. The events occurred in the community of Fort Good Hope, which is a small community where there are many familial connections and where it can be expected that virtually everyone knows everyone.

[21] It was not unreasonable to infer that the events giving rise to this charge would have deeply affected the members of this community. It is hardly surprising that any witness from that community, called to testify about these events, would find it difficult.

[22] Having regard the seriousness of the charge, the nature of the case, the fact that these events occurred in a small close-knit community, the relationship between K.M. and Lyla Tobac, and the understandable tension that would arise in the wake of events like this, I had no difficulty concluding that the use of a screen would facilitate Lyla Tobac and Samantha Kelly testifying fully about their knowledge of the events surrounding Ms. Lafferty's death.

[23] D.K.'s application to testify using a closed-circuit television system was also governed by section 486.2. D.K. testified that she is nervous about talking in public, that she barely goes out in public. She said her discomfort about speaking in public is like a phobia for her. She testified that she thought being in a separate room while she testified would make it easier for her to answer questions. On the basis of that testimony, I was satisfied that she should be permitted to testify using a closed-circuit television system.

4. The applications to exclude the public

[24] The Crown's applications to exclude the public for Lyla Tobac's evidence and Samantha Kelly's evidence were opposed by K.M.

[25] Section 132 of the *Youth Criminal Justice Act* S.C. 2002 c.1 (the *YCJA*) sets out the power to exclude the public during proceedings in the youth justice court. The relevant portion of that provision reads as follows:

> 132. (1) Subject to subsection (2), a court or justice before whom proceedings are carried out under this Act may exclude any person from all or part of the proceedings if the court or justice considers that the person's presence is unnecessary to the conduct of the proceedings and the court or justice is of the opinion that
> (…)
>
> > (b) it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the courtroom.
>
> (2) (…) a court or justice may not, under subsection (1), exclude from the proceedings under this Act
> (…)
>
> > (b) (…) a parent of the young person (…)

YCJA, s.132

[26] The reference to the proper administration of justice in Paragraph 132(1)(b) mirrors the language used in section 486 of the *Criminal Code*, which gives the court the power to exclude the public in criminal proceedings.

[27] The fundamental principles and competing interests that are at stake in this type of application are similar whether the proceedings are taking place in adult court or in youth court. The Crown and K.M.'s counsel both referred to those general principles in their submissions.

[28] The relevant portions of section 486 read as follows:

> 486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application (...) order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such order is in the interest of public morals, the maintenance of order or the proper administration of justice (...)
>
> (...)
>
> (2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider
>
> > (a) society's interest in encouraging the reporting of offenses and the participation of victims and witnesses in the criminal justice system;
> > (b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;

> (c) the ability of the witness to give a full and candid account of events if the order is not made;
>
> (d) whether the witness needs the order for their security or to protect them from retaliation;
> (e) the protection of justice system participants who are involved in the proceedings;
> (f) whether effective alternatives to the making of the proposed order are available in the circumstances;
> (g) the salutary and deleterious effects of the proposed order; and
> (h) any other factor that the judge or justice considers relevant.

Criminal Code, section 486

[29] Excluding the public from any court proceeding is an exception to the open court principle, which is fundamental under our system of law. The open court principle is founded on two rights guarantees by the *Canadian Charter of Rights and Freedoms* (the *Charter*): the right of every accused to a fair and public trial, protected by Paragraph 11(d), and freedom of expression, protected by Paragraph 2(b).

[30] The freedom of expression includes the right of representatives of the media to have access to court proceedings so that they can inform the public about such proceedings.

[31] The key principles that govern applications to exclude members of the public from the courtroom were set out in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson)* [1996] 3 S.C.R. 480. These principles were recently applied in this jurisdiction in *R v Wilson*, 2015 NWTSC 29.

[32] The burden of displacing the general rule of proceedings being open to the public is on the party making the application, in this case, the Crown. There must be a sufficient evidentiary basis in support of the application. *Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson)*, paras 71-72.

[33] The party bearing the onus has to demonstrate that the order is necessary, not merely that it would be helpful or convenient. *Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson)* para 71. The threshold to be

met is much higher than the one that now applies to applications for a support person, screen, or testimony by closed-circuit television system.

[34] The Supreme Court said the following about how a court should approach the
exercise of its discretion in this type of application:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
> (b) the judge must consider whether the order is as limited as possible; and
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson), para 69.

[35] Section 486 was amended in 2015, at the same time as the testimonial aids provisions were. The amendments did not alter the applicable test. However, the list of factors to be considered in deciding whether the public should be excluded from the courtroom was expanded.

[36] Previously, Subsection 486(2) simply provided that "the proper administration of justice" referred to in Subsection (1) included safeguarding the interests of witnesses under 18 and the protection of justice system participants. As noted above at Paragraph 28, the provision now sets out a number of additional factors to be considered.

[37] Aspects of the test evoked in *Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson)* are now included in the list of enumerated factors, such as the existence of reasonable alternatives to the order (now included at Paragraph 486(2)(f)) and the proportionality analysis of the positive and negative effects of the order (now included at Paragraph 486(2)(g)).

[38] Other new factors are similar to those that must be considered in applications for use of testimonial aids. These include the protection of witnesses, their ability to give a full and candid account of events, and society's interest in encouraging their participation in the criminal justice process.

[39] The overarching principles set out in *Canadian Broadcasting Corp. v New Brunswick (Attorney General) (Re R. v. Carson)* continue to apply. But the legal framework that governs these applications has been altered in that Parliament has broadened the factors that courts must take into account in determining whether an order excluding the public is in the interest of the proper administration of justice.

[40] While the open court principle and an accused's right to a public trial remain of fundamental importance, in my view, the amendments to section 486, show an intention by Parliament to ensure that in weighing the competing interests at stake on applications to exclude the public, consideration is given to the witnesses' interests and to the desirability of them being able to provide a full account of events.

[41] This is not about turning over the control over the proceedings to the witnesses, or making their needs paramount or determinative. Properly interpreted, the factors that courts are required to take into consideration are not simply about the witnesses' views, preferences, or comfort level. What must be considered is whether the evidence establishes that the presence of the public in the courtroom will hinder a witness' ability to testify fully about the matter. If so, this is of concern from the point of view of the administration of justice and public interest. It is very much in the interests of the proper administration of justice that witnesses testify fully about matters so that cases can be decided on their merits, with the most complete record possible. This is consistent with the truth-seeking function of a criminal trial.

[42] Although section 132 was not amended at the time section 486 was, I see no reason why the evolution in the legal framework that is reflected in the *Criminal Code* amendments would be any less relevant to proceedings governed by the *YCJA*. The truth-seeking function of a criminal trial is as relevant and important to proceedings in the youth justice court as it is in adult court proceedings. The reasons for increasing protection for witnesses, encouraging their participation to the court process, and ensuring that they are able to provide a full and candid account of events in adult court proceedings are equally valid for proceedings in the youth justice court.

[43] The evidence adduced on these applications showed that Ms. Tobac and Ms. Kelly's concerns were primarily with K.M.'s family members. I found that under the circumstances, those concerns were understandable. Lyla Tobac felt pressured by K.M.'s family to visit him in jail and to maintain contact with him even after they broke off, and did so until a short time before the trial was scheduled to take place. I have no difficulty concluding that she would find it particularly intimidating to answer questions at his trial for first degree murder knowing K.M.'s family members were watching as she did so.

[44] As for Ms. Kelly, she reported having had a physical run-in with one of K.M.'s aunts. She is the sister of Lyla Tobac. Irrespective of what the details of this run-in might have been, again, it is not difficult to understand why Ms. Kelly

might feel intimidated testifying at K.M.'s trial knowing family members were watching.

[45] K.M.'s counsel suggested that having these witnesses testify using a closed-circuit television system would be sufficient to accommodate their concerns. I disagree. These witnesses were advised of the various options for testimonial aids and conveyed to the Crown Witness Coordinators that excluding the public from the courtroom was what they thought they would need in order to be able to testify fully.

[46] The Crown Witness Coordinator who spoke to Ms. Kelly deposes that she said she would not testify if K.M.'s family were to be present in the courtroom. As K.M.'s counsel properly noted, a witness cannot dictate the terms of his or her testimony. But I am not persuaded that this is the intention that should be attributed to Ms. Kelly or derived from that particular comment. It may have simply been the expression of a belief that she would not be able to testify if K.M.'s family members were present.

[47] K.M.'s counsel argued that as a matter of logic, if these witnesses were concerned about family members' reactions to their evidence, it would be as great a concern to have family members review transcripts and know what the witnesses said as it would be to have family members listening while the witnesses were giving their evidence. Counsel suggested that before a finding could be made that one would be more intimidating than the other, expert evidence would be required.

[48] I disagree with that submission. Different witnesses may feel differently about such things. I do not find it unrealistic or illogical that for a witness, knowing others are listening to testimony as it is being given, could be more intimidating than knowing that the details of that testimony will become known to those same people after the fact. The person best placed to make that assessment is the witness.

[49] I concluded that the factors listed at Paragraphs 485(2)(a), (c), (d), (f), and (g) all militated in favor of granting the applications. As far as other factors that might be relevant (Paragraph 485(2)(h)), I considered the following: the nature of the charge; the relationship between the witnesses and K.M. and members of his family; the small size of the community where these events occurred and the fact that the witnesses, and many members of K.M.'s family, still reside in that community.

[50] I concluded that there were no alternatives to the order being sought. The concern was that witnesses, knowing that members of K.M.'s family would be

listening to their testimony as it was being given, would be less capable of providing a full and candid account of events. For the reasons I have already given, the option of testimony by closed-circuit television would not have alleviated this concern. Only the exclusion of the public could.

[51] The order sought was limited to what was required to achieve its purpose. It was limited to the evidence of only these two witnesses. The balance of the evidence called in this three-week trial would be open to the public. Members of the public would also be able to be present for the final addresses of counsel to the jury and jury charge, where the evidence of these two witnesses would be referred to.

[52] Finally, with respect to the proportionality analysis, as I noted in *R v Wilson*, it comes down to whether the order would do more harm than good when considering the competing interests at stake. Having regard to the seriousness of the charge and the importance for the jury to have the benefit of the best quality of evidence in deciding the case, I concluded that the benefits of the orders sought outweighed its deleterious effects on the rights that the open court principle is there to protect.

[53] With a view of limiting the deleterious effects of the order as much as possible, I included an exception to allow representatives of the media to remain present for the testimonies of Ms. Tobac and Ms. Kelly. This would ensure that an important aspect at the root of the open court principle, the publicity of the trial, would be maintained, while providing the witness the maximum opportunity to provide a full and candid account of events.

5. The effect of Subsection 132(2)

[54] The final issue to be determined was whether, by operation of Paragraph 132(2), the order excluding the public for Ms. Tobac's and Ms. Kelly's evidence applied to K.M.'s parents. As noted above, Subsection 132(2) provides that the court cannot exclude "a parent of a young person" from the proceedings.

[55] "young person" is defined as follows:

> "young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old, and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act.

YCJA, section 2

[56] K.M. was over 18 years old at the time of the trial. The issue, therefore, is whether the context requires that Subsection 132(2) apply to him.

[57] The definition of "young person" set out in the *YCJA*'s predecessor, the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (the *YOA*), was similar. The meaning of the phrase "where the context requires" in that statute was examined in *D.A.Z. v The Queen*, [1992] 2 S.C.R.1025. The issue, in that case, was whether section 56 of the *YOA*, which governed the admissibility of statements made by youths to persons in authority, applied to a person who gave a statement when he was 18, in relation to an offence allegedly committed when he was 17.

[58] The Supreme Court concluded that as a matter of statutory interpretation, the words "where the context requires" should be interpreted as words of limitation. It also found that the application of the various special protections set out in the *YOA* would have to be examined on an individual basis by the courts to determine whether they apply to a person who is over 18 years old. The Supreme Court of Canada concluded that section 56 of the *YOA* did not apply to a person over 18.

[59] As K.M.'s counsel noted, the role that the *YCJA* contemplates for the parents does not disappear completely once the youth charged turns 18. For example, the *YCJA* requires the court to give the young person's parents an opportunity to be heard at a hearing to determine whether an adult sentence should be imposed. *YCJA*, section 71. The same is true for a placement hearing following the decision to sentence a young person as an adult. *YCJA*, section 76. Section 3 of the YCJA, which sets out the policy statement for Canada with respect to young persons, states that the measures taken against young persons who commit offenses should, where appropriate, involve the young person's parents. *YCJA*, par.3(1)(c)(iii).

[60] At the same time, the definition of "young person" signals in no uncertain terms that not all the protections and accommodations provided for in the *YCJA* apply to a person who has turned 18.

[61] In my view, the right for a young person to have his or her parents present at all times in the courtroom and be exempt from the effect of an exclusion order is related to the vulnerability and immaturity of young persons compared to adults, and the notion that because of this they may need more support and assistance from their parents during a trial. This is analogous to the provision that was in issue in *D.A.Z. v The Queen*; it afforded special procedural safeguards to a young person being questioned by a person in authority. The Supreme Court concluded

that these safeguards did not apply to someone who is over 18. In my view, by analogy, the same reasoning applies to the provision at issue here.

[62] I conclude that in the context of an order excluding the public pursuant to section 132, the words "young person" at Subsection 132(2) do not include a person who was under 18 at the time of the alleged offence but is over 18 at the time of the trial. Therefore, K.M.'s parents were subject to the order excluding members of the public for the testimonies of Lyla Tobac and Samantha Kelly.

"L.A. Charbonneau"
L. A. Charbonneau
J.S.C.

Dated this 20th day of April, 2017

Counsel for Crown: Annie Piché and Jeannie Scott
Counsel for the Young Person: Charles Davison

AMENDED
Corrigendum of the Memorandum of Judgment
of
The Honourable Justice L.A. Charbonneau

1. This Amended Corrigendum is intended to replace the Corrigendum issued on April 28, 2017.

2. In Paragraphs 3 a), 12 and 13 of the Memorandum of Judgment issued on April 20, 2017, the name of M.M., a witness who was under the age of 18 at the time of the trial, has been replaced with her initials.

3. The Corrigendum issued on April 28, 2017 is to be discarded and replaced with this Amended Corrigendum.

3. The citation will remain:

R v K.M., 2017 NWTSC 27. cor 1

S-1-YO-2014-000005

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L. A.CHARBONNEAU
(APPLICATION FOR TESTIMONIAL AIDS AND FOR THE EXCLUSION OF THE PUBLIC)