

CANADA / JUDGMENT

R. v. Sorensen

2025 BCSC 1878

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1878 R. v. Sorensen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sorensen,

2025 BCSC 1878

Date: 20250127

Docket: X085366-2

Registry: New Westminster

Rex

v.

Darren Robert Sorensen

Before: The Honourable Justice C. Greenwood

Oral Ruling Re Crown's

Application to Call Rebuttal Evidence

Counsel for the Crown:

A. Bonfield

Counsel for the Accused:

J. Chadi

J. Sawani

Place and Date of Trial:

New Westminster, B.C.

January 20-23, 2025

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2025

- [1] THE COURT: This is a mid-trial ruling in response to a Crown application to call rebuttal evidence in response to the evidence of the accused, Mr. Sorensen.

Background

- [2] The background of this application can be briefly summarized. The Crown alleges two separate incidents of sexual assault. One of the alleged assaults took place on a night that the complainant and the accused attended Charlie Don't Surf which is a restaurant and bar in White Rock. The other alleged sexual assault took place on a night that the accused attended the apartment that the complainant shared with her then fiancé and they ordered pizza. The parties have referred to these two different nights as the "Charlie Night" and "Pizza Night". In general terms, the complainant's account of the Charlie Night and Mr. Sorensen's account of the Charlie Night are irreconcilable such that credibility will be a fundamental issue for the jury.
- [3] The complainant testified that, on the Charlie Night, Mr. Sorensen had texted her to tell her he was in town and that she and her fiancé, Mr. Fraser, met Mr. Sorensen at their apartment. They then walked to Charlie Don't Surf where Mr. Sorensen was pushing drinks on them. She testified that she was intoxicated and did not remember a lot from Charlie Don't Surf. The complainant then testified they went to a different restaurant, Uli's, for dinner and were joined by another uncle, Hugh Edmundson. She testified she was intoxicated at Uli's and did not remember getting home and had memory gaps. She then described, among other things, being shocked while in and out consciousness when Mr. Sorensen allegedly sexually assaulted her.
- [4] The complainant's then fiancé, Mr. Fraser, testified, as well, as a Crown witness. He testified that he, the complainant, and Mr. Sorensen attended Charlie Don't Surf and that all were drinking. Mr. Fraser testified that they went to Uli's Restaurant and then, there, they were joined by Hugh Edmundson. He testified that Mr. Edmundson attended the apartment perhaps to drop them off, but if he came inside, it was not for long. He also testified that the complainant was drunk at this stage.
- [5] Mr. Sorensen's account of what took place on Charlie Night was different. According to Mr. Sorensen, he never communicated with the complainant by text message. He testified that he had arranged to have dinner with Mr. Edmundson at Charlie Don't Surf and was surprised to see the complainant and Mr. Fraser when he arrived. He testified that they did not go to

Uli's Restaurant at all and, after splitting the bill with Mr. Edmundson, they all went back to the complainant's apartment. Mr. Sorensen testified that the complainant did not appear to be intoxicated at all. He testified that Mr. Edmundson came into the apartment, they all had a lengthy conversation, and that when Mr. Fraser got out of hand, he and Mr. Edmundson got up to leave, but Mr. Fraser and the complainant were adamant that he could stay overnight which he did. He then described sexual activity that took place and testified that it was all consensual, that the complainant was not intoxicated, and that he was simply following her lead.

The Proposed Evidence

- [6] The Crown application is to call Mr. Hugh Edmundson in rebuttal to contradict Mr. Sorensen's evidence about such matters as how the dinner was arranged, his observations of the drinking that was occurring including Mr. Sorensen buying shooters, and his observations of the level of intoxication. It is anticipated he will testify that the parties were already at the restaurant in White Rock when he arrived and appeared to be fairly drunk. It is also anticipated he will testify that he gave the other parties a ride back to the apartment in his truck, but did not go into the apartment.
- [7] The Crown points out that this is new evidence in the sense that Mr. Edmundson was not initially interviewed by the police and there was no will say of his evidence. They also point out that Mr. Sorensen never provided a statement to the police so they could not have anticipated the importance of certain details in his testimony until Mr. Sorensen testified.
- [8] The defence is opposed to the rebuttal evidence on the basis that: (1) the issue of intoxication was part of the Crown case from the beginning and this is evidence they could have led from the beginning; and (2) the other issues, such as how they met initially at the restaurant, how the group got back to the apartment from the restaurant, and whether Mr. Edmundson went into the apartment, are all collateral issues and run afoul of the rule against calling additional evidence on collateral matters to rebut the defence evidence. They also point out that Mr. Sorensen's account was put to the Crown witnesses in cross-examination. Therefore, it was not a surprise and the Crown could have called Mr. Edmundson as part of the Crown case if they wanted to. The defence position is that the Crown should not be permitted to split its case and it would be unfair to do so in the circumstances.

The Test for Rebuttal Evidence

- [9] The general principles governing the introduction of rebuttal evidence are set out in *R. v. Krause*, [1986] 2 S.C.R. 466 and *R. v. Aalders*, [1993] 2 S.C.R. 482.
- [10] The general rule is that the Crown may cross-examine an accused who testifies, but may not lead evidence that is collateral to challenge the statements of the accused. This avoids any prejudice associated with the Crown splitting its case since the accused is generally entitled

to know the case against him prior to responding to the Crown case. Thus, rebuttal evidence will not be permitted to simply reinforce the Crown evidence that has already been called and could have been tendered as part of the Crown case. However, rebuttal evidence may be called when the defence has raised some new matter that the Crown could not reasonably have anticipated. Justice McIntyre said the following in Krause at page 474:

Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed.

[11] In Aalders, Mr. Justice Cory noted that, while rebuttal evidence must be important on an essential issue, it need not be determinative. As he stated at page 498 to 499:

In my view, the crucial question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is determinative of an essential issue, but rather whether it is related to an essential issue which may be determinative of the case. If the reply evidence goes to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, then it is generally admissible. Thus, if a statement is made during the course of a witness's testimony at trial which conflicts with other evidence relating to an essential issue in the case, reply evidence will be permitted to resolve the conflict.

It is true that the Crown cannot split its case to obtain an unfair advantage. Nor should the Crown be able to put in evidence in reply on a purely collateral issue. However, it is fit and proper that reply evidence be called which relates to an integral and essential issue of the case. In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case. The course of a trial, particularly a criminal trial, must be based upon rules of fairness so as to ensure the protection of the individual accused. However, the rules should not go so far as to deprive the trier of fact of important evidence, that can be helpful in resolving an essential element of the case.

[12] Applying those principles in the context of the present case, in my view, the factual issues that the Crown seeks to call rebuttal evidence on are, generally speaking, new matters that came up during the testimony of Mr. Sorensen. The Crown did not have a statement from Mr. Sorensen in advance of calling their case and thus had no advance knowledge of any of the alleged details within his evidence that they now seek to rebut. Based on how the evidence has unfolded and the irreconcilable differences between the accounts of the Crown witnesses and Mr. Sorensen's account, I find that the issues are important to the fact-finding task the jury is to perform and to the credibility of the witnesses which is the essential issue for the jury to resolve.

- [13] The complainant did not have a strong memory about the events at Charlie Don't Surf and Uli's Restaurant, according to her evidence, due to her intoxication. Mr. Fraser was called by the Crown and his memory was exhausted and, while he did not remember everything, he did provide evidence of intoxication and that Mr. Edmundson either did not go into the apartment or, if he did, it was not for long.
- [14] Thus, going into the case for the Crown, the significance of what Mr. Edmundson might have been able to add would not have been apparent. It only assumed importance in light of the defence evidence. For example, the Crown would not have had any way of knowing that Mr. Sorensen would say that he had not even arranged to go for dinner with the complainant and Mr. Fraser and that he was surprised to see them at a dinner he had arranged with Mr. Edmundson. If, as anticipated, Mr. Edmundson will testify that, when he arrived, the other three were already at the restaurant, it could call into question whether the meeting with the complainant and Mr. Fraser was a coincidence as Mr. Sorensen claims or whether he had been in contact with the complainant in advance of the meeting as she claims. I do not think this is a case of the Crown improperly splitting its case.
- [15] Similarly, the assertion in Mr. Sorensen's evidence that he and Mr. Edmundson were in the apartment and then, when Mr. Fraser got out of hand, they got up to leave but he was then invited to stay over, could not have been anticipated and is important to the credibility of Mr. Sorensen's account and his distinct memory of a long discussion that included Mr. Edmundson at the apartment. The evidence of whether the parties were intoxicated and, if so, to what extent is an important factual issue that goes directly to the essential issues on the trial and to the credibility of Mr. Sorensen's evidence.
- [16] Counsel for Mr. Sorensen has drawn my attention to *R. v. Perry and Franks* (1977) 36 C.C.C. (2d) 209 (ONCA), a decision of the Ontario Court of Appeal that is cited in Krause and outlined the rule against calling evidence on collateral facts to rebut the general credibility of a witness. While I accept that rule of longstanding in the law, in my view, the proposed evidence, which is relatively brief, is not collateral in the context of the evidence here given the critical importance of credibility in this case. As Cory J. noted in *Aalders*, the evidence must be "related to an essential issue which may be determinative of the case". I consider the evidence sufficiently important to credibility which may well be, and likely will be, determinative in this case.
- [17] In *R. v. T.J.B.*, 2017 BCCA 49, the court upheld the trial judge's decision to permit the Crown to lead rebuttal evidence in a case involving sexual offences including sexual assault. In that case, the accused testified that he had initiated a meeting with a school principal after complaints about conduct in the schoolyard that was considered inappropriate. The trial judge allowed the Crown to call the principal in rebuttal to address the issue of who initiated the meeting. The Court of Appeal found at para. 9 that the evidence was responsive to a point made for the first time in the evidence of the accused. In my view, much of the evidence proposed in this case is also responsive in a similar fashion to factual issues that came up for the first time when Mr. Sorensen testified.

[18] The defence argues that the issue of intoxication was always part of the Crown case and that, by pleading not guilty, it would have been apparent that Mr. Sorensen would be contesting any suggestion that the level of intoxication was inconsistent with consent. While that may be true, as the Crown points out, intoxication can be relevant to sexual assault cases in a number of different ways and there was a huge range of facts that Mr. Sorensen might have testified to. To name one example, he could have testified that the parties were drinking as described in the Crown evidence but the complainant did not appear to be extremely intoxicated, was capable of consent and did consent. To name another, he could have testified that the parties were intoxicated but that no sexual activity took place. There are other possibilities, but in my view, while the issue of intoxication was always part of the Crown case, they could not reasonably have anticipated the specific evidence that Mr. Sorensen gave on that issue which, as I have indicated, is irreconcilable with the Crown evidence in its particulars and important on the issue of credibility.

[19] The defence also points out that the Crown could have anticipated the importance of the evidence based on the defence cross-examination of the complainant and Mr. Fraser, during which they put Mr. Sorensen's account, including many of the details that the Crown now wishes to rebut, to the Crown witnesses. Accordingly, they say that for that reason, as well, the Crown had notice of the issues and, if it wished to call the evidence, it could have done so as part of its case.

[20] In *R. v. S.M.*, 2025 ONCA 18, at para. 17, the Ontario Court of Appeal addressed a similar issue and stated as follows:

Where rebuttal evidence is used, as it was here, to refute a defence, it does not give rise to concerns about case-splitting: *R.D.*, at paras. 18-19. This is so because an accused could not be surprised by rebuttal evidence on an issue they themselves raised. Further, the fact that an issue was "foreshadowed" - and the question of where the appellant lived in the winter of 2019 was indeed raised by defence counsel before the Crown closed its case - does not necessarily preclude the admission of rebuttal evidence. As this court said in *Sanderson*, at para. 38:

It is true that compliance with *Browne v. Dunn*, as a general matter, may give "notice" of potential issues that the opposing party wishes to explore. That does not mean, however, that every suggestion put to a witness in compliance with the rule in *Browne v. Dunn*, or any question which foreshadows a possible attack on a witness's credibility, necessitates the Crown calling evidence on the issue in its case in chief. Such a rule would amount to chasing every shadow. This is particularly true where the witness has not accepted a suggestion advanced and where, at the end of the Crown's case, the witness has not been successfully impeached.

[21] In my view, the fact that counsel for the defence to some extent foreshadowed some of the factual issues that have now come up should not preclude admission of the rebuttal evidence. The importance of these details only became truly apparent once Mr. Sorensen testified. As I have indicated, there are a number of direct conflicts between Mr. Sorensen's evidence and the anticipated evidence of Mr. Edmundson that he may be able to shed light

on. In my view, it is important for the jury to hear this additional evidence in order to have all the available evidence on an important factual issue in the context of this trial.

- [22] I do note that there is a risk that, in allowing the Crown to lead this evidence, it will have a heightened importance in the jury's mind as the defence has noted. Accordingly, subject to the input of counsel, I will instruct the jury that there are certain circumstances in which the Crown may call rebuttal evidence, that they will be calling one relatively brief witness in rebuttal, but that the jury should not attach any special importance to this evidence or assume that it is more reliable or important simply because it was called after the Crown and defence had closed their case. The jury should treat the evidence as they would any other evidence and not attach any special significance to it.
- [23] For completeness' sake, I would note that I found the S.M. case instructive on its facts to a certain extent, as well. In that case, the complainant alleged that the accused had assaulted her on three occasions. The complainant's account was that the accused had assaulted her on each of the three occasions in the accused's parents' house. On cross-examination, it was suggested to the complainant that the accused did not live with his parents during the time period of one of the three assaults, but the complainant disagreed. In the defence case, the accused's mother testified that the accused did not live at the family home at the time of the alleged assault and had, in fact, moved out.
- [24] The trial judge allowed the Crown to recall the complainant to introduce time-stamped photographs of her visiting the accused at his parents' home during the relevant time period. In upholding the trial judge on this issue, the Court of Appeal noted that there was no evidence on that point until the defence case and, even though the defence satisfied the rule in *Browne v. Dunn* by suggesting facts to the complainant, "The issue did not gain significance until the defence called the appellant's mother", noting that, before closing its case, the Crown would not have known that the appellant's mother would testify or what her evidence would be.
- [25] In my view, there are some similarities between that case and this case. In S.M., the Crown would have known that the location of the assault was part of their case but would not have appreciated the significance of extra evidence on the point until there was specific defence evidence denying it. In this case, the Crown could not know what the details of Mr. Sorensen's account would be unless and until he testified. That would include his evidence about the drinking and the level of intoxication of the parties being different than what the Crown understood from its witnesses as well as very specific and concrete details that Mr. Sorensen outlined and which strengthen his account in material ways. In my view, the importance of these factual issues did not gain significance until Mr. Sorensen testified, but have now become important issues for the jury to consider in relation to credibility.
- [26] I would note, as well, that while the proposed rebuttal evidence is important to the truth-seeking function of the trial, it only addresses one aspect of Mr. Sorensen's account. In my view, that limits the prejudice that might otherwise arise to a certain extent as well.

[27] For all of these reasons, I am of the view that it is appropriate to allow the Crown to call the proposed evidence. To exclude the evidence would deprive the jury of important evidence that could help resolve an essential element of the case and, in my view, the importance of the jury hearing the additional evidence outweighs any prejudicial effect on these facts. For that reason, I will permit the Crown to call the evidence.

"Greenwood J."

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