*R v Mantla*, 2018 NWTSC 76 **S-1-CR-2017-000041**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**KEVIN MANTLA**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Ruling (Testimonial Aids) delivered by The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 31st day of October, 2018.

# \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**APPEARANCES:**

Ms. J. Andrews: Mr. B. MacPherson:

Counsel for the Crown Counsel for the Crown

Mr. T. Bock: Counsel for the Accused

(Charges under s. 235(1), s. 239(1)(b), s. 268 of the

*Criminal Code*)

**A publication ban is in effect prohibiting the publication or broadcast of any information that could**

**identify the children referred to in this decision**

1. THE COURT: This is my ruling on the
2. application made by the Crown at the start of
3. this trial seeking to have E.M. testify outside
4. the courtroom using a closed circuit television
5. system.
6. Other testimonial applications were made,
7. but they were not opposed. However, Mr. Mantla
8. did oppose this particular one. I granted the
9. application and the trial proceeded on that
10. basis, but I did say I would put reasons on the
11. record later on and these are those reasons.
12. It was undisputed at trial, even before the
13. trial started, that Mr. Lafferty and E.M. had
14. been the victims of an extremely violent attack
15. at E.M.'s residence, in the early morning hours
16. of September 28th, 2015. They were both stabbed
17. repeatedly. Although she survived the attack,
18. E.M. was very seriously injured. Three of her
19. young children were in the house at the time of
20. the attack. At the time this application was
21. heard, two of them were expected to be called by
22. the Crown at trial, and in the end they were
23. indeed called.
24. Before I deal with the substance of the
25. application, I wanted to reiterate some of the
26. comments I made when the application was dealt
27. with having to do with the evidence that was
28. presented in support of this motion. When I
29. raised those concerns, Crown counsel very fairly
30. acknowledged that these applications were
31. presented in somewhat of a disjointed manner.
32. But aside from that (and these things do happen),
33. there were specific issues about aspects of the
34. evidence that I found problematic which I want to
35. address.
36. One of the Notice of Motion that was filed
37. sought to have E.M. testify using a screen.
38. Another Notice of Motion was later filed, asking
39. that she be permitted to testify outside the
40. courtroom.
41. I recognize that, in any given case, the
42. scope of requests for testimonial aids for a
43. witness may evolve. It is not at all uncommon
44. for a witness to have a certain view or wishes
45. about what testimonial aids he or she may want to
46. use and for that view to evolve over time. This
47. can go in both directions.
48. Sometimes the Crown expects to have to apply
49. for testimonial aids, and in the end, the witness
50. decides that he or she does not want it after
51. all. Sometimes a witness who has indicated that
52. he or she does not want a testimonial aid changes
53. his or her mind and requests that one be used.
54. And sometimes there are changes in the type of
55. testimonial aid that the witness is asking be
56. sought. These are dynamic things; they are not
57. static.
58. But whatever the situation, and especially
59. when there is a change in the specific
60. testimonial aid sought, it is very important that
61. the evidence adduced in support of the
62. application track these changes and explain them.
63. In the context of the testimonial aids
64. sought for E.M., there were three affidavits
65. filed. The first two were filed on January 5th
66. and January 9th respectively. The affiant was a
67. Crown witness coordinator, employed with the
68. Crown's office. A third affidavit sworn by a
69. different Crown witness coordinator was filed on

16 January 17th.

1. In the first affidavit, that affiant deposed
2. that E.M. stated it would be easier for her to
3. talk if she could testify behind a screen. I
4. assume this affidavit was intended to be filed in
5. support of the motion to use a screen.
6. In the second affidavit sworn just a few
7. days later, the same affiant deposed that E.M.
8. told her she did not like the screen, that when
9. she testified with one at the preliminary
10. hearing, she did not feel like herself and she
11. was nervous about everything. That affiant made
12. no reference to her first affidavit or provide
13. any particulars of the circumstances that led her
14. to have a different belief about E.M.'s views
15. about whether a screen would be helpful to her or
16. not.
17. It is not difficult to surmise that E.M.
18. must have expressed different things to this
19. Crown witness coordinator at different times.
20. But that should have been set out in the second
21. affidavit. Without that kind of explanation, it
22. would be very difficult for the Court to decide
23. which affidavit actually represents E.M.'s state
24. of mind about testifying and what type of
25. testimonial aid may assist her.
26. Affidavits are a method of presenting
27. evidence. The rules are more flexible than for
28. in-court testimony, but it is still evidence.
29. Attributing any weight to contradictory
30. affidavits sworn by the same person when there
31. is no explanation within the affidavit is very
32. problematic.
33. As a matter of best practice, even when
34. there is no contradiction between two affidavits
35. that are sworn by the same affiant, an affiant
36. who swears multiple affidavits in relation to the
37. same matter should always ensure that each
38. subsequent affidavit makes reference to the
39. earlier ones, and as in this case, if there are
40. changes in circumstances or if the information
41. that is provided is different or contrary to
42. something the affiant has deposed to in an
43. earlier affidavit, this has to be addressed.
44. The third affidavit, which was sworn by a
45. different Crown witness coordinator, was much
46. more detailed than the first two. It referred to
47. specific meetings with E.M. in preparation for
48. the trial and of the discussions that took place
49. with respect to testimonial aids. That kind of
50. evidence is far more helpful and probative when
51. dealing with applications like this one.
52. Again, it would have been preferable for
53. that affiant to indicate that she was aware of
54. the other two affidavits already filed on the
55. same topic and to indicate that the third
56. affidavit was intended to provide updated
57. information to the Court.
58. With respect to that third affidavit, the
59. more significant problem was that it was sent to
60. the Court for filing after counsel had already
61. made their submissions on the application. It
62. was sent to the Registry for filing without any
63. correspondence flagging for the Court that it
64. pertained to a matter that had already been the
65. subject of submissions.
    1. Filing additional evidence after submissions
    2. are completed on an application is highly
    3. unusual. As I already noted, the use of
    4. testimonial aids is an issue that can be
    5. revisited as circumstances change. As such, it
    6. is an area where it may well be necessary to
    7. adduce additional evidence, even after
    8. submissions have been presented. Indeed, when
    9. this came up during the hearing, Defence counsel
    10. fairly noted that the issue could be reopened at
    11. various points. In that sense, it did not matter
    12. and it did not affect the ultimate outcome of the
    13. application. But, as a matter of process, when
    14. that type of situation arises, it should be
    15. raised with the Court. Further evidence should
    16. not simply be filed with the Registry when a
    17. matter is under deliberation.
    18. Now, I say all this in the hopes that it
    19. will be helpful in future cases. I do want to
    20. make it very clear that, generally speaking, this
    21. trial, which went on for several weeks, proceeded
    22. very smoothly. It was very obvious to me that
    23. counsel for the Crown and counsel for Defence
    24. were extremely well-prepared and organized and
    25. their work on this case was of the highest
    26. quality. I would not want the comments that I am
    27. making now about these aspects of the evidence
66. filed in support of the testimonial aids to any
67. way detract from the fact that counsel's conduct
68. of the case was, in my view, exemplary.
69. I have made these comments because these
70. types of applications are frequently made, and
71. more often than not they are based, as the case
72. was here, on affidavits sworn by persons who have
73. discussed the issue of testimonial aids with
74. witnesses.
75. It is quite proper for the evidence to be
76. presented in this manner. Under the rules of
77. evidence, an affiant may depose to a matter based
78. on information and belief. But the issues that
79. arose here underscore the importance of great
80. care being taken in the preparation of such
81. affidavits, especially when a witness has
82. expressed different things, at different times
83. about the use of these testimonial aids.
84. Turning now to my reasons for having granted
85. the application, it is governed by Section 486.2
86. of the *Criminal Code*. I reviewed the legal
87. framework that governs applications like this one
88. in some detail in *R v K.M.*, 2017 NWTSC 27, cor 1.
89. I adopt that analysis for the purpose of this
90. case.
91. To grant this application, I had to be
92. satisfied that testifying outside the courtroom
93. would facilitate the giving of a full and candid
94. account of events by E.M. As I noted in *R v*
95. *K.M.*, this is a much lower threshold than the one
96. that applied under the previous version of this
97. provision. Before the section was amended, the
98. Court had to be satisfied that the aid was
99. necessary for the witness to provide a full and
100. candid account of events.
101. In this case, defence noted that the various
102. testimonial aids contemplated by the *Criminal*
103. *Code* represent departures, to varying degrees,
104. from the manner and processes whereby witnesses
105. ordinarily testify.
106. The testimonial aid that represents the most
107. minor departure from the usual process is to
108. permit a support person to sit near the witness
109. under Section 486.1.
110. The next level of accommodation is to have a
111. screen that prevents the witness from seeing the
112. accused, the first accommodation contemplated by
113. Section 486.2.
114. The most significant departure from the
115. ordinary process is to have the witness testify
116. outside the courtroom, which is the second
117. accommodation contemplated in Section 486.2.
118. For an adult witness, the threshold to be
119. met for all three types of accommodations is the
120. same one, that it would facilitate the witness
121. giving a full and candid account of events.
122. Defence argued at the application that if an
123. accommodation that represents less of a departure
124. from the normal process is sufficient to achieve
125. the intended purpose, that is the accommodation
126. that should be permitted. The Crown, noting that
127. the test that governs these applications is the
128. same, argued that the choice as to which
129. testimonial aid should be used rests with the
130. Crown. There is support for the Crown's position
131. in the case law, but the matter is not without
132. controversy.
133. The Crown relied on *R v S.B.T.*, 2008 BCSC
134. 711. That case involved a review brought by the
135. Crown in *certiorari* and *mandamus* of the decision
136. of a trial judge on a testimonial aid
137. application. The Crown had sought an order
138. permitting a child witness to testify outside the
139. courtroom, and the judge had only permitted that
140. the child testify behind the screen.
141. On review, the Crown argued that the judge's
142. role on the application was simply to decide
143. whether the use of any specific accommodation
144. would interfere with the proper administration of
145. justice. That is the test to be met by a party
146. opposing the use of a testimonial aid when the
147. witness is a child.
148. Aside from that, the Crown argued, the judge
149. had no role in deciding which accommodation is
150. most appropriate and should not have ordered the
151. use of the screen when what was requested was
152. testimony outside the courtroom.
153. Defence, relying on principles of statutory
154. interpretation, argued that Parliament's
155. intention was not to give one party in the
156. adversarial process decision-making control over
157. what type of accommodation should be granted and
158. that the judge retains discretion to decide which
159. testimonial aid should be permitted.
160. The reviewing judge concluded at paragraph
161. 36 of the decision that the decision as to which
162. type of testimonial aid is to be used rests with
163. the applicant, namely the Crown.
164. Judges in other cases have expressed
165. agreement with this approach, for example, in *R v*
166. *Bell*, 2017 BCSC 2303 and *R v Etzel*, 2014 YKSC 50,
167. but other Courts have not agreed. In *R v C.T.L,*
168. 2009 MBQB 266, the court concluded that the judge
169. has discretion to order the use of a testimonial
170. aid other than the one being sought. Martin J
171. said at paragraph 18: 26

27 In many cases, such as this one, counsel may legitimately disagree as to which

1. testimonial aid is best or optimal for the specific case. Assuming that the competing
2. testimonial aids fulfill the object of the section, and none would interfere with the
3. proper administration of justice, which is to be chosen, why, and by whom? This is
4. clearly an exercise of discretion concerning the conduct or management of the
5. trial that should not fall to one of the advocates but ... remains within the
6. inherent jurisdiction of the trial judge. It is part of his or her duty and role.

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8 That approach was followed in *R v Brown*, 9 2010 SKQB 420.

1. In its written submissions on this
2. application, the Crown stated that the law did
3. not give defence counsel any say in which
4. testimonial aid will be used and that: 14
5. The choice of testimonial aids rather is the preserve of the applicant who has
6. considered which testimonial aid best serves the purpose of facilitating the
7. witness's testimony.

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1. In oral submissions, Crown counsel was less
2. categorical and conceded that the Court has the
3. power to govern its own process and that dealing
4. with an application for testimonial aid does
5. involve the exercise of discretion.
6. The cases that I have referred to all dealt
7. with cases where the aid was sought for a child
8. witness. The application, in this particular
9. case, was not one of those, and this is worthy of
10. mention and it gives rise to some nuances because
11. the applicable tests are different. Arguably,
12. when the application is for a child witness, the
13. Court has far less discretion.
14. For child witnesses, the structure of the
15. provision is that the Court shall make the order
16. unless it is satisfied that it would interfere
17. with the proper administration of justice. For
18. an adult witness, the provision says that the
19. Court may allow the use of a testimonial aid if
20. the test that I have referred to is met.
21. The use of the word "may" is not consistent
22. with the suggestion that once the threshold is
23. met, namely the Court finds that a testimonial
24. aid would facilitate the witness giving evidence,
25. the specific aid sought must necessarily be
26. ordered. On the contrary, it seems to me that
27. the use of the word means that even if the Court
28. finds that a certain testimonial aid would
29. facilitate the witness providing a full and
30. candid account, the Court does not have to make
31. the order.
32. Generally speaking, and with respect to the
33. contrary view, I find that the analysis
34. articulated by Martin J in *R v C.T.L,* is more
35. convincing than that of the other cases.
36. To the extent that *R v S.B.T.* can be
    1. interpreted to mean that the Court can never make
    2. an order for a testimonial aid other than the one
    3. being sought, I respectfully disagree. In my
    4. view, it would be open to the Court, in an
    5. appropriate case and provided the evidentiary
    6. basis existed to do so, to be satisfied that
    7. something that is not being sought or, perhaps,
    8. is not the witness's first choice, should be
    9. ordered.
    10. For example, in a situation where the
    11. testimonial aid being sought proves to be
    12. unavailable for technical reasons (which is the
    13. situation that could very well arise in some of
    14. the communities where this Court sits), it may be
    15. open to the Court to order that another type of
    16. testimonial aid be used.
    17. I have addressed this legal issue because it
    18. was raised in submissions, but it makes no
    19. difference to the outcome of this particular
    20. application. In this case, I had no difficulty
    21. concluding, having considered the factors listed
    22. at paragraph 486.2, that the application ought to
    23. be granted as framed. That provision lists the
    24. factors to be considered in deciding an
    25. application like this one.
    26. The nature of the offence was relevant.
    27. That is set out at paragraph (b). E.M. was the
37. victim of a very violent assault committed in the
38. presence of her children, and her boyfriend was
39. killed during the same series of events. There
40. is no doubt that testifying about those events
41. would be a very difficult and painful experience.
42. Paragraph (d) was also applicable. It
43. refers to the nature of the relationship between
44. the witness and the accused. In this case, this
45. was very relevant, Mr. Mantla being E.M.'s former
46. spouse.
47. Paragraph (g) talks about society's interest
48. and encouraging the participation of victims and
49. witnesses in the criminal justice process. E.M.
50. was one of the victims in this matter and an
51. eyewitness. The fact that she was brutally
52. attacked and that her boyfriend died as a result
53. of an attack committed during the same chain of
54. events was never going to be an issue in this
55. case. It was clear at the outset that the issues
56. would be identity and, possibly, intent.
57. Society has a considerable interest in
58. ensuring that cases are decided on the fullest
59. and best evidentiary record possible and that
60. witnesses are given the best opportunity to
61. testify. That is consistent with trial fairness
62. and with the truth-seeking function of the
63. criminal justice system.
    1. Paragraph (h) allows the Court to consider
    2. other factors that the judge considers relevant.
    3. In this case, I have considered the fact that
    4. there was no suggestion that having E.M. testify
    5. outside the courtroom would impede
    6. cross-examination or that it would render the
    7. process of eliciting her evidence particularly
    8. cumbersome. Steps would have to be taken to
    9. ensure that certain exhibits could be showed to
    10. her in the room she was in, but that is something
    11. that is quite possible to do, and this was not a
    12. case where this was expected to make the process
    13. unduly complicated.
    14. There were also several things in the
    15. affidavit filed on January 17 that constitute
    16. information that falls under this heading of
    17. "other factors." More specifically, in that
    18. affidavit, the affiant provided evidence of the
    19. witness's reactions and feelings when she was
    20. shown the courtroom and what she expressed about
    21. how challenging it would be for her to talk about
    22. these events if she was seated close to the
    23. accused. The affiant deposed that E.M. was shown
    24. the courtroom on January 10th. She saw the
    25. layout of the courtroom, she sat in the witness
    26. chair, and after leaving the courtroom she was
    27. upset and crying.
        1. On January 12th, E.M. told the affiant that
        2. when she sat in the witness chair, she did not
        3. feel comfortable with the physical distance
        4. between the witness chair and the defence table.
        5. She said she would not feel safe with the accused
        6. seated that close to her. She also told the
        7. affiant that when she testified at the
        8. preliminary hearing with the screen, the distance
        9. between the defence table and her was greater;
        10. that having the accused seated close to her
        11. during her evidence would make her too emotional
        12. and it would be too hurtful to be able to
        13. testify; that she would not be able to
        14. concentrate if she had to talk about what
        15. happened if sitting this closely to the accused.
        16. Finally, she said that seeing the physical layout
        17. of the courtroom gave her anxiety.
        18. This detailed evidence, as I noted already,
        19. which is very helpful to the Court in deciding
        20. this type of application, was completely
        21. uncontradicted. It was compelling evidence that
        22. testifying outside the courtroom would make it
        23. easier for this particular witness to testify on
        24. this particular case, and it is not at all
        25. surprising given the subject matter of the trial
        26. and the relationship with the accused.
        27. Those were my reasons for allowing E.M. to
            1. testify outside the courtroom that I was
            2. satisfied that this would facilitate her
            3. providing a full and candid account of events,
            4. and this is why I granted the application.

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6 **ADJOURNED TO NOVEMBER 8, 2018 AT 9:30 A.M.**

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# 9 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and
5. ability.
6. Dated at the City of Sault Ste. Marie, Province
7. of Ontario, this 16th day of November, 2018. 18
8. Certified Pursuant to Rule 723
9. of the Rules of Court 21

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1. Kerri Francella
2. Court Transcriber

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