

CANADA / JUDGMENT

R. v. Hollaman

2023 BCSC 1630

COURT

Supreme Court of British Columbia

DECIDED

14 June 2023

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hollaman,

2023 BCSC 1630

Date: 20230614

Docket: 91727A

Registry: Kelowna

Rex

v.

Kyle Hollaman

Before: The Honourable Mr. Justice Wilson

Oral Ruling on Defence application to call surrebuttal evidence

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

E. Holzman

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 14, 2023

Place and Date of Judgment:

Kelowna, B.C.

June 14, 2023

- [1] THE COURT: This is an application by the defence to call surrebuttal evidence in this criminal trial. By way of background, the accused Mr. Hollaman is charged with possession for the purposes of trafficking of drugs, and some other related charges pertaining to items that were found in the master bedroom and ensuite at 505 Valley Road.
- [2] Mr. Hollaman testified in his own defence and said during his evidence, that the master bedroom was actually the bedroom of Kevyn Kirbyson, a co-tenant. A partial copy of the lease is in evidence that shows that the tenants are Mr. Hollaman and Mr. Kirbyson. When I say the lease, it is a partial copy. It appears unsigned and is missing at least one page. The accused agreed that he wrote Mr. Kirbyson's name on the lease agreement.
- [3] There was nothing in the bedroom that made reference to Mr. Kirbyson, other than the lease.
- [4] The Crown suggested to Mr. Hollaman during cross-examination that Mr. Kirbyson did not live there at all, and in fact his name was added to the lease to cover up circumstances such as what has happened here.
- [5] The Crown applied for and was granted leave to call rebuttal evidence as it related to two items: two police interactions or observations with Mr. Kirbyson, one was approximately three weeks before the execution of the warrant at 505 Valley Road. That interaction took place at a motel. And the second interaction was in the early hours of the day following. The Crown application was brought about a month ago. The Crown rebuttal evidence was heard this morning. Following the Crown rebuttal evidence, the accused applied to call surrebuttal evidence.
- [6] The proposed witness for surrebuttal is Mr. Kevin Grant. Mr. Grant, according to Mr. Hollaman, is another former tenant of 505 Valley Road and it is proposed that Mr. Grant's evidence be limited to the evidence surrounding Mr. Kirbyson's residence on the dates indicated in the rebuttal evidence.
- [7] The accused was asked about Mr. Grant during his cross-examination at the trial which took place on March 3. Mr. Grant clearly would have had material evidence and the question of who lived at the home and where was something that was clearly in issue from the perspective of the defence theory of the case. In particular, Mr. Grant would have had evidence perhaps about who occupied the master bedroom. When asked about those matters at trial, Mr. Hollaman on cross-examination said that he did not know where Mr. Grant was and that he had made no efforts to locate Mr. Grant at that time. As I said, the proposed limit to the surrebuttal evidence from Mr. Grant is limited to Mr. Kirbyson's residence on October 28 and December 20, 2018.

- [8] I was referred to one decision on the issue of surrebuttal evidence, being *R. v. Norris*, 2019 NLCA 29. In that case, the Newfoundland Court of Appeal summarized the principles that apply in the case of an application for surrebuttal witnesses. At paragraph 42, the Court said:
- [42] These decisions demonstrate the balance that must be engaged when the defence seeks to adduce surrebuttal evidence. I begin with the premise that the permissible scope of defence surrebuttal evidence should be liberal in favour of the accused in order to ensure the opportunity to make full answer and defence.
- [43] That said, the accused's opportunity to make full answer and defence does not mean that the defence should be permitted to "split its defence" just as the Crown is not permitted to "split its case". Failure to present its full case, whether the Crown in proving the elements of the offence, or the accused in establishing a defence, may result in prejudice to the other side and interference with the orderly and expeditious conduct of the trial.
- [9] At paragraph 44, the Newfoundland Court of Appeal went on to address certain factors that must be considered in determining the appropriate scope of surrebuttal evidence. These include the relevance of the proposed testimony, whether the accused had the opportunity during the presentation of his or her defence to address the issues for which surrebuttal evidence is requested, whether the accused failed to provide a complete foundation for the defence and sought instead to split its case, and the extent to which the evidence adduced by the Crown in rebuttal is new, for example, evidence directed to an alternative explanation, not dealt with in defence evidence, or Crown rebuttal evidence that included observation of the accused during the trial as in *Ewert*, and there are three other factors which are less relevant here, in that they focus primarily on new witnesses.
- [10] In these circumstances, I have concluded that calling Mr. Grant amounts to a splitting of the defence case. It is obvious and apparent that Mr. Grant would be a witness who could have been important to the accused's case. I say it is obvious because it is clear on the evidence that I have heard from the accused that Mr. Grant lived at the house, and because it was conceded on cross-examination that Mr. Grant would have that type of evidence. Despite that, no efforts had been made to locate him.
- [11] The end of cross-examination of the accused was on March 3, 2023. At that time, the Crown said they may apply to call rebuttal evidence. The Crown did apply to call rebuttal evidence, which order was granted on May 11th. I heard no evidence as to why Mr. Grant is suddenly available now, when the accused was unaware of where he was when he was under cross-examination and had taken no steps to locate him by that time.
- [12] The first mention of Mr. Grant as a witness is today, June 14, and only after the Crown's rebuttal evidence has been completed. I am told he is sitting out in the hallway outside the courtroom.

- [13] If the accused had applied to reopen the defence because he had suddenly found Mr. Grant, but before the rebuttal evidence was called, I would have a different decision to make. However, Mr. Grant clearly has or likely has relevant evidence on the question of whether Mr. Kirbyson lived at 505 Valley Road, and who also would have been in possession of the master bedroom at that location, which was where Mr. Hollaman was found when he was arrested.
- [14] Had Mr. Grant been called by the accused, the Crown could listen to his evidence and focus the cross-examination accordingly. Here the direct evidence would be focused solely on the two discrete narrow points, being the interactions between Mr. Kirbyson and members of the police on November 28th and December 20th, and although the Crown could cross-examine at large, the accused would then have a very liberal ability to re-examine Mr. Grant as a witness without a chance to further cross-examine.
- [15] Ultimately the primary concern for the court here is trial fairness. I conclude that the fact that Mr. Grant had already been located and that the accused wished to call him as a witness could and should have been raised before the Crown rebuttal evidence was called. Returning to Norris, I find that calling Mr. Grant at this point would be splitting the defence case. Mr. Grant obviously became available after March 3 when the defence closed its case. But no application was brought to reopen the defence case before the rebuttal witnesses were called. In the circumstances, because I find that it is a splitting of the defence case, I will not permit the calling of Mr. Grant as a surrebuttal witness.
- [16] CNSL E. HOLZMAN: Thank you.
- [17] THE COURT: That concludes my decision.

"Wilson J."

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