R. v. Andre-Stewart, 2017 NWTSC 64

 S-1-CR2016000075

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

 IN THE MATTER OF:

 HER MAJESTY THE QUEEN

 - vs. -

 JAKE ANDRE-STEWART

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 Transcript of the Rulings by the Honourable Justice L. A.

 Charbonneau at Inuvik, in the Northwest Territories, on

 August 23rd, 2017:

 1. To exclude the public from the courtroom; and,

 2. Access to exhibits entered on a voir dire.

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 APPEARANCES:

 Mr. B. Green: Counsel for the Crown

 Mr. C. Davison: Counsel for the Accused

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 Charge under s. 271 Criminal Code

 No information shall be published in any document or

 broadcast or transmitted in any way which could identify

 the victim or a witness in these proceedings pursuant to

 s. 486.4 of the Criminal Code of Canada

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 1 THE COURT: I am going to now deal with

 2 the application that was heard earlier in this

 3 trial with respect to the exclusion of the

 4 public for the evidence of the complainant.

 5 This application was brought in the

 6 context of a trial on charges of sexual

 7 assault and sexual interference. The offences

 8 are alleged to have occurred during the summer

 9 of 2015 in Tsiigehtchic.

 10 The complainant was 11 years old at the

 11 time of the alleged events, and 13 at the time

 12 of the trial. She and the accused are first

 13 cousins.

 14 Earlier this week, at the start of the

 15 trial, a voir dire was held to determine

 16 whether the videotaped statement given

 17 by R. A. to a police officer in Whitehorse

 18 could be used as part of her evidence,

 19 pursuant to section 715.1 of the Criminal

 20 Code.

 21 She was called as a witness on that voir

 22 dire because one of the statutory conditions

 23 for admissibility of this type of evidence is

 24 that the witness has adopted the contents of

 25 the recording.

 26 The Crown sought an order excluding the

 27 public for her evidence pursuant to section

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 1 486 of the Criminal Code, as well as orders

 2 for the use of a screen and the presence of a

 3 support person with her during her testimony.

 4 These requests were made both for the voir

 5 dire and for the trial itself.

 6 The defence did not oppose the requests

 7 for the screen and the support person but

 8 objected to the request that the public be

 9 excluded.

 10 In support of the application, the Crown

 11 relied on the representations of Crown

 12 counsel. No evidence was adduced in support

 13 of the application.

 14 Crown counsel indicated that R. was

 15 nervous about testifying with the accused's

 16 parents present in the courtroom given the

 17 nature of the allegations and the close family

 18 connections between all involved. Crown

 19 counsel underscored the age of the witness,

 20 the nature of the allegations, the family

 21 connections between the witness and the

 22 accused and his parents. I should say that

 23 the only members of the public who were

 24 present at the time and throughout the trial

 25 were the accused's parents.

 26 There was also reference during the

 27 submissions to the testimony of another

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 1 witness who had been called already in the

 2 trial. That witness, now 16 years of age, is

 3 also related to the accused and to R. That

 4 witness was asked about her family connections

 5 in Tsiigehtchic and said that she is related

 6 to virtually everyone in that community.

 7 An order excluding the public for her

 8 evidence was sought and was not strongly

 9 opposed by defence.

 10 In the case of that witness, the basis for

 11 the request was that she felt some pressures

 12 from R.'s family, felt torn between the two

 13 sides of her family in this case, and was

 14 reluctant to testify about this matter. I did

 15 exclude the public for the testimony of that

 16 witness.

 17 The legal framework that governs

 18 applications to exclude the public is set out

 19 at section 486 of the Criminal Code. As I

 20 have noted in other cases, that provision was

 21 amended a few years ago and this has altered

 22 the legal framework somewhat. I discussed

 23 this in some detail in a few cases, including

 24 R. v. K. M. 2017 NWTSC 27. I discussed the

 25 fundamental principles that are engaged in

 26 applications like this and the effect of the

 27 2015 amendments. Without repeating what I

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 1 said in R. v. K. M. here, I adopt my analysis,

 2 in that case, for the purposes of this

 3 application.

 4 In opposing the exclusion of the public

 5 for R.'s evidence, the defence underscored the

 6 importance of the open-court principle but

 7 also noted because of the nature of the

 8 application and the testimony, R. would not in

 9 this case have to recount all the details of

 10 the alleged events. As part of the voir dire,

 11 she would, for the most part, be watching and

 12 listening to the videotaped interview. She

 13 may be asked a few additional questions but

 14 would not have to describe the events in great

 15 detail.

 16 This, counsel argued, would reduce the

 17 burden on her and thereby reduce the concerns

 18 about the necessity to exclude the public to

 19 obtain a full and candid account of events.

 20 The Crown countered that even if the

 21 witness did not actually have to describe the

 22 events, having to sit and watch a video of

 23 herself describing those events to a police

 24 officer in the presence of the public, and of

 25 the accused's parents, would be difficult and

 26 could compromise her ability to answer

 27 whatever questions might be put to her

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 1 afterwards.

 2 As I said already, there was no evidence

 3 adduced on the application. Although the

 4 representations of counsel can serve as a

 5 basis for granting applications like this one,

 6 when we get into things like comparing levels

 7 of trauma or difficulties that might arise in

 8 different situations, the effect of watching a

 9 statement in the presence of the public and

 10 the impact of that on the person's ability to

 11 testify afterwards, we are venturing into an

 12 area that may require evidence as opposed to

 13 simply the representations of counsel.

 14 So in considering the application, I

 15 approached that aspect of the submissions with

 16 great caution. And I didn't feel I could

 17 attach much weight to either counsel's

 18 representations about how the use of the video

 19 would or would not mitigate the impact on the

 20 witness of having the public present for her

 21 testimony.

 22 But aside from that evidentiary concern

 23 and from the point of view of policy

 24 considerations that are engaged in these types

 25 of applications, the effect of the position of

 26 the defence, if it prevailed, would be that

 27 where section 715.1 is used in a trial, it

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 1 would be more difficult for the Crown to

 2 succeed on an application to exclude the

 3 public. A child witness that is benefitting

 4 from the section 715.1 accommodation would be

 5 more likely to be deprived of another

 6 potential accommodation (the one contemplated

 7 by section 486). And I agree with the Crown's

 8 submission that this would be somewhat of an

 9 incongruous result.

 10 Section 715.1 was enacted to facilitate

 11 the presentation of evidence of child

 12 witnesses, in recognition of the failure of

 13 the justice system to address the special

 14 needs of child witnesses, particularly in

 15 sexual assault cases. This is explained in

 16 some detail in the Supreme Court of Canada

 17 decision of R. v. L. (D. O.), [1993] 4 S.C.R.

 18 419 where the constitutional validity of

 19 section 715.1 was upheld.

 20 Clearly, concern for young witnesses was

 21 also one of the things that was addressed in

 22 the 2015 amendments to section 486, as was

 23 encouraging the reporting of offences and the

 24 participation of witnesses in the criminal

 25 justice process. It would be an odd result to

 26 have the 715.1 procedure become an argument

 27 against offering a young witness the

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 1 accommodation contemplated by section 486.

 2 In deciding that the application to

 3 exclude the public for R.'s testimony should

 4 be granted, I considered her age, the nature

 5 of the allegations, the family relationship

 6 between R. and the accused, the size and

 7 close-knit nature of the community of

 8 Tsiigehtchic (which I would take judicial

 9 notice of, even if I did not have the evidence

 10 of the other witness about her being related

 11 to everyone in the community).

 12 Although the public was also excluded for

 13 the evidence of one other witness in this

 14 trial, the public could be present for the

 15 rest of the proceedings, other testimony, the

 16 submissions of counsel, and eventually my

 17 ruling.

 18 The allegations and the evidence are a

 19 matter of the record and will not be kept

 20 secret. There has been no application by the

 21 Crown to ban publication of the evidence aside

 22 from information that would be specific enough

 23 to identify R. So the order sought, in my

 24 view, is as limited as necessary to achieve

 25 its intended purpose.

 26 The Crown also applied to exclude the

 27 public during R.'s testimony during the trial

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 1 itself. Previously I was referring to the

 2 voir dire. My reasons for granting the

 3 application for the voir dire apply equally to

 4 the trial proper. More so, in fact, because

 5 the scope of cross-examination and of

 6 examination in-chief in the trial itself would

 7 exceed what it was in the voir dire. And

 8 that's why I granted that application as well.

 9 The last issue to be dealt with is access

 10 to the videotaped statement that was marked as

 11 an exhibit on the voir dire.

 12 That issue arose as a result of the

 13 question I asked during submissions on the

 14 application to exclude the witnesses. My

 15 understanding of the law is that the

 16 open-court principle applies to testimony in

 17 court. It also applies to access to exhibits.

 18 Exhibits that are presented during a trial

 19 are not ordinarily sealed. The Court has

 20 jurisdiction to seal them on application. But

 21 the same kind of balancing between

 22 transparency of court proceedings and other

 23 important principles has to be considered

 24 before access to exhibits is prevented.

 25 On a successful 715.1 application, as was

 26 the case here, the video-recorded statement

 27 becomes a substitute for what would otherwise

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 1 be the bulk, or at least part of, the

 2 witness's testimony in-chief. It is not

 3 marked as a trial exhibit but it is marked as

 4 an exhibit on the voir dire.

 5 As far as the publicity of proceedings in

 6 the open-court principle, I am not aware of

 7 any legal principle that draws a distinction

 8 between voir dire exhibits and trial exhibits

 9 when there is no sealing order. My

 10 understanding of the rule is that those are

 11 accessible to the public barring a court order

 12 stating otherwise. Here, there was no such

 13 application. I see no legal basis to prevent

 14 access to exhibits in this case. There may

 15 well be logistical issues that come up,

 16 particularly when we are on circuit, but as

 17 far as the principle is concerned I do not

 18 think access can be prevented.

 19 Those are my reasons for the ruling I

 20 delivered earlier in this trial.

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 1 Certified to be a true and

 accurate transcript pursuant

 2 to Rules 723 and 724 of the

 Supreme Court Rules,

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 8 Lois Hewitt,

 Court Reporter

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