SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Anderson* , 2010 YKSC 18

Date: 20100429
S.C. No. 09-01506
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHARLES LESLIE ANDERSON

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code.*

Before: Mr. Justice R.S. Veale

Appearances:

Judy Bielefeld — Counsel for the Crown
Brook Land-Murphy — Counsel for the accused

REASONS FOR JUDGMENT
(Rebuttal Evidence)

INTRODUCTION

[1] Charles Leslie Anderson has been charged with committing a sexual assault against the complainant on April 30, 2008.

[2] The Crown and defence have closed their cases and the Crown applies to bring rebuttal evidence to respond to evidence presented in the defence case. The issue is whether the Crown is attempting to split its case or whether the defence has presented evidence that the Crown could not reasonably have anticipated.

[3] There is no dispute that the accused had sexual intercourse with the complainant and the trial issue is whether she consented or had the capacity to consent.

BACKGROUND

[4] To put this application for rebuttal evidence in perspective, the complainant's evidence reveals that she was drinking with girlfriends at her residence during the day of April 29, 2008. One of them was Tammy Doucette who testified that she and the complainant were subsequently driven to the local bar by Rebecca Freeman.

[5] In the evening of April 29, the complainant left the bar with the accused, who drove her to her home. The complainant testified that the last memory she had was seeing the accused seated across from her at her home after having been at the bar. She did not remember anyone else being present. When she woke up the next morning, she was alone. She was cross-examined about the presence of other persons at her home, such as Brandon Birckel and Charmaine Anderson. She denied or did not remember that there were any others present.

[6] The accused testified in great detail about a number of people at the complainant's house after she and the accused left the bar. Specifically, the accused testified that, among others, Charmaine Anderson, Rebecca Freeman and Brandon Birckel were present. He gave extensive evidence about the complainant being sexually provocative and encouraging him to have sexual intercourse with her.

[7] Charmaine Anderson is the accused's daughter. She testified that she was at a party at the complainant's residence with Rebecca Freeman and that Brandon Birckel was present that evening.

[8] The Crown did not call Rebecca Freeman or Brandon Birckel as part of its case. The Crown applies to call Rebecca Freeman and Brandon Birckel to give evidence to rebut the testimony that they were present, as alleged, at the complainant's residence.

[9] The Crown's disclosure revealed that on May 1, 2008, Constable Smith spoke to a person named Shawn Charlie who said that he was at the complainant's residence that evening. He also said that a person named Brandon (last name unknown), Charmaine Anderson and the accused were present that evening or early morning at the complainant's residence. However, the Crown informed the Court on the rebuttal application that its disclosure also noted that Shawn Charlie initially refused to give a statement and said "I left before anything happened", "I don't know nothing" and "I didn't see nothing". Shawn Charlie did not attend at the police station at the pre-arranged time to give his statement. Constable Smith also testified in the Crown's case that Shawn Charlie told him that Charmaine Anderson and the accused were at the complainant's residence. Constable Smith made one further attempt to get a statement from Shawn Charlie at his home, but no one answered the door.

[10] Further, the Crown was aware that Charmaine Anderson had potential evidence but that she had refused to give a statement to the police. The evidence of Charmaine Anderson was to the effect that she did not want to give a statement at that particular time but the police never returned to take a statement.

[11] The rebuttal evidence application must be placed in context. The community where the event took place is a small First Nation community with an RCMP detachment of two or three officers. The male officers had difficulty obtaining a

statement from the complainant until a female officer was brought in from Whitehorse. The female officer was unsuccessful in getting a statement from Charmaine Anderson.

THE LAW

[12] I will summarize the general rule for rebuttal evidence set out in *R.* v. *Krause*, [1986] 2 S.C.R. 466:

1. The Crown is not allowed to split its case and must present all the clearly relevant evidence it intends to rely on. The reason for the rule against splitting a case is that the accused is entitled, at the close of the Crown's case, to have the full case for the Crown before responding (para. 15).
2. The Crown may be allowed to call evidence in rebuttal when the defence has raised a new matter that the Crown could not reasonably have anticipated. The important principle is that each party will have an equal opportunity to hear and respond to the case of the other (para. 16).

[13] I will not deal with the law of rebuttal evidence on cross-examination of the defence witnesses by the Crown because the matter in this dispute arose from the examination in chief of the defence witnesses.

[14] In *Krause*, the accused was charged with murder arising out of a stabbing incident. The Crown had in its possession a statement made to the police by the accused which was ruled admissible in a *voir dire*. However, the Crown decided not to call that evidence as part of its case. The evidence related to the accused's involvement with the police during the investigation. The accused testified about the circumstances of the offence as well as his involvement with the police during the investigation. The

Crown then cross-examined the accused extensively on his statement to the police during the investigation which did not relate to the stabbing and murder charge.

[15] The trial judge allowed the rebuttal evidence but the Supreme Court of Canada refused to allow the rebuttal evidence stating that it should have been introduced as part of the Crown's case. The rebuttal evidence was also collateral in the sense that it did not touch on the guilt or innocence of the accused (para. 21).

[16] The test for rebuttal evidence was further refined in *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303. In that case, the accused raised the defence of insanity and the trial judge permitted the Crown to present rebuttal evidence on the insanity issue. The Supreme Court of Canada found that the trial judge was correct for the following reasons:

1. There is a corollary principle that the Crown does not have to adduce evidence to challenge a defence that an accused might possibility raise (para. 119).
2. Rebuttal evidence is restricted to evidence to meet new facts introduced by the defence (para. 119).
3. Although the Crown may have some anticipation that a certain defence will be raised or the defence may give some indication of its defence in cross-examination, the Crown cannot be expected to adduce evidence of a defence that may possibly be raised (paras. 119 and 120).
4. To ensure that the defence is not prejudiced by the rebuttal evidence, it may be given the opportunity to present surrebuttal evidence, i.e. the calling of evidence by the defence to meet the Crown's rebuttal evidence.

[17] Also in *Chaulk*, the Supreme Court of Canada quoted with approval at para. 118, the following statement in *R.* v. *Drake* (1970), 1 C.C.C. (2d) 396 at 397:

> "There is a well-known principle that evidence which is clearly relevant to the issues and within the possession of the Crown should be advanced by the Crown as part of its case, and such evidence cannot properly be admitted after the evidence for the defence by way of rebuttal. In other words, the law regards it as unfair for the Crown to lie in wait and to permit the accused to trap himself. The principle, however, does not apply to evidence which is only marginally, minimally or doubtfully relevant." (my emphasis)

[18] This principle was confirmed in the Ontario Court of Appeal in *R.* v. *G.P.*, [1996] O.J. No. 4286 (C.A.), at paras. 22 and 23.

[19] In *R.* v. *Aalders*, [1993] 2 S.C.R. 482, the accused was convicted of first degree murder. In a statement to the police, the accused admitted that he had stolen money from the victim and the residence. At trial, in cross-examination, the accused said some of the money came from his welfare allowance. The Crown was allowed to adduce rebuttal evidence from welfare authorities that the accused never received social assistance and his application had been refused. The majority in the Supreme Court of Canada said the following:

1. The crucial question for admission of rebuttal evidence is whether the evidence "related to an essential issue which may be determinative of the case". If the Crown could not have foreseen that such evidence would be necessary, it is generally admissible (para. 37).
2. While the Crown cannot split its case and put in evidence on a purely collateral issue, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case (para. 38).

[20] I conclude from the case law that when the Crown is in possession of evidence, as in *Krause*, that is clearly relevant, it would be well-advised to present the evidence rather than risk an adverse ruling on a rebuttal evidence application. Nevertheless, the Crown does not have to call evidence to anticipate the defence where it may be "possibly raised" either from an indication of the defence or by way of defence cross-examination of Crown witnesses.

ANALYSIS

[21] The distinguishing feature in the case at bar is that the Crown did not have evidence in its possession about a party or persons present at the complainant's residence after she was driven home by the accused. The complainant herself testified that it was just the accused. In cross-examination, she denied or did not remember that others were there or that there was a party at her residence after the accused drove her home from the bar.

[22] However, it is clear that the Crown had some verbal information that Brandon Birckel and Charmaine Anderson were present at the complainant's residence in the evening of April 29 or the early morning of April 30, 2008. While it cannot be said that the Crown was unaware of the issue that others may have been present at the complainant's residence, the police had been unable to obtain statements confirming it. There is no indication that the police were aware that Rebecca Freeman was at the complainant's residence later that evening although they were aware that she had driven the complainant and Tammy Doucette to the bar earlier that day.

[23] The issue of a party with a number of other people present at the complainant's residence, although raised in cross-examination of the complainant, did not become a

significant element of the case until the accused and his daughter testified. The accused, in particular, gave an extensive narrative about who was present and when while alleging that a sexually provocative complainant was encouraging him to have sexual intercourse with her.

[24] Defence counsel submits that the Crown should have reasonably anticipated this evidence in the course of their investigation, implying that the police investigation was not very diligent. While it is true that the police were aware of further information about other people at the complainant's residence, they did not ignore the evidence but attempted to confirm it in a statement. They were not successful and I am not going to enter the arena to determine how many attempts should be made by the police to get a statement from a witness. There is no suggestion that the police were turning a blind eye to potentially relevant evidence.

[25] More importantly from the Crown's perspective, there was no witness statement to verify the verbal information given to the police and the Crown cannot be expected to call evidence that it did not have. Disclosure was made to the defence as required, but that unsubstantiated verbal information did not require the Crown to call the witnesses, who would not co-operate in giving a statement, on the speculative possibility that the defence would make the allegation of other people at the complainant's residence a significant part of the defence case. This is not a case of the Crown lying in wait with evidence that it did not present in an attempt to trap the accused. The Crown is not attempting to split its case but rather responding to evidence introduced by the defence. The Crown does not have to address in its case every possible avenue of evidence that the defence may pursue. It would be unfair to not allow the Crown to respond to the

evidence of the accused and his daughter about who was present, despite the Crown's knowledge that it was a possible issue for the defence.

[26] In my view, this is not a collateral issue as it is all part of the narrative that evening which only became fully apparent in the defence evidence. As the evidence impacts on the credibility of both the complainant and the accused, it is evidence that the trier of fact should not be deprived of.

[27] As the Crown disclosure suggests that there is a witness who may testify that the persons in question may indeed have been at the complainant's residence on the evening in question, as a matter of fairness, the defence should be permitted to call surrebuttal evidence on the same issue.

CONCLUSION

[28] I conclude that the Crown is permitted to call rebuttal evidence of Brandon Birckel and Rebecca Freeman as to whether they were present that evening with the complainant and the accused at the complainant's residence. The defence is permitted to call surrebuttal evidence on the same issue.

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VEALE J.