

CANADA / JUDGMENT

R. v. Nikal

2025 BCCA 361

COURT

British Columbia Court of Appeal

DECIDED

6 October 2025

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2025 BCCA 361 R. v. Nikal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Nikal,

2025 BCCA 361

Date: 20251006

Docket: CA50684

Between:

Rex

Respondent

And

Briar Gerrydean Malloy Nikal

Appellant

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Before:

The Honourable Madam Justice Fenlon

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated January 9, 2025 and January 30, 2025 (R. v. Nikal, 2025 BCSC 104 and 2025 BCSC 718, Smithers Docket 26631).

Oral Reasons for Judgment

Counsel for the Appellant:

W.E. Solmon

Counsel for the Respondent:

M. Richards

Place and Date of Hearing:

Vancouver, British Columbia

October 6, 2025

Place and Date of Judgment:

Vancouver, British Columbia

October 6, 2025

Summary:

Mr. Nikal applies for leave to appeal the decision of a summary conviction appeal judge to increase his sentence from a 90-day intermittent custodial sentence, which he had already served, to a jail term of 18 months. He says the summary conviction appeal judge erred both in increasing the sentence and in deciding not to stay the execution of the sentence in order to avoid reincarceration. Held: Leave to appeal denied. Mr. Nikal has failed to identify any errors of law committed by the summary conviction appeal judge that could support the possibility of a successful appeal.

- [1] FENLON J.A.: Mr. Nikal applies for leave to appeal a decision of a summary conviction appeal judge allowing the Crown's appeal and increasing Mr. Nikal's sentence from a 90-day intermittent custodial sentence to a jail term of 18 months.
- [2] On October 17, 2022, Mr. Nikal was caring for the complainant, his girlfriend's 14-year-old daughter, while her mother was in the hospital. The complainant fell asleep on Mr. Nikal's bed. She awoke to Mr. Nikal with his pants down and holding her hand on his penis. The complainant immediately objected, ran out of the house, and called 911. Mr. Nikal was arrested that evening.
- [3] Both Mr. Nikal and the complainant are Indigenous.

- [4] On October 26, 2023, Mr. Nikal was convicted of sexual assault and sexual interference contrary to ss. 271(b) and 151(b) of the Criminal Code, R.S.C. 1985, c. C-46. The count of sexual assault was stayed in accordance with *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14.
- [5] The Crown sought a jail term of two years less a day, three years of probation, and various ancillary orders. Mr. Nikal sought the mandatory minimum 90-day sentence, relying on his Gladue report and other mitigating factors.
- [6] As earlier noted, Mr. Nikal was eventually sentenced to a 90-day intermittent custodial sentence followed by two years of probation.
- [7] The Crown appealed. The summary conviction appeal judge held that the 90-day intermittent sentence was demonstrably unfit. He found that the sentencing judge had made errors in principle by failing to consider several aggravating factors--including that Mr. Nikal was in a position of trust--and by failing to consider the harm suffered by the complainant, who is herself Indigenous.
- [8] The summary conviction appeal judge found that a sentence of two years less a day would be appropriate but imposed a sentence of 18 months followed by two years of probation, taking into account the factors in *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679; 2025 BCSC 104. Because Mr. Nikal had already served his interim sentence, was on probation, and would have to be reincarcerated, the judge asked for further submissions from the parties as to whether execution of the sentence should be stayed. Ultimately, the summary conviction appeal judge credited Mr. Nikal for the 90 days already spent in custody and ordered him to serve the remaining 458 days: 2025 BCSC 718.
- [9] An appeal to this Court in a summary conviction matter is an appeal from the summary conviction appeal court. It is not a second appeal from the trial court. As such, "the focus of a leave application, and the appeal if leave is granted, is on whether any error of law was committed by the summary conviction appeal judge": *R. v. Winfield*, 2009 YKCA 9 at para. 12.
- [10] To obtain leave, an applicant must establish that: (a) the ground of appeal involves a question of law alone; (b) the issue is one of importance; and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success: *Winfield* at para. 13.
- [11] Because there has already been one appeal, leave is to be granted sparingly: *R. v. Gaudaur*, 2010 BCCA 157 at para. 3. The overriding consideration is whether it is in the interests of justice to grant leave: *Winfield* at para. 13.
- [12] The appellant, through counsel, identifies four main errors.

- [13] First, although he concedes that the sentencing judge made errors in principle warranting intervention by the summary conviction appeal judge, he says the summary conviction appeal judge was required to accept the sentencing judge's findings of fact and to give the same weight to the untainted aggravating and mitigating factors as the sentencing judge did. To support this argument, he relies on *R. v. Friesen*, 2020 SCC 9:
- [28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).
- [Emphasis added.]
- [14] The appellant points to three factors in particular that the summary conviction appeal judge did not defer to in accordance with the paragraph above:
1. He failed to accept that a car accident Mr. Nikal was involved in when he was a child caused permanent injuries, which led to difficulties with learning and completing school, and contributed to challenges in other aspects of his life.
 2. He failed to accept and give effect to evidence showing the importance to his community of Mr. Nikal's job as a maintenance worker and the community's reliance on him.
 3. He did not identify and accept as a factor Mr. Nikal's role as a single parent and the responsibilities he carries in that role.
- [15] Respectfully, I cannot agree that the summary conviction appeal judge failed to defer to the sentencing judge's identification of the untainted aggravating and mitigating factors. He largely reviewed the same factors but gave them different weight. The appeal judge was entitled to reweigh the factors in arriving at a fit sentence because the sentencing judge's assessment of Mr. Nikal's moral culpability was fundamentally flawed by his failure to take into account Mr. Nikal's position of trust, the indigeneity of the victim, and the major impact the crime had on her life.
- [16] The second ground of appeal Mr. Nikal identifies relates to the judge's finding that the sentencing judge had erred by "scaling down" the sentence he imposed because the assault was charged as a summary conviction offence. Mr. Nikal agrees that a fit sentence must be imposed whether the offence is indictable or summary, and that it would be an error to scale down a summary conviction sentence simply because the minimum and maximum sentences are lower than an indictably charged offence. The error he alleges is that the summary conviction appeal judge found that the sentencing judge committed the scaling down error when he did not. Mr. Nikal submits that the summary conviction appeal judge read too much into the sentencing judge's single reference to the cases the Crown relied on all being indictable cases, before moving immediately to imposing the minimum sentence

allowed for a summary offence.

- [17] In my view, the summary conviction appeal judge's finding of this error is supportable when considered in the context of the record, and the arguments made by defence counsel at the sentencing hearing on the difference between summary and indictable offences.
- [18] However, even accepting, for the sake of argument, that the summary conviction appeal judge was wrong to find that the sentencing judge erred in this way, this would not be a material error that could support the prospect of a successful appeal. The summary conviction appeal judge found other clear errors--which were conceded by the appellant on this application--that were sufficient in and of themselves to justify the "sentencing anew" that the summary conviction appeal judge undertook.
- [19] Third, the appellant says the summary conviction appeal judge erred in law by misreading this Court's decision in *R. v. Maslehati*, 2024 BCCA 207, as requiring a minimum two-year sentence in any case of serious sexual assault and applying that rule to this case without considering the differences in the circumstances of the offence, which were significantly more aggravated in *Maslehati*.
- [20] I begin by noting that Mr. Maslehati was sentenced to 28 months and that the sentence imposed here was 18 months. In any event, I see no error of law identified in the summary conviction appeal judge's reliance (at para. 46 of his reasons) on *Maslehati* to establish the appropriate range of sentence. The summary conviction appeal judge referred to *Maslehati* at para. 102, which notes the seriousness of adult sexual assault offences with aggravating circumstances and states that, even for a first-time offender, such an offence will generally attract a minimum sentence of two years, subject to the offender's moral culpability.
- [21] Fourth, and finally, Mr. Nikal says the judge erred in the application of *R. v. Veysey*, 2006 NBCA 55, by failing to consider that circumstances other than the four factors identified by the New Brunswick Court of Appeal could constitute "exceptional circumstances" justifying a stay of execution of a higher sentence imposed on appeal.
- [22] In particular, Mr. Nikal says the judge erred in refusing to consider the factors raised in sentencing generally, the Gladue factors, Mr. Nikal's childcare responsibilities, the loss of his job if he were to be reincarcerated, and the impact of his absence from the community.
- [23] I cannot agree that it is an error of law not to expressly say in reasons for judgment considering a stay of execution that there are other factors that may possibly be considered in assessing whether a stay should be granted. Nor is it an error of law to focus on whether there is evidence that reincarceration would be unjust because it would have a negative effect on the offender's rehabilitation.
- [24] In summary, Mr. Solmon has said all that could be said in support of his client's application, but he has not, in my respectful view, identified an error on a question of law.

[25] That conclusion applies to any of the other errors that were identified during oral submissions and in the written material provided to the Court. Even if those errors could be characterized as questions of law, there is in my view no prospect that they could support a possibility of a successful appeal of the sentence itself.

[26] I would accordingly dismiss the application for leave to appeal, with thanks to counsel.

"The Honourable Madam Justice Fenlon"

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