

CANADA / JUDGMENT

R. v. Hollaman

2023 BCSC 1613

COURT

Supreme Court of British Columbia

DECIDED

11 May 2023

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hollaman,

2023 BCSC 1613

Date: 20230511

Docket: 91727A

Registry: Kelowna

Rex

v.

Kyle Hollaman

Before: The Honourable Mr. Justice Wilson

Oral Ruling on Crown application to call rebuttal evidence

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

E. Holzman

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 11, 2023

Place and Date of Judgment:

Kelowna, B.C.

May 11, 2023

- [1] THE COURT: The Crown applies to call rebuttal evidence in this case. The trial proceeded primarily by way of admissions and the evidence of one police officer.
- [2] The accused then testified in his own defence. The accused testified that the master bedroom and safe inside the ensuite were not in his possession and control and that the contents of the safe were not his. Rather, the rooms were occupied by a co-tenant, Mr. Kevyn Kirbyson.
- [3] The evidence at the trial includes a residential tenancy agreement. Kevyn Kirbyson is named on the residential tenancy agreement as a tenant. The residential tenancy agreement is unsigned. The accused's name is the other tenant and the accused's telephone number is on the residential tenancy agreement, but Mr. Kirbyson's is not. The signature page is missing.
- [4] The Crown's evidence included various documents that were found in the master bedroom and the ensuite. Those documents were in the name of the accused and included such things as correspondence, business cards, insurance documents. There were no documents found in the master bedroom indicating Mr. Kirbyson's name, with the exception, of course, of the residential tenancy agreement that I just mentioned.

Legal framework

- [5] An application to call rebuttal evidence is not the same as an application to reopen the Crown's case, although they are similar. The case law refers to them as close cousins, but not identical twins. This apt phrase is from a decision of the Ontario Court of Appeal in *R. v. F.S.M.*, [1996] O.J. No. 3536.
- [6] As Madam Justice Church described in *R. v. Heltman*, 2018 BCSC 2385 at paragraph 70:
- [70] . . . Rebuttal evidence is properly admissible where the matter addressed arises out of the defence's case, where it is not collateral, and the Crown could not have foreseen its development. Reopening the Crown case after defence has called evidence is only allowed where the evidence arose ex improviso or unexpectedly and no one could have foreseen that evidence.
- [7] In *F.S.M.*, Mr. Justice Doherty said the following at paragraph 30:
- [30] . . . When the Crown applies to reopen it accepts that the evidence is relevant to a factual issue which was material during the case for the Crown. The Crown acknowledges that in a perfect adversarial setting the evidence would have been led during its case and offers an explanation for failing to do so which it contends justifies departing from the normal trial format. An application to call reply evidence is premised on the contention that the

proffered evidence takes its significance from something tendered during the defence case. On an application to reopen, the Crown must justify deviating from the normal rules of the adversarial process. When the Crown seeks to tender reply evidence, it relies on those same rules to justify the admission of the evidence.

- [8] An underlying concern regarding both reopening and rebuttal evidence is whether the Crown is seeking to split its case. In the context of criminal cases, there is an additional and very important consideration, which is that the accused's Charter-protected rights against self-incrimination may be infringed.
- [9] In the Supreme Court of Canada's decision in *R. v. M.B.P.*, [1994] 1 S.C.R. 555, Chief Justice Lamer said the following:
- [41] What is so objectionable about allowing the Crown's case to be reopened after the defence has started to meet that case is that it jeopardizes, indirectly, the principle that an accused not be conscripted against him- or herself. In *Dubois*, this Court interpreted the privilege against self-incrimination contained in s. 13 of the Charter as preventing the Crown from indirectly conscripting the accused to defeat himself by using his previous testimony against him -- something which the Crown is directly prohibited from doing under s. 11(c) of the Charter. In my opinion, a similar danger is involved when the Crown seeks to reopen its case after the defence has begun to answer the case against it -- that is, there is a real risk that the Crown will, based on what it has heard from the defence once it is compelled to "meet the case" against it, seek to fill in gaps or correct mistakes in the case which it had on closing and to which the defence has started to respond. . . .

[Emphasis in original]

- [10] The questions that must be answered on this application are:
- a) does the evidence the Crown seeks to now tender arise only from the evidence tendered in the defence case or is it an attempt to reopen the Crown case; and
 - b) second, the evidence the Crown seeks to tender, does it go to an essential element of the case or is it collateral. If it is only collateral, this would, of course, favour dismissing the application.

The proposed rebuttal evidence

- [11] The evidence the Crown seeks to adduce by way of rebuttal is summarized as follows, and I am reading from the Crown's written submissions:
- 13) [Firstly] On November 29, 2018 [which is some three weeks before the search in this case], the RCMP assisted in effecting an eviction of Kevyn Kirbyson and a woman from a Kelowna motel. During the eviction the former co-accused on the indictment with the accused attended the scene [that would be Mr. Swerhun].

- [14] [Second] In the early morning hours, [following] the execution of the search warrant . . . [Mr. Kirbyson] was encountered sleeping in a tent in front of a Kelowna homeless shelter, miles away from the [accused].
- [12] That apparently occurred in front of the Kelowna Friendship Centre on Leon Avenue at 5:54 a.m.
- [13] The proposed rebuttal evidence will be called to rebut Mr. Hollaman's evidence that Mr. Kirbyson resided at 505 Valley Road where the evidence was found.

Discussion

- [14] The accused argues the Crown should not be able to call the evidence, because it is not rebuttal arising out of the defence evidence. They say that the residential tenancy agreement was well known and was admitted into evidence as part of the Crown case, and that the Crown could and ought to have anticipated that a co-tenant could be the person in possession of the master bedroom, the ensuite, and the contents therein.
- [15] At trial, possession is the sole issue. That is, the items seized upon execution of the search warrant are conceded to have been drugs that are the subject of the Controlled Drugs and Substances Act and the question of quantities was also addressed by way of an agreed statement of facts, such that the quantities were of such a type that they would be for the purposes of trafficking.
- [16] As such, the sole question is whether the Crown can prove beyond a reasonable doubt that it was the accused who was in possession of those items.
- [17] The accused argues that this is a circumstantial case, given that the drugs were not found on the accused's person, and that the Crown should have anticipated that they would need to prove that the contraband did not belong to Mr. Kirbyson.
- [18] I will turn now to the Crown evidence at trial. The Crown evidence included documents found in the master bedroom that connected the accused to that room, and also to the safe. That evidence is:
- a) a search of the master bedroom revealed personal documents in the name of the accused, which included the tenancy agreement, and also included documents that predated the tenancy;
 - b) the accused's business cards, several of them were found located on top of the safe that contained the drugs;
 - c) the key to the safe was found in the master bedroom, the same bedroom where some of the accused's effects and personal records were found;

- d) a diary was found in the master bedroom that contained notes that were consistent with flooring work, which was the accused's occupation, and also with drug trafficking, and the accused himself was personally found in the master bedroom at the time of the execution of the search warrant.
- [19] By contrast, there was nothing in the master bedroom or in the ensuite that showed any connection to Mr. Kirbyson, other than his name was on the handwritten residential tenancy agreement. That is, there were no other documents with Mr. Kirbyson's name on them. He was not present at the time of the search warrant execution, nor was he noted at any point during the surveillance. No evidence regarding his name came up at all, except on the residential tenancy agreement.
- [20] The question therefore is, was it reasonable for the Crown to have to call evidence to prove that Mr. Kirbyson did not occupy and was not the person in control of the master bedroom and ensuite, based solely on the single document being the residential tenancy agreement.
- [21] I have concluded there was nothing in this case, either in the surveillance or in the trial procedures as they unfolded, that would have rendered it incumbent upon the Crown to prove that Mr. Kirbyson was not in possession of the master bedroom. In reaching that conclusion, I note that there was nothing at all that suggested Mr. Kirbyson was in any way connected to the residence on Valley Road, other than on this residential tenancy agreement that was found in the master bedroom. No part of the investigation or search showed any documents, sightings, observations, or anything else with regard to Mr. Kirbyson.
- [22] They did reveal the identity of another person, Mr. Swerhun, who was charged concurrently, but nothing with regard to Mr. Kirbyson.
- [23] Had there been some evidence other than the residential tenancy agreement that tied Mr. Kirbyson to the residence, it would then perhaps be reasonable for the Crown to assume that Mr. Kirbyson could be an occupant and therefore somebody who might be in possession and control of the master bedroom.
- [24] In those circumstances, it would likely have been incumbent upon the Crown to establish that Mr. Kirbyson was not the person with possession or control of the contraband. But here, the one and only piece of evidence that could constitute advance notice in this case is that residential tenancy agreement. The residential tenancy agreement itself, while tendered by the Crown, is incomplete, unsigned, and it seems that Mr. Kirbyson did not write his own name on it, given the spelling correction of his first name and the fact that the accused agreed that he filled in Mr. Kirbyson's name on the agreement.
- [25] I therefore conclude that the proposed Crown evidence arises from evidence tendered by the defence, and I do not find that it is an attempt to split the case or otherwise backfill a gap or omission that should have been dealt with in the Crown's case in chief.

- [26] The Crown could not have foreseen that the accused would point to Mr. Kirbyson as the person with possession and control of the master bedroom in all of the circumstances here.
- [27] The actual whereabouts and living arrangements of Mr. Kirbyson, an individual wholly unconnected with the investigation, becomes significant solely because the accused testified that the master bedroom and the safe containing the drugs, where the drugs were located, was actually Mr. Kirbyson's bedroom. This is, in my view, proper rebuttal evidence.
- [28] I do agree with the submission that the Crown would not have been entitled to call this evidence if the accused simply argued following the closing of the Crown's case that Mr. Kirbyson, and not the accused, was the occupant of the master bedroom. However, possible inferences that may be drawn from the absence of evidence is different from actual evidence called in the trial which must be dealt with.
- [29] I turn now to the question of whether it is collateral only or if it goes to an essential element of the case that the Crown is required to prove.
- [30] The key issue in this trial is whether the Crown can prove beyond a reasonable doubt that the accused was in possession and control of the contents of the master bedroom, and in particular the contents of the safe. To this end, and for the purposes of this discussion only, I am not willing to draw a distinction between the master bedroom and the safe and the ensuite. That is, the only access to the ensuite is through the master bedroom. The key to the safe was found in the master bedroom. The evidence from the accused is that it was Mr. Kirbyson and not he who occupied the master bedroom.
- [31] If Mr. Kirbyson did not live at 505 Valley Road at the material time, it would be evidence material and relevant in the analysis of who was in possession and control of the master bedroom. I conclude the evidence sought to be introduced by the Crown goes to an essential element of the case, namely possession, and is not collateral. In so saying, it is obviously certainly open to the accused at the time of the closing submissions to argue that possession and control of the master bedroom is not the same as the safe. And notwithstanding my earlier comments on the purposes of the admissibility of evidence, I conclude that the Crown's application should be granted.
- [32] That concludes my decision.

"Wilson J."

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