

CANADA / JUDGMENT

R. v. Sewell

2025 BCCA 433

COURT

British Columbia Court of Appeal

DECIDED

19 November 2025

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2025 BCCA 433 R. v. Sewell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sewell,

2025 BCCA 433

Date: 20251119

Docket: CA50632

Between:

Rex

Appellant

And

Justin Donald Sewell

Respondent

Corrected Judgment: The text of the judgment was corrected

at paragraphs 2, 5, and 8 on December 5, 2025.

Restriction on publication: A publication ban was imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of information that could identify the complainant. On February 25, 2025, the trial judge granted an application to revoke this publication ban pursuant to s. 486.51(3) of the Criminal Code. The publication ban no longer applies.

Before:

The Honourable Justice Winteringham

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated

April 4, 2025 (sentence) (R. v. Sewell, Fort St. John Dockets 37506-1,

37506-3, and 37506-4).

Oral Reasons for Judgment

Counsel for the Appellant:

M. Shah

Counsel for the Respondent:

R.C. Gibbs, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 19, 2025

Place and Date of Judgment:

Vancouver, British Columbia

November 19, 2025

Summary:

The applicant seeks bail pending an application for leave to appeal his sentence to the Supreme Court of Canada. The applicant pleaded guilty to sexual assault and two voyeurism offences. The sentencing judge imposed a cumulative sentence of two years less a day to be served pursuant to a conditional sentence order. The Court of Appeal allowed the Crown appeal from sentence and imposed consecutive custodial sentences of two years less a day on the sexual assault count, six months on one of the voyeurism counts and three months on the other, finding the sentencing judge had erred by imposing concurrent sentences.

Held: Application for bail dismissed. Under s. 679(1)(c), the applicant satisfied the merits and surrender threshold but failed to meet the public interest criterion. Relevant to the reviewability interest, the applicant had not brought a motion to expedite the leave application. Balancing the interests of enforceability and reviewability, the public interest criterion supports the applicant's continued detention.

WINTERINGHAM J.A.:

Overview

- [1] Justin Donald Sewell applies pursuant to s. 679(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46 for judicial interim release pending his application for leave to appeal his sentence to the Supreme Court of Canada. Mr. Sewell pleaded guilty to one count of sexual assault of his sister-in-law, Vienna Luke, and two counts of voyeurism in relation to Ms. Luke. The sentencing judge imposed a cumulative sentence of two years less a day, to be served pursuant to a conditional sentence order ("CSO").
- [2] The Crown appealed the sentence to this Court. The sentence appeal was allowed on October 14, 2025, by reasons indexed as R. v. Sewell, 2025 BCCA 348, and the sentence imposed by the Provincial Court of British Columbia was set aside (the "Appeal Reasons"). This Court imposed custodial sentences of two years less a day on the sexual assault count; six months, consecutive, on one of the voyeurism counts; and three months, consecutive, on the other voyeurism count, for a total sentence of 33 months.
- [3] Mr. Sewell filed his application for leave to appeal to the Supreme Court of Canada on October 27, 2025 and seeks bail pending the disposition of the leave application. Mr. Sewell submits that he has satisfied the three statutory criteria for bail: that his leave application raises issues that are beyond the "not frivolous" criterion and that the public interest requires his release--particularly because much of his sentence could very well be served by the time he receives a decision on his application for leave.
- [4] The application for bail is opposed by the Crown on the basis that Mr. Sewell (1) has failed to meet the merits threshold; and (2) has failed to establish his detention is not necessary in the public interest. The Crown states that it would not oppose a motion to expedite the application for leave pursuant to R. 6 and R. 47 of the Rules of the Supreme Court of Canada, SOR/2002-156. Additionally, the Crown asserts that if leave is granted, Mr. Sewell could bring a further bail application based on a material change of circumstances.

Background

- [5] The offences occurred in or around 2007 when Ms. Luke was 20 years old and living with Mr. Sewell and his wife, who is one of Ms. Luke's two sisters. While his wife and children were away, Mr. Sewell added ketamine or Valium to Ms. Luke's drink, rendering her incapacitated, then sexually assaulted Ms. Luke and took photographs of her naked body. On other occasions, Mr. Sewell took photographs of Ms. Luke through her bedroom window.
- [6] In 2019, Ms. Luke reported what she could recall of the incident to the police. In 2021, with the assistance of the police, Ms. Luke arranged and recorded a meeting with Mr. Sewell at a restaurant at the Vancouver International Airport. During that meeting, Mr. Sewell confessed what he had done and disclosed that he had given Ms. Luke either ketamine or Valium and sexually assaulted her. He also told Ms. Luke about the photographs he had taken during the sexual assault and through her bedroom window.

- [7] In April 2022, the Crown charged Mr. Sewell with four offences: one count of sexual assault; one count of administering a stupefying drug with intent to enable him to commit the sexual assault; and two counts of voyeurism. On November 15, 2022, Mr. Sewell pleaded guilty to one count of sexual assault and two counts of voyeurism and the Crown stayed the administering a stupefying drug count.
- [8] At the time of sentencing, Mr. Sewell was in his late 40s, with no criminal record. He and his wife had four children together. He was a full-time veterinarian and operated a clinic in the Fort St. John community. The clinic employed 15 people. He was the only full-time veterinarian in the clinic and he told the sentencing judge that if he was unable to continue working as a result of being incarcerated, the clinic would likely close. The materials reveal that the applicant's veterinary clinic is one of two operating in the area.

Sentencing Reasons

- [9] The sentencing judge commenced his reasons by summarizing the purpose and principles of sentencing set out in ss. 718-718.2 of the Criminal Code: *R. v. Sewell* (4 April 2025), Fort St. John Dockets 37506-1, 37506-3, and 37506-4 (B.C.P.C.) (the "Sentencing Reasons") at paras. 3-4.
- [10] The sentencing judge then turned to the aggravating and mitigating factors. The judge found Mr. Sewell offered to provide a safe space for Ms. Luke to get drunk, then surreptitiously placed drugs into Ms. Luke's drink, which involved an element of planning: Sentencing Reasons at paras. 39-45. The prolonged sexual assault involved invasive, violative, and demeaning conduct and occurred while Ms. Luke was in her own home: Sentencing Reasons at paras. 41-43. Turning to the mitigating factors, the judge noted Mr. Sewell had no prior criminal record, he confessed to his crimes, he instructed counsel early in the process of his intention to plead guilty, and there was a low risk of reoffending: Sentencing Reasons at paras. 48-65.
- [11] The judge noted that this Court had recently issued decisions concerning the appropriate range of sentence for adult sexual offences: *R. v. T.H.*, 2024 BCCA 123; *R. v. Henry*, 2024 BCCA 132; and *R. v. Maslehati*, 2024 BCCA 207. He considered the facts and outcome of each decision and highlighted key principles: Sentencing Reasons at paras. 69-77.
- [12] The judge then found Mr. Sewell's moral culpability for all three offences to be high, but that his confession and admission of responsibility were "compelling if not, in fact, exceptional mitigation": Sentencing Reasons at para. 84. The sentencing judge considered the range of sentence for sexual assault and concluded the appropriate sentence was two years less one day. For the voyeurism offences, the sentencing judge imposed a six-month sentence for Count 3 and a three-month sentence for Count 4: Sentencing Reasons at para. 96.
- [13] In addressing the question of whether the sentences should be consecutive or concurrent, the sentencing judge observed that if consecutive sentences were imposed, then a CSO would not be available as the cumulative sentence would exceed two years: Sentencing

Reasons at para. 87. He noted the totality principle enshrined in s. 718.2(c) of the Criminal Code, which provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh": Sentencing Reasons at para. 87. He also noted the principle of restraint, which states that imprisonment should be the sanction of last resort. Ultimately, the judge concluded that the sentences would be concurrent because consecutive sentences "would effectively undo the value of the guilty plea by creating an unduly long and harsh sentence": Sentencing Reasons at para. 90.

- [14] Having concluded that a fit cumulative sentence was two years less a day, the judge determined that a conditional sentence order was appropriate: Sentencing Reasons at paras. 91-93.

On Appeal

- [15] The Crown's position on appeal was that a cumulative sentence between three to four years' imprisonment would be a fit sentence. The Crown argued the sentencing judge erred in principle by overstating the mitigating effect of Mr. Sewell's confession and allowing it to overwhelm the analysis and by imposing concurrent sentences for the voyeurism offences. Specifically, the Crown submitted the concurrent sentences for the voyeurism offences failed to recognize the distinct harm caused by those offences and the judge imposed concurrent sentences to preserve the availability of a CSO, thus incorrectly circumventing the precondition of a CSO.
- [16] Mr. Sewell's position on appeal was that the sentencing judge appropriately weighed all the relevant factors and committed no error in principle. He submitted that the finding of compelling mitigation supported the judge's decision to impose a CSO and it was not an error in principle to sentence outside the generally applicable range.
- [17] This Court began its analysis, noting that the standard of review on a sentence appeal is highly deferential and as such, this Court can intervene to vary a sentence only if the sentencing judge made an error in principle that impacted the sentence or the sentence is demonstrably unfit: Appeal Reasons at para. 44. The Court noted an error of principle includes an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor: Appeal Reasons at para. 45.
- [18] The Court found no error in principle in the sentencing judge's consideration of the mitigating circumstances and the weight given to them. However, this Court agreed with the Crown that the imposition of concurrent sentences for the voyeurism offences reflected errors in principle.
- [19] On this point, the Court found the sentencing judge's analysis commenced correctly by determining a sentence for each offence individually but failed to then determine whether a principled basis existed for imposing concurrent rather than consecutive sentences: Appeal Reasons at para. 78.

- [20] The Court considered how the decision whether to impose consecutive or concurrent sentences is an individualized inquiry; however, generally, offences that are so closely linked to each other as to constitute a single criminal endeavor may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences. The Court also noted that a sentence imposed for voyeurism committed during a sexual assault should generally be imposed as a consecutive sentence: Appeal Reasons at para. 80.
- [21] The Court turned to *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 98, which requires sentencing judges to provide a reason if they impose concurrent sentences for offences constituting invasions of different legal interests and remain cognizant of the fact that different legally protected interests have been invaded: Appeal Reasons at para. 79. In this case, the judge failed to consider the invasions of Ms. Luke's privacy interests caused by the voyeurism offences as distinct from the invasion of her bodily integrity caused by the sexual assault. This Court also found the sentencing judge failed to consider the fact that the voyeurism offence underlying Count 4 arose from an entirely different incident from that underlying Counts 1 and 3.
- [22] The Court also found the sentencing judge failed to determine whether a penitentiary term of imprisonment could be excluded as a cumulative sentence, and only if it could be, to consider whether a conditional sentence was appropriate. The sentencing judge's decision to impose concurrent sentences "was wrongly skewed by the judge's conclusion that a CSO was appropriate without him first finding that a penitentiary term was unavailable": Appeal Reasons at para. 86.
- [23] Given these errors, the Court noted it must determine a fit sentence by applying the principles of sentencing afresh, with due deference to the sentencing judge's finding of fact and identification of aggravating and mitigating factors: Appeal Reasons at para. 87.
- [24] The Court found that to achieve a cumulative sentence proportionate to the gravity of the offences and Mr. Sewell's degree of personal responsibility, the sentences for voyeurism should be served consecutively to each other and to the sexual assault sentence: Appeal Reasons at para. 90.
- [25] This Court substituted a custodial sentence of two years less a day on the Count 1 of sexual assault; a custodial sentence of six months' imprisonment on Count 3, the voyeurism, and consecutive to the sentence on Count 1; and a custodial sentence of three months' imprisonment on Count 4 of voyeurism, consecutive to the sentences on Counts 1 and 3. The Court determined this cumulative penitentiary sentence of 33 months would not be unduly long or harsh and noted a conditional sentence order would not be available because the sentence exceeded two years.

Bail Pending Appeal to the SCC

- [26] A judge of the Court of Appeal may release an applicant from custody pending an appeal or an application for leave to appeal to the Supreme Court of Canada if the applicant has filed and served his notice of appeal, or where leave is required, his application for leave to appeal: Criminal Code, s. 679(1)(c).
- [27] The test is set out in s. 679(3) of the Criminal Code:
- a) The appeal or application for leave to appeal is not frivolous.
 - b) The applicant will surrender themselves into custody in accordance with the terms of the order.
 - c) The applicant's detention is not necessary in the public interest.
- [28] The applicant seeking bail bears the burden of establishing that each criterion is met on a balance of probabilities: *R. v. Oland*, 2017 SCC 17 at para. 19.
- [29] To obtain leave to appeal to the Supreme Court of Canada from a sentence imposed, varied, or affirmed by a provincial Court of Appeal, an applicant must demonstrate, to the satisfaction of the court, that the question raised, by reason of its public importance or the importance of any issue of law or mixed law and fact involved in that question, is one that ought to be decided by that court or that is, for any other reason, of such a nature or significance as to warrant a decision by that court: see *R. v. Boussoulas*, 2018 ONCA 326 (Chambers). I am mindful as well of Justice Saunders' comment in *R. v. Czechowski*, 2021 BCCA 19 at para. 27 (Chambers), where she states "[w]hile I would not dip my toe into predicting the outcome of the application for leave, what I know of the application for leave to appeal suggests it is a real step beyond one 'doomed to fail'".

Analysis

- [30] On this application, Mr. Sewell says he has met all three criteria. The Crown agrees that Mr. Sewell will surrender himself into custody as required but says he has not met the merits threshold nor established that his detention is not necessary in the public interest.
- [31] It is accepted that the merits assessment of the first criterion, whether the application is frivolous, is a low bar. On a Supreme Court of Canada leave application, the merits will include consideration of whether the proposed appeal could be of national importance. This is in the context, however, of the low bar: see *Czechowski* at para. 13.
- [32] Mr. Sewell advances four grounds of appeal in his application for leave to appeal to the Supreme Court of Canada:
- a) Did the Court of Appeal err in its application of the test for appellate intervention and must an appellate court provide reasons concerning the impact an error had on the sentence?

- b) Is the proportionality principle or totality principle a basis upon which a sentencing judge can rightly impose concurrent sentences?
 - c) Post-Bertrand Marchand, are consecutive sentences required whenever offences impact distinct legal interests? If not, what is required of a sentencing judge imposing sentences for offences which impact distinct legal interests?
 - d) What is the relationship between the totality principle and conditional sentence orders and how rigidly must the test for a CSO be applied by a sentencing judge?
- [33] The Crown submits these issues have already been considered and decided by the Supreme Court of Canada.
- [34] The first issue alleged by Mr. Sewell is whether this Court erred in its application of the test for appellate intervention and whether an appellate court must provide reasons concerning the impact of an error on the sentence imposed. The test for appellate intervention was recently confirmed by the Supreme Court of Canada in *R. v. Sheppard*, 2025 SCC 29 at paras. 38-42. It is well settled that an appellate court can intervene to vary a sentence only if the sentencing judge made an error in principle that impacted the sentence or the sentence is demonstrably unfit: see *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Friesen*, 2020 SCC 9 at para. 26; and *Sheppard* at paras. 38-39. In this case, the Court identified errors in principle that impacted the sentence and varied the sentence accordingly.
- [35] Mr. Sewell has characterized the Court's reasons as revealing "exactly the kind of impermissible parsing of a sentencing decision that has been found unacceptable". However, this submission does not take into account the fact that the Court rejected errors raised by the Crown on the basis that they did not meet the test for appellate intervention: Appeal Reasons at paras. 51-73. As an example, this Court rejected the Crown's submission that the mitigating effect of the confession should have been attenuated on the basis that "[t]he Crown is inviting us to reweigh the mitigating effect of the confession, which we cannot do": Appeal Reasons at para. 62.
- [36] Mr. Sewell advances two issues related to the principles governing consecutive and concurrent sentences. First, Mr. Sewell says this Court's decision suggests that the totality principle cannot serve as a principled basis for imposing a concurrent basis, or at the very least, it cannot serve as a principled basis where the offences impact distinct legal interests. Second, Mr. Sewell submits this Court misapprehended *Bertrand Marchand* as requiring sentencing judges to provide a reason for imposing a concurrent sentence in the context of distinct legal interests that explicitly mentions the distinct legal interests.

- [37] This Court found that the sentencing judge erred in proceeding directly to a consideration of the totality principle, without first determining whether a principled basis existed for imposing concurrent rather than consecutive sentences: Appeal Reasons at para. 78. The sentencing judge's error was not in considering the totality principle but rather in failing to first consider the distinct legal interest impacted by the voyeurism offence and the fact that the counts did not all arise out of the same incident: Appeal Reasons at para. 81.
- [38] The Supreme Court of Canada has recently considered and clarified the law concerning concurrent and consecutive sentences in *Bertrand Marchand*. I would add that this Court addressed consecutive and concurrent sentencing and the trial judge's exercise of discretion in *R. v. Moazami*, 2025 BCCA 190,--a case released earlier this year. In *Bertrand Marchand*, the Supreme Court of Canada held the sentencing judge erred in imposing a concurrent sentence for luring to the offence of sexual interference and set out the proper approach for determining whether sentences should be consecutive or concurrent. After determining the overall fit sentence, *Bertrand Marchand* directs judges to apply the principle of totality to ensure the series of sentences are, in aggregate, "just and appropriate": at para. 99.
- [39] I accept Mr. Sewell's submission that confusion can arise over the imposition of concurrent versus consecutive sentences, especially where the offences impact distinct legal interests. How sentencing judges can properly exercise their discretion to impose concurrent sentences where distinct legal interests are impacted and what is required for a judge to be "cognizant" of these distinct legal interests could be further clarified, such that this ground of appeal is not frivolous.
- [40] The final issue raised by Mr. Sewell concerns the test for imposing a CSO. The Crown submits that again, this issue is well-settled and points to section 742.1 of the Criminal Code and *R. v. Proulx*, 2000 SCC 5. See also *R. v. Jaramillo*, 2025 BCCA 77. Section 742.1 speaks to the statutory criteria governing the availability and imposition of conditional sentences which have been interpreted by the Supreme Court of Canada in *Proulx*. *Proulx* requires a sentencing judge to first conduct a preliminary determination of the appropriate range of available sentences before considering whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing: at para. 60.
- [41] Considering the recent discussions by the Supreme Court of Canada on the very issues raised by Mr. Sewell, it is difficult to see how these proposed grounds of appeal might engage issues that the Supreme Court of Canada could consider of national importance. However, in light of the low bar and the issue I have addressed regarding the exercise of discretion, I accept that some of the grounds of appeal may arguably pass the "not frivolous" threshold. I would add that the merits criterion may very well be assessed differently should Mr. Sewell's application for leave to the Supreme Court of Canada be granted.

- [42] The second criterion engages the likelihood that the applicant will surrender himself into custody in accordance with the terms of the order. Both parties submit there is no concern that Mr. Sewell will surrender himself into custody and I agree that on the materials before me, there is evidence to satisfy this criterion.
- [43] The main question before me is whether Mr. Sewell has satisfied the third criterion: has he established that his detention while he awaits the decision in his leave application is not necessary in the public interest.
- [44] The question of public confidence engages two competing interests which must be balanced, the enforceability and reviewability.
- [45] In *R. v. Boima*, 2018 BCCA 498 (Chambers), Justice Dickson described enforceability and reviewability in these terms:
- [21] Enforceability relates to the public interest in the enforcement of judgments and in denying bail to a person convicted of a serious offence. It captures the gravity of the offence, the circumstances surrounding the commission of the offence and the potential length of imprisonment: *Oland* at para. 38. The fact that an appellate court upheld a guilty verdict means that the pendulum swings towards enforceability and away from bail pending further review: *R. v. Drabinsky*, 2011 ONCA 647 at para. 10 (Doherty J.A. in Chambers).
- [22] Reviewability relates to the public interest in the review and correction of errors in judgments: *R. v. Mapara*, 2001 BCCA 508 at para. 32. In the appellate context, the strength of the case factor translates into the strength of the grounds of appeal and informs reviewability: *Oland* at para. 40. Using their experience and knowledge, judges should form a preliminary assessment of the strength of the grounds of appeal to see if they "clearly surpass the not frivolous standard": *Oland* at paras. 44-45.
- See also paras. 37-39 of *Oland*.
- [46] Mr. Sewell submits the grounds of appeal are strong and thus, the public interest in reviewing this Court's decision is significant. At the same time, Mr. Sewell points to his history of compliance with bail conditions and the conditional sentence order and his lack of criminal record apart from these proceedings as supporting a finding that detention pending appeal is not in the public interest. He also submits that the relatively short duration of his sentence--being a low federal sentence--supports this application for release. He submits that he will have served a considerable portion of the custodial portion of his sentence by the time the Supreme Court of Canada releases its decision on the leave application.

- [47] The Crown argues society's interest in enforcing the sentence imposed by this Court is high, as Mr. Sewell committed a serious sexual assault with "invasive, violative, and demeaning sexual conduct": Sentencing Reasons at para. 42. In contrast, the Crown submits the reviewability interest is minimal because Mr. Sewell requires leave to appeal to the Supreme Court of Canada.
- [48] The Crown further submits that any concern that Mr. Sewell will serve a significant portion of his sentence before the leave application is determined can be addressed by a motion to expedite the application for leave to appeal. The Crown says that it would not oppose such a motion.
- [49] I accept that Mr. Sewell does not present a flight risk or public safety risk. That said, the offence is very serious, involving, as the judge put it, "invasive, violative, and demeaning sexual conduct" with devastating effect on the victim and her entire family: Sentencing Reasons at para. 42. I have considered this application by acknowledging this Court must be somewhat cautious about its analysis of whether the Supreme Court of Canada will grant leave. However, I agree with the Crown's submission that applications for leave to appeal from sentence, particularly in circumstances like these (where the issues have recently been addressed by the Supreme Court of Canada), it is not an easy hurdle for Mr. Sewell. Importantly, Mr. Sewell does not have a right to appeal the sentence. I am satisfied that I must also consider steps that could be taken to address the reviewability concerns raised by Mr. Sewell. That is, if Mr. Sewell files a motion to expedite the application for leave to appeal, which the Crown does not oppose, then Mr. Sewell will not have served substantially most of his sentence before the leave to appeal application can be decided. Thus, public confidence in the administration of justice would be undermined if Mr. Sewell was released on bail where the offences are very serious and his application for leave to appeal to the Supreme Court of Canada, though meeting the "not frivolous" stage, is somewhat weak. In addition, should leave be granted, the Crown agrees this would constitute a material change of circumstance such that a new bail application could be brought.
- [50] When I balance the interests of enforceability and reviewability, in my view, the public interest criterion supports his continued detention.

Disposition

- [51] I dismiss Mr. Sewell's application for judicial interim release pending the application for leave to appeal to the Supreme Court of Canada.

"The Honourable Justice Winteringham"

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