

CANADA / JUDGMENT

R. v. Volk

2025 BCSC 1593

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Supreme Court of British Columbia

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2025 BCSC 1593 R. v. Volk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Volk,

2025 BCSC 1593

Date: 20250708

Docket: X085103

Registry: New Westminster

Rex

v.

Damian Volk

Before: The Honourable Justice Gibb-Carsley

Oral Ruling on Voir Dire #4

Accused's Application to Compel a Witness to Testify

Counsel for the Crown:

C. Lo

A. Chang

Counsel for the Accused:

N. Wiberg, K.C.

D. Ching McNamee

Place and Dates of Hearing:

New Westminster, B.C.

June 27 and July 3, 2025

Place and Date of Judgment:

New Westminster, B.C.

July 8, 2025

Introduction

- [1] THE COURT: In this application, the accused, Staff Sergeant Damian Volk, seeks an order from the Court that either the Crown be compelled to call a witness at trial or that the Court call that witness at trial. The specific witness the accused argues must be compelled to be called, either as a Crown witness or a witness for the Court, is Constable Craig Andrews.
- [2] The application was argued on June 27, 2025. At that time, the accused had elected to have the trial by judge and jury. On July 2, 2025, the accused re-elected to be tried by judge alone.
- [3] On July 3, 2025, I reopened this application to allow counsel to provide additional submissions as to whether the re-election to judge alone had any impact or relevance on their submissions on this application. Counsel advised me that the re-election did not change their ultimate positions. However, the Crown, fairly in my view, submitted that the strength of its previous submission that having a witness either compelled to be called by the Crown or called as the Court's own witness could be seen by the jury as increasing the importance of that witness was somewhat attenuated because the trial was converted to trial by judge alone.
- [4] On July 3, 2025, I ordered that the Court would call Cst. Andrews as the Court's witness and would do so after the Crown concluded its case and before the defence called its case. I also ordered that both parties would have the opportunity to cross-examine Cst. Andrews with the defence conducting the first cross-examination, followed by the Crown. I indicated that my reasons would follow. These are the reasons.
- [5] The accused is charged with a single count of assault contrary to s. 266 of the Criminal Code. The indictment alleges that the accused assaulted Dalibor Kuzmanovic, on August 17, 2020, in the cells of the Langley RCMP detachment (the "Langley Cells").
- [6] The accused asserts that fairness requires that he be able to cross-examine Cst. Andrews, and in the particular circumstances of this case, it is not sufficient that the defence call Cst. Andrews as their own witness. In short, the accused asserts that the Crown has decided not to call Cst. Andrews as its witness in order to prevent the Court from hearing exculpatory evidence about the events surrounding the alleged offence.

- [7] The Crown contends that the accused has not met the high burden of finding this is a rare and exceptional case where the Court should interfere with how the Crown presents its case. The Crown asserts that the accused is not prevented from calling Cst. Andrews as its own witness and the Court should not interfere to require either the Crown to call Cst. Andrews or have Cst. Andrews called as a witness for the Court.
- [8] I find it is appropriate that the Court call Cst. Andrews as a witness and that both the accused and Crown will be entitled to cross-examine him. As I will describe below, in the particular circumstances of this case, I am satisfied that the trier of fact should hear the evidence of Cst. Andrews, and that both the accused and Crown be permitted to cross-examine him.
- [9] At their core, trials are a pursuit for truth. In my view, having the Court call Cst. Andrews as a witness finds the balance between the search for truth and the fairness to the accused to make full answer and defence and also to the Crown to allow it to present its case as it wishes without being required to present a witness with whom it has reliability concerns.
- [10] In these reasons for judgment, I will first set out a brief background of the facts relevant to this application and then turn to my discussion and analysis.

Background

- [11] As referenced above, the accused is alleged to have assaulted Mr. Kuzmanovic while Mr. Kuzmanovic was being booked in after being arrested on suspicion of stealing items from a Home Depot.
- [12] In the course of Mr. Kuzmanovic being "booked in" by the RCMP officers in the Langley Cells, the Crown alleges the accused used excessive force, thereby assaulting Mr. Kuzmanovic, amounting to an offence under the Criminal Code. In addition to the accused and Mr. Kuzmanovic, two other individuals were present during the booking-in process and during the alleged assault. These individuals were Constable Michael Dee and Craig Andrews who, at the time, was a cell guard at the Langley Detachment. I understand that since August 2020, Mr. Andrews is no longer a cell guard and has obtained the rank of constable with the RCMP.
- [13] Mr. Kuzmanovic was interviewed by an investigating officer, Staff Sergeant Harder, on December 1, 2021. The statement made by Mr. Kuzmanovic to S/Sgt. Harder was audio recorded (the "Kuzmanovic Statement").
- [14] Mr. Kuzmanovic died on January 30, 2022. As a result of his death, the Crown sought to admit the audio recording into evidence before the jury at trial. The Crown brought an application, known as a Bradshaw application, and the Court held a voir dire to decide the admissibility of the Kuzmanovic Statement. The voir dire took place in April 2024 and continued in October 2024.

- [15] As part of the evidence on the Bradshaw voir dire, the Crown called two of the eyewitnesses to the alleged assault, Cst. Dee and Cst. Andrews. Constable Andrews testified on April 16, 2024, at the voir dire.
- [16] I dismissed the Crown's application to admit the Kuzmanovic Statement on December 18, 2024. As a result of additional evidence being discovered regarding the nature and quality of the CCTV footage from the Langley Cells, the Crown brought a second application to adduce the Kuzmanovic Statement. On May 9, 2025, I dismissed the Crown's second application to put the Kuzmanovic Statement before the jury.
- [17] On January 29, 2025, four days before the scheduled first date of the jury trial in February 2025, Crown counsel advised defence counsel that it would not be calling Cst. Andrews as part of its case at the trial. The text of the email is important in my view, and so I will repeat the relevant passage from the text of the email verbatim:

I've decided that I will not be calling Cst. Andrews as part of the Crown case. I'm of the opinion that his testimony in the voir dire was embellished and inconsistent with the statement that he provided to Sgt. Harder.

- [18] It is with these facts that I turn to my discussion and analysis.

Discussion

- [19] This application engages three fundamental principles that are at the core of the criminal justice system. Those principles that require balancing are: first, the truth-seeking function of a trial; second, the Crown's right in an adversarial system of advocacy to present the case how it wishes, undisturbed by the court; third, the accused's right to a fair trial and the right to make full answer and defence.
- [20] The Supreme Court in *R. v. Cook*, [1997] 1 S.C.R. 1113, set out the considerations in play when there is an application to compel the Crown to call a witness at trial. The Court held the general rule is that there is no obligation for the Crown to call witnesses to assist the defence. Decisions on how to present the case against an accused must be left to the Crown's discretion absent evidence that the discretion is being abused: *Cook* at para. 55.
- [21] At para. 21, the Supreme Court in *Cook* set out that while the Crown can act as a strong and vigorous advocate due to the special and unique function of the Crown to ensure that the administration of justice is served, the Crown must have balance in its approach:

21 Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v. The Queen*, [1955] S.C.R. 16; *Power*, *supra*, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 295, per L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate

result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Jones*, [1994] 2 S.C.R. 229; *Boucher*, *supra*. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.

[Emphasis in original.]

[22] The role the Crown plays has been articulated repeatedly by the Supreme Court as not being motivated to secure a conviction or to win. In 1954, in *Boucher v. The Queen*, [1955] S.C.R. 16, the Court stated the premise as follows:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should [also] be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; [its] function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

[23] Forty-eight years later in *R. v. Regan*, 2002 SCC 12, the Supreme Court reiterated the principle at para. 228:

Society, like the Crown Attorney, has no specific interest in "winning or losing" but it does have an interest in placing the relevant facts before a court for determination on their merits.

[24] That said, courts have repeatedly held that the general rule is that courts must leave the Crown, like any party, with a decision about which witnesses to call to support its case: *R. v. Rybak*, 2008 ONCA 354, at para. 172.

[25] There are exceptions to this general rule in which the court may compel the Crown to call a witness. For example, courts have found that where there is a "perverse or oppressive exercise of prosecutorial discretion [that] could amount to an abuse of process", it can be appropriate for the court to order that the Crown call a specific witness: see *R. v. Nesbitt*, 2024 ONSC 5839 at para. 13. In *R. v. Hillis*, 2016 ONSC 451, Justice Pomerance (as she then was) found that the Crown's discretion to call or not call a witness can be reviewed, like all prosecutorial decisions, where the decision is a product of an oblique or improper motive and amounts to an abuse of process: *Hillis* at para. 17.

[26] In the case at bar, the accused asserts the Crown has made a determination to not call Cst. Andrews to prevent the trier of fact from hearing exculpatory evidence. The accused bases this proposition on an inference that, because Cst. Andrews' evidence provided at the voir dire was inconsistent and an embellishment of his evidence provided to the investigating officer it will be helpful to the accused because it is exculpatory. The accused contends that the Crown's conduct runs contrary to its duty to present evidence to the trier of fact. In other words, the accused argues that the Crown is focused on winning and securing a conviction,

not on having justice achieved by having the trier of fact hear evidence that is relevant to determine the charged offence.

- [27] While the accused could call Cst. Andrews as its own witness, it argues it should not have to do so and it would be unfair for it to do so for two reasons. First, because it would not be able to cross-examine Cst. Andrews, thus getting at the truth of the potential changing testimony. Second, it would change the order of the address to the trier of fact because if the accused is required to call evidence, it would be first to make submissions to the Court.
- [28] In respect of the second issue, counsel for the accused, Mr. Wiberg, candidly and transparently in my view, as an officer of the Court, acknowledged that while theoretically having to call Cst. Andrews as a witness would change the order of presentation of submissions, at this point in time the accused intends to call evidence in the form of a use of force expert. As such, the change in order of submissions caused by having to call Cst. Andrews is more a theoretical concern rather than a practical reality.
- [29] The Crown asserts that in the adversarial criminal justice system, it should be permitted to call the evidence it believes supports its position. Further, the Crown argues that it should not be compelled to call a witness who it believes will provide unreliable evidence as part of its case.
- [30] Guidance on this issue is provided in the case of Nesbitt. In Nesbitt, the Crown was prosecuting a police officer for allegedly planting drugs in a vehicle during an investigation and lying about his observations of observing drugs in that vehicle. Officer Nesbitt was charged with breach of trust, fabricating evidence and attempt to obstruct justice.
- [31] The Crown in Nesbitt, well in advance of trial, informed the defence it would not call Constable Lo to testify because of concerns that Cst. Lo's testimony had been improperly influenced by an investigator in obtaining the evidence for the prosecution. Put simply, the Crown's position was that it had concerns about the reliability of Cst. Lo's evidence that it did not want to put before the trier of fact. Officer Nesbitt's counsel argued that the Crown was attempting to keep relevant evidence from the trier of fact and that fairness required that the accused have an opportunity to cross-examine Cst. Lo to determine how the investigating officer may have influenced Cst. Lo's account of events: para. 21.
- [32] Justice Speyer determined that the Crown's motivation for not calling Cst. Lo as a witness was motivated by its professional obligations and not based upon a tactical choice or oblique motive: Nesbitt at para. 17. In other words, the Crown should not be forced to call a witness to testify that it expects will provide unreliable evidence: para. 25. Justice Speyer determined that the appropriate resolution in that case was that the Court call Cst. Lo as its witness.

- [33] Similar to the facts in Nesbitt, I find that the Crown made its determination not to call Cst. Andrews, not to suppress evidence that may be helpful to the accused or as a tactical choice. Instead, it appears that Crown counsel made an assessment after comparing the testimony of Cst. Andrews at the voir dire to the previous statement Cst. Andrews gave to S/Sgt. Harder and was concerned that the evidence given at the voir dire was "inconsistent" with the previous statement and "embellished".
- [34] It strikes me that the Crown's decision not to call Cst. Andrews to testify is adhering to the professional obligations of all counsel, and especially Crown counsel, not to put a witness before the Court if counsel has concerns about consistency or embellishment. Using the words of Justice Speyer in Nesbitt, "[t]he Crown should not be forced to lead evidence it believes to be unreliable": para. 25. Like Justice Speyer, I find that the decision made by the Crown not to call Cst. Andrews reflects professional obligations rather than a tactical choice: para. 17.
- [35] Given the foregoing, I find it inappropriate to compel the Crown to call Cst. Andrews as a witness. The law appears settled that it will be rare and exceptional cases where the Court will interfere with the Crown's discretion to determine which witnesses will be called to support a prosecution. I accept that the discretion should not be interfered with lightly.
- [36] However, coming to this conclusion not to compel the Crown to call Cst. Andrews as a witness does not end my analysis. In my view, this is one of the rare and exceptional cases where it is appropriate for the Court to call Cst. Andrews as a Court witness. I come to this conclusion for a number of reasons.
- [37] First, Cst. Andrews was already called as a witness by the Crown in the application to admit the Kuzmanovic Statement. It strikes me as unsavoury for a witness to be relied upon by the Crown during a voir dire, but then shielded from providing evidence in the trial proper.
- [38] Second, there are few witnesses to the alleged offence. At the time of the alleged assault, only Cst. Andrews, Cst. Dee, the accused, and Mr. Kuzmanovic were present. While there is video evidence available, it has no audio. Mr. Kuzmanovic cannot provide his version of the events, and there is no requirement that the accused testify. As such, in my view, Cst. Andrews has important and material evidence for the trier of fact in this case. Further, if Cst. Andrews is called by the Court, both the Crown and the defence counsel will have an opportunity to cross-examine him. In my view, this will allow both parties an opportunity to elicit his evidence regarding the alleged offence and probe if and why there has been any change to his version of events, all with the goal of getting at the truth of what occurred in the Langley Cells during the alleged assault. This is important for the truth-seeking function of a trial.

- [39] Third, Cst. Andrews is a police officer and would be the type of witness one would expect to be called in a case of this nature. Indeed, in *Hillis*, the fact that a witness was "of the type that would be ordinarily called by the Crown" and were "police investigators" was a factor supporting Pomerance J.'s decision to compel the Crown to call the witness: *Hillis* at para. 48.
- [40] Fourth, the witness was on the Crown's witness list until only days before the first jury selection. As such, I infer that the accused structured its defence based on its belief that the Crown would be calling Cst. Andrews and so the defence would have an opportunity to cross-examine him at trial. To change that position so soon before trial, in my view, presents an unfairness to the accused in making full answer and defence. Especially so if as part of its preparation, the accused expected to rely upon the evidence given by Cst. Andrews at the voir dire that Crown counsel considered to be "inconsistent" and "embellished". I note that in *Nesbitt*, the Crown had alerted the accused well in advance of the trial that it would not call Cst. Lo as a witness, and still it resulted in an order that Cst. Lo be called as the court's witness: *Nesbitt* at para. 2. I also note that having the witness on the witness list previously and only removed shortly before trial was a reason relied upon by Pomerance J. in *Hillis*: at para. 48.
- [41] I acknowledge that I had concerns whether a jury might put undue weight on the evidence of Cst. Andrews if he were called as the Court's witness, because a jury might place elevated importance to his evidence because of the Court's determination to call him. Further, while a jury instruction could assist the jury in understanding the reasons that Cst. Andrews was called as a witness by the Court, it could add confusion and complexity to the jury trial. Given the trial is now by judge alone, my concern that the trier of fact might place too much weight on Cst. Andrews' evidence because he is being called as the Court's witness is lessened to an acceptable level.
- [42] Finally, while the accused acknowledged that he will likely call a use-of-force expert and tender defence evidence, thus having the accused address the trier of fact first, if required to call Cst. Andrews it would change the order of presentation to the trier of fact for closing submissions. Trials are unpredictable. Despite defence counsel acknowledging that it expects to call evidence, there is no guarantee that after the Crown presents its case, that the defence would not, absent the need to call Cst. Andrews, decide not to call defence evidence. While not a significant factor for my decision, I find that effectively requiring the accused to call Cst. Andrews as a witness, thus reversing the order of submissions, supports my conclusion to call Cst. Andrews as the Court's witness. However, as with my concern that undue weight might be placed on Cst. Andrews' evidence if this were a jury trial, given this trial is now by judge alone, any concern regarding the order of submissions is attenuated.

[43] The words of Justice Speyer aptly summarize what underpins my decision. At para. 28 of Nesbitt, Speyer J. holds: "[a]t its core, a criminal trial is a search for truth, conducted fairly". In my opinion, the best way to accomplish this goal in the circumstances of this case, doing the least amount of mischief to the ordinary and general conduct of trial, is to leave the parties with the decision as to how each wish to present their case by calling the witnesses they wish to call, and for the Court to call Cst. Andrews as the Court's witness.

Summary and Conclusion

[44] In summary, I order that the Court shall call Cst. Andrews as a witness. This will occur after the Crown closes its case and before the accused begins its case. Both Crown counsel and defence counsel will have an opportunity to cross-examine Cst. Andrews with the defence conducting the first cross-examination.

[45] I thank counsel for their submissions on this application.

"Gibb-Carsley J."

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