CITATION: R. v. N.C., 2021 ONSC 780
COURT FILE NO.: YC-20-133
DATE: 2021-02-01

SUPERIOR COURT OF JUSTICE – ONTARIO
YOUTH CRIMINAL JUSTICE COURT

RE: Her Majesty the Queen, Applicant

- AND –

N.C., Respondent

BEFORE: The Honourable Mr. Justice C.S. Glithero

COUNSEL: S. Kim and L. Ellins, Counsel for the Crown, Applicant

J. Goldlist and M. Bavaro, Counsel for the Young Person N.C., Respondent

HEARD: January 26, 2021

RULING ON APPLICATION

WARNING – *Pursuant to Section 110(1) of the Youth Criminal Justice Act, no person shall publish the name of a young person or any other information relating to a young person if it would identify them as a person dealt with under this Act, subject to exceptions which are inapplicable at this stage of the proceedings. Section 111(1) of the same Act provides that no person shall publish the name of a child or young person, or any other information relating to such person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with an offence committed or alleged to have been committed by a young person. Further take notice that contravention of either of the two sections constitutes either an offence punishable by indictment, or one punishable on summary conviction.*

[1] This is a Crown application for an order removing Ms. Jordana Goldlist as counsel for N.C., who is jointly charged with two other young persons, S.B. and Y.F., with the second degree murder of another young person, A.H. The three young persons were committed for trial on September 8, 2020. The election is for trial with a jury. No dates have yet been set for pretrial

motions or for trial. That is in part because of this application, but also because counsel for the other two young persons have indicated an intention to bring a *certiorari* application to quash the committal for trial on the charge of second degree murder.

[2] The basis for the requested order is that Ms. Goldlist is alleged to be in a conflict of interest because she also acts on other unrelated charges for a Crown witness in this case.

Summary of the Allegations

[3] A.H. was 17 years of age when he was shot to death on April 15, 2019. His body was found sitting in the front passenger seat of a vehicle owned by his parents, which had been driven to a reasonably remote and forested area. Civilians reported seeing three young males standing outside the parked vehicle. One of them stopped to ask if the three young persons needed any help. One of those young persons was described as having an appearance which is said to fit the description of the respondent. The young persons declined any help. Shortly after that, another civilian walked up to the car and found the body.

[4] The three young persons were later observed about a kilometre from the crime scene, flagging down a vehicle and requesting the civilian occupant to call a taxi for them.

[5] Minutes later, the respondent and the other two young persons were arrested by the police. The victim's blood was found on the respondent's clothing and on a gun found in his possession. The victim's blood was also found on the clothing of the young person, Y.F. He was also found to be in possession of the victim's cell phone.

[6] The GPS tracking feature on the victim's cell phone indicates him to have been at the home of Y.F. at approximately 5:50 p.m. on April 15, 2019, the evening during which the shooting occurred.

Factual Basis for the Application

[7] L.W. was a 17 year old young person when he gave a statement to the police. He was 19 years old when he was called by the Crown at the preliminary. The Crown intends to call him to testify at the trial. He is represented by Ms. Goldlist on totally unrelated charges, which is the foundation for this application.

[8] On August 25, 2019, L.W. came to a police station and gave a videotaped statement to the police under oath following a KGB warning.

[9] L.W. brought his girlfriend's mother, Yvonne, with him for support. The interview ran for just under three-quarters of an hour and a transcript was produced occupying 28 1/2 pages typed.

[10] The following paragraphs summarize the relevant portions of the statement. The summary will appear confusing because the pronouns "he" and "they" appear to be interchanged without care or thought. This careless interchange of the pronouns is as they appear in the videotape and the transcript. I have italicized them as it is this loose terminology which gives rise to competing interpretations.

[11] The meat of the interview began at the top of page 4 where Detective Adams tells L.W. that he is investigating the murder of A.H. and that it has come to his attention that L.W. knew the victim and also knew who the three young people accused of the killing are, and that L.W. had some kind of communication or conversation with one of that group on the day that A.H. was killed. Although not contained in the materials filed, Crown counsel advised me during submissions that apparently L.W. had indicated to his probation officer that he knew something about this case, the probation officer then advised the police of what he had been told. The police

then invited L.W. to come to the station for an interview. The information received by the police from the probation officer apparently accounts for the assertion by Det. Adams that he had information as indicated above. Note that the information suggested that L.W.'s communication was with one of the group and that it was on the day of the murder.

[12] In response, L.W. tells the detective that he went to school with the victim and accordingly knows him, and that he thinks he knows two of the three young persons charged with the killing as being Y.F. and N.C. and that he had no knowledge of the third person.

[13] The detective then tells L.W. that his understanding is that in some way or another *they* called you or you spoke to one of them or communicated maybe by text or something with one of them on the day that A.H. was killed. L.W. replies that it was Y.F., *he* called me and said *he* was gonna come over to talk about something, but *he* ended up not coming. When the detective tries to determine what day that happened L.W. says "you're obviously saying that it's the day that it all happened." The detective answers, "well that's what I've been told by someone else."

[14] In another portion of the interview, L.W. says that *they* messaged me and *they* weren't answering and then I saw on the news about the killing and I just knew, so I sent *them* a Snapchat and none of *them* opened it, so I just knew something was going on. Then L.W. says *he* didn't open it, so I'm guessing that *he* was arrested and after that says it's like both of them, Y.F. and N.C., but none of them answered.

[15] At another point the detective asks how did L.W. know it was them who were involved and L.W. answers "cause *we* met another day, like *they*, they told me *they* were gonna --Y.F. said *he* was gonna come over *he* had to talk to me about something." But *he* never came over.

[16] The detective asked whether *they* had said anything to L.W. before this and L.W. answers that he doesn't know what *they* were up to, *they* just told me *they* had something to talk about, about some money or something. I was messaging *them*, and *they* have a lick or some kind of sting and *they* wanted to come over and talk about it. A lick means a robbery of someone. L.W. tells the police that when I spoke to *him*, it was just Snapchat. I just have *him* on Snapchat. When I messaged *them*, *they* messaged me asking about a sting and then like *he* said *he* wanted to come over and talk about it that night, but I said it was too late. Y.F. told me that by Snapchat. Everything was by Snapchat.

[17] L.W. tells the officer that he sent *them* a message, and none of them opened it, so I knew something was going on.

[18] L.W. advised the officer that Y.F. wasn't making any sense in his text messages and *he* would try and text me and I would say just call me, cause it's hard to do the text and so Y.F. always uses his phone because there is something wrong with his eyes, so I just say call me but he didn't call me, he just texted me but he kept texting but I couldn't understand it.

[19] The detective asked L.W. whether he ever got any texts from the respondent and L.W. says no, only from Y.F. Out of the two of them, I am closest to Y.F. L.W. advises the officer that he would be surprised if it was Y.F., or if it was N.C., and I don't know the other kid and I don't know of any of them having a gun. He adds that N.C. just got out for a gun charge or something like that, but he said it wasn't his, but he's been around guns. The officer asked whether *they* told him anything else about the lick that *they* were planning to do and L.W. answers that *they* wouldn't say that *they* would come to the house to talk about it but then no one came and no one talked to me about it.

[20] The officer asked if *they* do a lot of robberies and L.W. answers that he didn't know and then the officer asked if Y.F. is still doing a lot of robberies and L.W. answers that he doesn't have a clue. The officer then asked about N.C. and L.W. answered that he didn't have a clue. Then the officer asked if L.W. thinks *they* would have been trying to rob the victim, is that the lick, or does L.W. think it was separate from the killing and L.W. answers that he thinks it was separate because he didn't know what the victim would have on him.

[21] The detective then asked whether L.W. thinks the lick that they were talking about, the robbery, was related to the killing and L.W. answers that he has no clue, it could be, or it couldn't be, t*hey* never talked to me. *They* just told me *they* had something *they* wanted to talk about and would come in person, but *they* never ended up showing up and *they* weren't answering me for awhile, the two of them.

[22] The detective then indicates that he is unclear as to why L.W. thinks *they* did it, just because *they* weren't answering his texts, and L.W. answers "No, I didn't say, I didn't think *they* did it, I just thought, I just thought *they* were, like *they* might be involved."

[23] Detective Adams left the interview room at one point for approximately 3 minutes. What was said between N.C. and Yvonne during his absence was not transcribed but is audible on the videotape. During that conversation the respondent tells her that it was only Y.F. that he sent messages to.

[24] At the request of the detective, L.W. looks through some Snapchats on a cell phone and the detective asks if L.W. could show him N.C.'s Snapchat and L.W. answers that he could not as he did not message N.C. When asked about a deleted message on April 17, 2019, L.W. says it was about drugs.

[25] L.W. tells the officer that he didn't know who was going to be hanging out with Y.F. that day, he didn't know *they* were going to hang out with the victim, and he didn't know N.C. was doing anything with Y.F. Y.F. just messaged me so I thought it was just *him* and me. *He* didn't say *he* was going to rob, and *he* didn't talk about what *they* were thinking of doing.

[26] At the preliminary hearing, the transcript of Y.F.'s police interview was filed pursuant to s.540(7) of the *Criminal Code*.

[27] Somewhat strangely, during submissions, Crown counsel advised the presiding justice of some of the confusing answers given during the statement and then says "This is the first instance where we are seeing that L.W. is not being completely honest. By the end of the statement, if you review it in its entirety, there are several more instances where I submit you can easily infer that he is being dishonest about what the communications were with Y.F.

[28] All three defence counsel then pointed out that s.540 requires that evidence filed thereunder be "trustworthy and credible" and pointed out that if the Crown is submitting that its own witness is not being honest then it obviously ought not to be a statement accepted under the requirements of s.540.

[29] The result was that L.W. was then called to testify viva voce. The videotape of the police interview of L.W. was then played, essentially as his testimony in-chief, following which L.W. was asked by the Crown whether his evidence would be the same today. L.W. answers that that was a year ago and he was just dealing at that time with the passing of his mother and his girlfriend had just recently gotten pregnant and that he was using a lot of drugs at the time, so he didn't remember saying any of this.

[30] L.W. was then cross-examined at the preliminary hearing by counsel for Y.F., who agreed with her that the drugs he was on influenced his ability to think clearly and impacted his ability to comprehend information and his ability to communicate his thoughts accurately and impaired his memory.

[31] In that cross-examination he also said he was not aware of any licks in relation to Y.F. in 2019, and that to the best of his recollection, Y.F. never messaged him at any time with any information about somebody who was going to be licked, and L.W. agreed that Y.F. was not good at messaging, that his messages were always mixed up, words and letters, and in trying to interpret most of his messages, you had to tell Y.F. to call him so that you could figure out what he was trying to say. L.W. also agreed that he had told the police that he and Y.F. were going to talk, but then Y.F. never came over, so L.W. had sent follow-up messages to find out what was happening and he only did so because Y.F. hadn't come over. But Y.F. didn't answer. Counsel for Y.F. suggested that L.W. had then sent a message to N.C., but L.W. answered that he had not messaged N.C.

[32] L.W. testified that when he indicated to the officer in his statement about Y.F. texting about a sting or a lick, that was just his interpretation of what he recalled about the text, but in reality he really don't know what Y.F. was trying to talk about, and had no clue, and that's why he wanted Y.F. to call him or to come over. He continued that he messaged Y.F. by Snapchat, but Y.F. didn't answer. He denied sending any message to N.C.

[33] L.W. testified that the only reason he thought about the news story regarding the murder was because it was unusual for him not to be able to get a hold of Y.F., and it was unusual that Y.F. hadn't come over to follow up on what he had previously said about wanting to talk.

[34] In re-examination by Crown counsel, during which L.W. maintained that he had not messaged N.C., and he remembers watching himself on the video showing the detective that he never messaged N.C.

[35] Ms. Goldlist did not cross-examine L.W. at the preliminary hearing.

[36] There is no evidence of any cell phone contact or other social media contact between the respondent and L.W. on either the day before or the day of the killing.

Waivers

[37] Filed on the application is a waiver by the respondent confirming that Ms. Goldlist is his counsel of choice, acknowledging that he is aware that Ms. Goldlist is also counsel for L.W. on unrelated charges, and setting forth the essence of the Crown's assertion that L.W.'s statement indicating messages being sent to "them" means himself and Y.F. N.C. further states that he recognizes L.W.'s interests could come into conflict with his at trial, but that at this juncture, L.W. is not an adverse witness towards N.C.'s position. N.C. also indicates that he has received independent legal advice, that he will not be claiming a conflict of interest as a result of his counsel also representing L.W. and wishes Ms. Goldlist to remain as counsel of choice.

[38] There is also a waiver signed by L.W. acknowledging that Ms. Goldlist represents him on unrelated charges, that she also represents N.C. on the murder charge and asserts there is no factual relationship between his charges and N.C.'s charge on the murder. L.W. acknowledges he could end up being a witness at trial potentially, either for the Crown or the defence. He acknowledges that the Crown's current theory is that he spoke to Y.F. about a robbery, that the robbery may have been in relation to the victim of the homicide and that the Crown asserts that he had sent a message to both Y.F. and N.C. following the killing. He states his awareness that if he

is called as a witness at N.C.'s trial, his interest and that of N.C. may come into conflict during the trial. He further indicates that he has received independent legal advice and that if called to testify at N.C.'s trial, he will not be claiming a conflict of interest because of Ms. Goldlist's representation of him. He consents to Ms. Goldlist defending N.C. as well.

Legal Principles

[39] While counsel have provided a number of authorities, I don't think there to be much dispute about most of the basic principles.

[40] In *MacDonald Estate v. Martin*[1] the Supreme Court of Canada established that in determining whether a conflict exists which should lead to disqualification there are competing values to consider. One is the need to maintain the high standards of the bar and public confidence in the integrity of our legal system. Another "countervailing value" is that client not be deprived of counsel of choice except for good reason. Lastly is the desirability of fostering reasonable mobility within the profession.

[41] In that case the issue of conflict arose in the context of the possibility of improper use of confidential information obtained from a client by counsel now representing a party opposite in interest. The Court introduced the test as being whether a reasonably informed person would be satisfied that no misuse of confidential information would occur.[2]

[42] Aside from misuse of confidential information situations, a conflict of interest may arise more broadly if a lawyer owes a duty of loyalty to two different clients in the same or a related matter.

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[1] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at para. 13.
[2] Ibid, para. 44

[43] Each client is entitled to the undivided loyalty of his or her counsel. Such loyalty is important not only to the client, but to the integrity of the administration of justice as it is of high public importance that public confidence in such integrity be maintained.[3] "Loyalty" in that sense refers to dedication to the effective representation of the client, unfettered or diminished by concerns for the legal wellbeing of another client. It includes the duty of candour to the client. The court also noted the "countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause".

[44] At paragraph 29 of *Neill* the court held that a "bright line" is required and "is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client - even if the two mandates are unrelated - unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. "

[45] The court must be concerned with actual conflicts of interest and potential conflicts that may develop as the trial unfolds and accordingly "Trial judges must to some degree, speculate as to the issues which may arise and the course the trial will take. The trial judge's task is particularly difficult since they cannot be privy to the confidential discussions which may have passed between the clients and counsel which may reveal the source of potential conflicts. Given those circumstances, trial judges must proceed with caution and when there is any *realistic risk* of conflict of interest, they must direct that counsel not act for one or perhaps either accused."[4] (emphasis added).

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[3] *R. v. Neil*, [2002] 3 S.C.R. 631 at paras 12-14, 19.
[4] *R. v. Widdifield*, 25 O.R. (3d) 161 at page 9.

[46] In *R. v. Brissett*[5], Hill J. observed that a finding that counsel possesses confidential information of such relevance that would be or might be utilized in a trial cannot be based merely on conjecture and assumption. At para. 40, the court also observed "Where there is no real adversity between the former and present clients, however, conflict of interest problems are less likely."

[47] *R. v. St.Clair Wright*[6] is an example of a case where the Crown sought an order removing counsel of record in circumstances where the witness in question was just as liable to give evidence favourable to the defence as to the Crown, it was a factor to take into account. It was held that if the Crown witness became adverse then alternate counsel could cross-examine that witness.

[48] In *R. v. Quick*[7]a junior counsel had acted for a Crown witness in the same matter, but part of her evidence was consistent with the defence and parts of it served as the foundation for the defence advanced. It was held that there were no opposing interests and hence no conflict.

[49] In *R. v. M.Q.*[8], 2012 ONCA 224, the court held, in a case where it was discovered during trial that counsel acting for the accused had previously been consulted by the complainant about the same matters. There the appellant wanted to proceed with the trial with his counsel of choice. Both the complainant and the accused signed waivers and both received independent legal advice, and both were content to have the trial continue. At para. 37, the court held that while such waiver was not determinative, it was deserving of significant weight.

Position of the Parties

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[5] *R.v. Brissett*, [2005] O. J. No. 343 at para. 40
[6] *R. v. St. Clair Wright*, 2015 ONSC 1764 (CanLII)
[7] *R. v. Quick*, [1993] B. C. J. No. 1205 (B.C.C.) at paras 46-56
[8] *R. v. M. Q.*, 2012 ONCA 224

[50] The Crown acknowledges during submissions that it intends to call LW. at trial in hopes of being able to refine and clarify his position, or in other words, have him "become more honest" as the Crown believes he is withholding essential information.

[51] It is on the basis of the results the Crown hopes to achieve from L.W. at trial, even if it requires utilization of s.9(2) of the *Canada Evidence Act*, or the *KGB* procedure, that the Crown maintains it will be able to demonstrate a clear and realistic adversity in position and conflict of interest.

[52] It is an unstated suggestion within the Crown position that L.W. held back or minimized relevant information as a result of the involvement of his counsel, albeit on unrelated matters, on behalf of N.C. in the within prosecution. This of course is undermined by the fact that Ms. Goldlist was not involved with L.W. in any way, until long after he had given his statement to the police.

[53] The respondent's position is that there is no realistic risk of conflict of interest as the witness L.W. is not an adverse witness to N.C. L.W. has no evidence to give that is admissible against N.C. as L.W. only spoke to Y.F. Indeed, the respondent contends that L.W.'s evidence was indeed favourable to the respondent.

[54] The respondent also points to the informed waivers, with independent legal advice, on the part of both L.W. and N.C., both of which ought to be given significant weight. The respondent also suggests that as a precautionary matter, independent counsel can be arranged to conduct a cross-examination of L.W., if indeed that need ever develops.

Discussion

[55] The videotaped statement given by L.W. to the police is in my opinion full of loose language and vague thought and might very well be the product of drug influence as claimed by

L.W. at the preliminary. Clearly, he exhibited little ability or inclination to be precise in his language. His alternative use of "he" and "they" makes it confusing but in my opinion, a reading of the interview as a whole, leads one to conclude that he spoke by text message only with Y.F. and never with N.C. I also note that it was the officer, not the witness, who first introduces interchangeability of "he" and "they". That it was only Y.F. with whom he messaged is made abundantly clear when that precise question was put to him near the end of the interview and made even more clear during his evidence at the preliminary hearing.

[56] I have concerns about the admissibility of his evidence at all. It seems to me, fairly read, that it amounts to little more than a hunch that N.C. was involved. It seems to come down to Y.F. having indicated to him he wanted to come over to talk about something, and L.W. learning of the murder through the media, and Y.F. not showing up as he indicated he would, that led L.W. to speculate that Y.F., N.C. and the third unknown individual might be responsible for the murder.

[57] In terms of the references in the statement to a "lick" to him meaning a robbery, it's an inference on his part that that's what Y.F. wanted to come over and talk about, and is then even more remote in that he admits there is no basis to think it was this robbery, if indeed robbery was part of the murder.

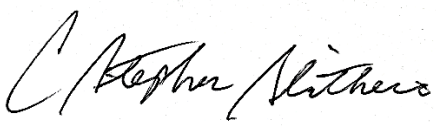
[58] No pretrial motions have been served in this matter, other than this application. As indicated earlier, the other young persons charged apparently are going to bring *certiorari* applications, and as explained during submissions, other pretrial motions are expected but have not been yet determined with any precision pending the outcome of this and the *certiorari* applications. The references in L.W.'s statement to the respondent N.C. having just got out on a drug charge, or having a history with guns, or in anyway being involved in "licks" or robberies, raise discreditable conduct issues which would require a discreditable conduct application by the

Crown, as such evidence is presumptively inadmissible. A probative value versus prejudicial effect assessment may also bear on the outcome. Without such references to alleged criminal inclinations on the part of the respondent, L.W.'s "hunch" is left even more naked.

[59] During submissions, I inquired as to whether the Crown contemplated a further interview of L.W. I was advised that the Crown does not, and rather intends to try and rehabilitate this witness, or put another way, to have him become honest and forthright, at trial is quite speculative and not an appropriate basis upon which to deny the respondent of his counsel of choice.

[60] I take into account the informed waivers of both the respondent and the witness. I also take into account the professed willingness on the part of Ms. Goldlist to utilize an independent counsel to cross-examine the witness if it should develop that a realistic adversity in interest exists.

[61] On the basis of the evidence as it now stands, together with the speculation as to how this may unfold, or is likely to unfold, I am not satisfied that a realistic risk of adversity in interest has been made out. This application is dismissed.



C.S. Glithero J.

DATE: February 1, 2021